THE LAW REPORTS OF BRITISH INDIA

BY

M. SUBRAMANIAM, B.A., B.L.,

AND

M. V. KRISHNASWAMY, B.A., B.L.,

VAKILS, HIGH COURT, MADRAS.

CALCUTTA Vol. 8.

PUBLISHED BY

THE LAW REPORTS OFFICE

MADRAS, SOUTH INDIA

1915

TABLE OF CASES CITED.

A

B

BAS—BOM

DEO—EMP

E

H

LUC–MOD	CAL.	PAGE
Luchmun Chunder Geer Gossain v. Kally Churn Singh, 19 W.R., 292	XVI ...	149
Luckhee Narain Banerjee v. Ram Kumar Mukherjee, I.L.R., 15 Cal., 564...	XVII ...	565
Luke v. South Kensington Hotel Company, L.R., 11 Ch. D., 121 ...	XVII ..	162
Lyell v. Kennedy, L.R., 8 Ap. Cas., 217	XVII ...	844
M		
Macgowan, In the Goods of, Morton, 370	XVI ...	779
Macgregor v. Tarini Churn Sircar, I.L.R., 14 Cal., 124... ...	XVII ...	633
Mackenzie v. Coulson, L.R., 8 Exch., 368	XVI ...	568
Mackinnon, Mackenzie and Company v. Lang Moir and Company, I.L.R., 5 Bom., 584...	XVII ...	451
Macmillan v. Kally Das Mookerjee (unreported)	XVII ...	958
Madhavkeshav Tilak v. Gangabai, I.L.R., 2 Bom., 639... ...	XVI ...	762
Madhub Chandra Bhadory v. Mahima Chandra Mazumdar, 8 B.L.R., Ap., 83 *note*, 12 W.R., 142	XVI	454
Madhub Chunder Mozumdar v. Novodeep Chunder Pundit, I.L.R., 16 Cal., 121	XVI	770
Madhub Chunder Poramanick v. Rajcoomar Das, 14 B.L.R., 76 ...	XVII	321
Madhusudan Sagory v. Nipal Khan, 8 B.L.R., Ap., 87 *note*; 15 W.R., 440	XVI	450
Madras Equitable Assurance Company v. The President, Municipal Commission, Madras, I.L.R., 11 Mad., 238	XVII	801
Mahammad Azmat Ali Khan v. Ladli Begum, I.L.R., 8 Cal., 434 ...	XVI	96
Maharajah of Burdwan v. Kristokamini Dasi, I.L.R., 9 Cal., 931, I.L.R., 14 Cal., 365, L.R., 14 I.A., 30	XVII	479
Maharajah of Burdwan v. Tarasundari Debi, I.L.R., 9 Cal., 619, L.R., 10 I.A., 19	XVII	478
Maharanee Bussunt Koomaree v. Maharanee Kunmul Koomaree, 7 Sel. Rep., 165, new edition	XVII	678
Maharani of Burdwan v. Krishna Kamini Dasi, I.L.R., 14 Cal., 365, L.R., 14 I.A., 30	XVII ...	478
Mahin Bibi, *In re*, 13 B.L.R., 160	XVI ...	197
Mahomed Ali Hadji v. The Queen-Empress, I.L.R., 16 Cal., 612 ...	XVI ...	612
Mahomed Hossein v. Hadji Abdulla, I.L.R., 3 Cal., 727 ...	XVI ...	269
Manager of Raj Dharbanga v. Coomar Ramaput Singh, 14 Moore's I.A., 605...	XVI ...	19
Manappa Mudali v. McCarthy, I.L.R., 3 Mad., 192	XVII ...	710
Mancharam v. Pranshankar, I.L.R., 6 Bom., 298	XVII ...	558
Manchester-Sheffield and Lincolnshire Railway Company v. Brown, L.R., 8 Ap. Cas., 703	XVII ...	41
Manickavelu Mudali v. Arbuthnot & Co., I.L.R., 4 Mad., 104 ...	XVI ...	164
Manikji Shapurji Kaka, *In re*, 5 Bom. H.C. O.C., 61	XVII ...	212
Mani Lall Sahu v. Collector of Sarun, 6 B.L.R., Ap. 93 ...	XVII ...	597
Mankee Kooer v. Munnoo, 11 B.L.R., 315	XVI ...	698
Manly v. Patterson, I.L.R., 7 Cal., 339	XVII ...	155
Manohar Bhivrav v. Potanis, 2 Bom. H.C., 396	XVII ...	701
Mari v. Chinammal, I.L.R., 8 Mad., 107	XVI ...	370
Martinson v. Clowes, L.R., 21 Ch. D., 857	XVI ...	135
Mary Stonhouse, The, Pritchard's Digest, Edn. 1865, Vol. 2, pp. 844, 1091; 3rd edn., Vol. 2, pp. 1852, 1940	XVII ...	99
Mary Stuart, The, v. Nevada, The (unreported)	XVII ...	73
Masoyk v. Steel, I.L.R., 14 Cal., 661	XVII ...	702
Mayor of Penryn v. Best, L.R., 3 Exch. D., 292	XVII ...	461
Meenakshi Naidu v. Subramaniya Sastri, L.R., 14 I.A., 160, I.L.R., 11 Mad., 26	XVII ...	701
Meer Mahomed Hossein v. Forbes, L.R., 2 I.A., 6	XVII ...	742
Mew v. Thorne, *In re*, 31 L.J., Bkcy., 87	XVII ...	855
Mewa, *In re*, 6 N.W. [illegible]	XVI ...	723
Micharaya Guruvu v. Sadasiva Parama Guruvu, I.L.R., 4 Mad., 319	XVI ...	185
Michelino, The, v. Dee, The (unreported)	XVII ...	73
Minakshi Nayudu v. Immudi Kanaka Ramaya Goundan, L.R., 16 I.A., 1, I.L.R., 12 Mad., 142	XVII ...	587
Minet v. Morgan, L.R., 8 Ch. Ap., 361	XVII ...	844
Mirzan Bibee v. Hills, 3 W.R., Act X, 159...	XVII ...	395
Mis. Ap. 453 of 1885 (unreported)	XVI ...	356
Mitchell v. Mathura Das, L.R., 12 I.A., 150; I.L.R., 8 All., 6 ...	XVII ...	410
Modun Mohun Ghose Hazra v. Baroda Soondari Dasia, 8 C.L.R., 261	XVII ...	701

MOH—NIL	CAL.	PAGE
Mohabeer Pershad v. Mohabeer Singh, I.L.R., 7 Cal., 591; 9 C.L.R., 164	XVII ...	259
Mohabeer Pershad Singh v. The Collector of Tirhut, 15 W.R., 137 ...	XVII ...	418
Mohan Ram Jha v. Shib Dutt Singh, 8 B.L.R., 235	XVII ...	428
Mohesh Chunder Sen v. Juggut Chunder Sen, I.L.R., 5 Cal., 212 ...	XVI ...	187
Mohima Chunder Roy Chowdhry v. Ram Kishor Acharj Chowdhry, 15 B.L.R., 142 *note*; 23 W.R., 174	XVI ...	512
Mohunto Southo Pursad Dass v. Parasu Padhan, 26 W.R., 98 ...	XVII ...	552
Mokha Harakraj Joshi v. Biseswar Doss, 5 B.L.R. Ap., 11; 13 W.R., 344	XVII ...	581
Mokort Nath Persad v. Gujadhur Persad, 25 W.R., 156... ...	XVII ...	784
Moniram Kolita v. Keri Kolitani, I.L.R., 5 Cal., 776	XVII ...	675
Moore v. Rawlins, 6 C. B. (N S.), 289	XVII ...	796
Moorhill, The, v. Natmoo, The (unreported)..	XVII ...	73
Moothora Kant Shaw v. India General Steam Navigation Company, I.L.R., 10 Cal., 166	XVII ...	41
Moran v. Mittu Bibee, I.L.R., 2 Cal., 228	XVI ...	294
Morgan v. Griffin L. R., 6 Ex., 70	XVII ...	179
Morley v. Chadwick, 7 B. & C., 47	XVII ...	462
Morrison v. Universal Marine Insurance Company, L. R. 8 Exch., 40	XVI ...	569
Moulavi Muhammad v. Syed Hussan, I.L.R., 5 All., 203 ...	XVI ...	750
Mowla Buksh v. Kishen Pertab Sahi, I.L.R., 1 Cal., 102 ..	XVII .	455
Mrinamoyi Dabea v. Jogodishuri Debia, I.L.R., [illegible] Cal., 450 ..	XVII .	353
Muguiram Marwari v. Gursahai Nund, I.L.R., 17 Cal., 317 ...	XVII ..	916
Muhamed Fayez Chowdhry v. Jamoo Gazee, I.L.R., 8 Cal., 730 .	XVII ..	732
Muhammad Abid v. Muhammad Asghar, I.L.R., 8 All., 64 ..	XVII ..	265
Mukhun Lal Panday v. Koondun Lal, 15 B.L.R., 228; L.R., 2 I.A., 210; 24 W.R., 75	XVI ..	189
Mullick Ahmed Zumma v. Mahomed Syed, I.L.R., 6 Cal., 194 .	XVI ..	600
Mullick Case, 9 Moore's I.A., 123...	XVI ..	392
Mulmantri v. Ashfak Ahmad, I.L.R., 9 All., 605	XVII	61, 713
Mungul Pershad Dichit v. Grija Kant Lahiri, I.L.R., 8 Cal., 51; L.R., 8 I.A., 123	XVI ...	269,464,466
Murray v. Bogue, 1 Drew., 353	XVII ..	958
Muthoora Nath Pal v. Chundermoni Dabia, I.L.R., 4 Cal., 817 ..	XVII ...	29
Muttayan v. Zamindar of Sivagiri, I.L.R., 6 Mad., 1	XXII ...	38
Muttu Ramalinga Setupati v. Perianayagum Pillai, L.R., 1 I.A., 209	XXII ...	15
Muzhurool Huq v. Puhraj Ditarey Mohapattur, 13 W.R., 235 ...	XXII ..	505

N

Nadir Hossein v. Pearoo Thoviddarnee, 14 B.L.R., 425.. ...	XVI ..	356
Nanak Ram v. Mehin Lal, I.L.R., 1 All., 487	XVII ...	660
Nanhu Koer v. Somrun Thakur, 8 C.L.R., 287	XVII ...	49
Nani Bibi v. Hafizullah, I.L.R., 10 Cal., 1073	XVI ...	116
Nani Tara Naikin v. Allarakhia Soomar, I.L.R., 1 Bom., 573 ..	XVII ..	891
Nanoni Babuasin v. Modhun Mohun, L.R., 13 I.A., 1; I.L.R., 13 Cal., 21	XVII ..	587
Narain Chunder v. Tayler, I.L.R., 4 Cal., 103	XVII ...	596
Narain Chunder Chuckerbutty v. Dataram Roy, I.L.R., 8 Cal., 597; 10 C.L.R., 241	XVI ...	416,623
Narain Singh Roy v. Nurendro Narain Roy, 22 W.R., 297 ..	XVII ...	464
Narasayya v. Venkata Krishnayya, I.L.R., 7 Mad., 397 ...	XVI ...	458,467
Narasimma Thatha Acharya v. Anantha Bhatta, I.L.R., 4 Mad., 391	XVII ...	558
Narayan Vithe Parab v. Krishnaji Sadashiv, I.L.R., 10 Bom., 233...	XVII ...	910
Narendro Narain Rai v. Ishan Chandra Sen, 13 B.L.R., 274; 22 W.R., 22	XVII ...	828
Naro Hari v. Anpurnabai, I.L.R., 11 Bom., 160	XVII ...	701
Narotam Dass v. Sheopargash Singh, I.L.R., 10 Cal., 740 ..	XVI ..	542
Nasir Bin Abdul Habib Fazal v. Dayabhai Itchachand, 10 Bom., 300	XVI ..	28
Nath Mal Das v. Tajamul Hussain, I.L.R., 7 All., 36	XVI .	3,605
Nath Mal Das v. Tajamul Hussain, I.L.R., 7 All., 36 .. .	XVII ...	61
Neate v. Pink, 15 Sim., 450	XVII .	237
Neerunjun Mookerjee v. Oopendro Narain Deb, 10 B.L.R., 60 .	XVI	688
Newman, In the goods of, 1 Curt., 914	XVI ...	21
Newton v. Clarke, 2 Curt., 320	XVI ..	21
New York Life Insurance Company v. Styles, L.R., 14 App. Cas., 381	XVII ..	796
Nga Tha Yah v. Burn, 2 B.L.R., F.B., 91; 11 W.R., F.B., 8 ...	XVII ...	713
Nilkomul Chuckerbutty v. Bir Chunder Manikya, I.L.R., 16 Cal., 450 *note*	XVI ...	450

O

P

Q

R

RAM—SAT

S

T

THE INDIAN LAW REPORTS, CALCUTTA SERIES CONTAINING CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA NOT SUBJECT TO ANY HIGH COURT.

CALCUTTA -Vol. XVI--1889.

APPELLATE CIVIL.

The 30th January, 1888.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Rajrup Singh and another............Two of the principal Defendants.

versus

Ramgolam Roy....... ....Plaintiff.*

Civil Procedure Code, 1882, s. 244--Question relating to execution of decree—Parties to suit—Representatives.

K and *M* were brothers alleged to be joint in food, dwelling, and business. In a suit which was brought against *K*, and which was unsuccessfully defended by him on behalf of himself and the joint family, a decree for costs was passed against him. *K* died after decree, and the decree-holder in execution had *K*'s sons put on the record as his representatives. Certain property was attached in execution, and the sons objected that the property in question had come to them as the self-acquired property of their uncle *M*, who had died after *K*, and that they had inherited no property from their father *K*. Their objection was allowed by the Court executing the decree, and the property was ordered to be released from attachment. In a suit brought by the assignee of the decree-holder against the sons of *K* to establish his right to proceed against the property in question in execution of the decree against *K*: *Held*, that the question of the liability of the property to be taken in execution in the hands of the defendant was a "question arising between the parties to the suit in which the decree was passed *or their representatives*, and relating to the execution, etc., of the decree" within the meaning of s. 244 of the Civil Procedure Code, and that the suit was consequently not maintainable.

[2] The cases as to the position of representatives added to the suit either before or after decree referred to and discussed.

---

* Appeal from Order No. 152 of 1888, against the order of T. M. Kirkwood, Esq., Judge of Patna, dated the 18th of April 1887, reversing the decree of Baboo Troilokho Nath Mitter, Subordinate Judge of Patna, dated the 5th of February 1886.

THE facts in this case were shortly as follows:—

Kheba Singh, the father of the defendants, and his brother Mewa Lal, were joint in food and dwelling, and carried on business jointly as members of a joint family. In a suit which was brought against Kheba Singh, and which had been contested by him on behalf of himself and the joint family, Kheba was unsuccessful, and decrees for costs were passed against him. Kheba Singh having died after the decrees, the decree-holder, in execution of those decrees, substituted his sons as judgment-debtors in their father's place, and they were brought on the record as his representatives. The decree-holder attached certain property, and the defendants objected that they had succeeded to no property from their father, but that the property attached had come to them by inheritance from their uncle Mewa Lal, who had died after their father, and that such property had been Mewa Lal's self-acquired property. On the 22nd March 1884 this objection was allowed, and the property was released from attachment The present suit was brought on the 21st March 1885 by a purchaser from the original decree-holder to establish his right to proceed against the property in question in execution of the decrees against Kheba Singh.

At the hearing, before the merits of the case were gone into, a preliminary objection was taken that the matter dealt with by the order of the 22nd March 1884 was, within the meaning of s. 244 of the Civil Procedure Code, a "question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree," and therefore had been properly dealt with by the Court executing the decree, and could not now be the subject of a separate suit.

The Subordinate Judge upheld this objection and dismissed the suit.

On appeal the Judge was of opinion that the proceedings and order of the Court executing the decree was taken and made under ss. 278, 280 of the Code, and not under s. 244, and that the suit was maintainable. He therefore reversed the decree of the Subordinate Judge and remanded the suit for hearing on the merits.

[3] From this decision the defendants appealed.

Baboo *Nilmadhub Sen* for the Appellants.

Moulvie *Mahomed Yusoof* for the Respondent.

The following cases were referred to in argument: *Chowdhry Wahed Ali* v. *Jumaee* (11 B. L. R., 149); *Oseemunnissa Khatoon* v. *Ameerunnissa Khatoon* (20 W. R., 162); *Arundadhi Ammyar* v. *Natesha Ayyar* (I.L. R., 5 Mad., 391); *Nimba Harishet* v. *Sitaram Paraji* (I. L. R., 9 Bom., 458); *Ameeroonissa Khatoon* v. *Mozuffer Hossein Chowdhry* (12 B. L. R., 65); *Buddu Ramaiya* v. *Venkaiya* (3 Mad., 263); *Kuriyali* v. *Mayan* (I. L R., 7 Mad., 255); *Ram Ghulam* v. *Hazaree Kuar* (I. L. R., 7 All., 547); *Sitaram* v. *Bhagwan Das* (I. L. R., 7 All., 733); *Dhiraj Mahatab Chand* v. *Peari Dasi* (6 W.R., Mis., 61): *In re Rainey* (6 B.L.R., 725); *Abdul Rahman* v. *Muhammad Yar* (I. L. R., 4 All., 190); *Awadh Kuari* v. *Raktu Tewari* (I. L. R., 6 All., 109); *Shankar Dyal* v. *Amir Haidar* (I.L.R., 2 All., 752); *Nath Mal Das* v. *Tajammul Husain* (I.L.R., 7 All., 36); *Bahori Lal* v. *Gauri Sahai* (I. L. R., 8 All., 626); *Kanai Lal Khan* v. *Sashi Bhuson Biswas* (I.L.R., 6 Cal., 777) and *Kameshwar Pershad* v. *Run Bahadur Singh* (I.L.R., 12 Cal., 458).

The following **Judgments** were delivered by the Court (WILSON and MACPHERSON, JJ.) :—

Wilson, J.—The plaintiffs are the assignees of a decree obtained against one Kheba Singh; and in this suit they ask for a declaration that certain

properties are liable to be attached and sold to satisfy that decree in the hands of the substantial defendants to the suit, who are the sons of Kheba Singh. It appears that after the decree was obtained Kheba Singh died, and that an application was made to execute the decree against the property now in question in the hands of the same persons who are now defendants ; and that application was dismissed. Neither the petition nor the order has been put in evidence, and we are therefore obliged to derive our knowledge of them from the [4] admissions in the plaint, from which we learn that the decree-holders "filed a list of the disputed property as property belonging to the judgment-debtor Kheba Singh ; " that the sons alleged in answer that " they had got it from the estate of Mewa Lal and not from the estate of Kheba ;" and that by the order then made "the disputed property has been exempted from sale by auction."

The decree was subsequently assigned to the plaintiffs, and they now sue for a declaration that the property in question is liable in the defendant's hands to be attached and sold to satisfy the decree. The Subordinate Judge held that s. 244 of the Code of Civil Procedure was a bar to this suit, and he dismissed it accordingly. The District Judge reversed that decision and remanded the case for trial on the merits. Against that order the present appeal has been brought.

The sections of the Code which it seems necessary to refer to are these :—

Section 234 says: " If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

" Such representative shall be liable only to the extent of the property of the deceased which has come to his hands, and has not been duly disposed of ; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit."

Section 244 says : "The following questions shall be determined by order of the Court executing a decree and not by separate suit, namely :—

" *(a) and (b)* relate to mesne profits.

" (c) any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree."

Section 248 says : " The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him ;

[5] " (b) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made."

What we have to say is whether the question of the liability of this property to be taken in execution in the hands of the present defendants—a question raised and decided in the execution proceedings, and now raised again in this suit—is a question " arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree," within the meaning of s. 244. And this may be divided into two questions : whether the defendants were and are representatives of the judgment-debtor, and whether the question in dispute is a question between the decree-holders and such representatives in the sense intended by the section.

The provision formerly in force corresponding to s. 244, namely, s. 11 * of Act XXIII of 1861, was limited in its operation to questions arising between parties to the suit, and the question arose whether the term "parties" applied to persons who had not been made parties before decree, but against whom execution was sought as heirs of the judgment-debtor upon his death after decree. In the present section the words "or their representatives" have been added; and I entertain no doubt that they apply to persons against whom or against the property in whose hands execution is sought, on the ground that they are the heirs of a judgment-debtor who has died after decree.

As regards the kind of questions intended in s. 244, the matter I think is pretty clear from the provisions of s. 234. Under that section the representative can be made liable "to the extent of the property of the deceased which has come to his hands and has not been duly disposed of." So that two kinds of property can be attached: First, property of the ancestor found in the hands of the heir; and, secondly, the property of the heir, from whatever source derived, to the extent to which he has wasted the assets descended to him without satisfying the debts by the deceased. In the case now before us, the property is of the first kind—property said to be liable to execution in the hands of heirs as assets inherited from their ancestor. In such a case the question [6] that ordinarily arises is, whether the property has so descended or not. That is a question in which the parties interested are the judgment-creditor on one side, and the alleged heir himself on the other. The persons interested would be the same if the property against which execution was sought were the property of the heir himself which it was sought to charge on the ground of his having wasted the inherited assets; the provision in s. 234 for taking an account makes this plain. Upon the construction of the words of the section, it appears to me that the question which the plaintiff seeks to raise in this case not only arose, but was decided in the execution proceedings between his vendor and the present defendants brought in as representatives of the original judgment-debtor, and that s. 244 bars this suit.

An examination of the decisions leads to the same result. The cases fall into two classes. The first class consists of cases in which a person is originally made a party in a representative capacity, or is subsequently made a party in consequence of the death of an original party before decree. In this case, it is clearly settled I think that such a person is a party to the suit within the meaning of s. 244, and that a question between him and the decree-holder, as to whether property has come to him as the representative of the judgment-debtor, and so is liable to be taken in execution of the decree against him as such representative, or, on the other hand, belongs to himself alone and not in such representative character, is one that must be decided in the execution proceedings, and not by suit. The governing authority on the subject is the decision of the Privy Council in *Chowdry Wahed Ali* v. *Jumaee* (11 B. L. R.,

* [Sec. 11 :—All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal. Provided that if upon, a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.]

How questions regarding amount of mesne profits and interest and sums paid in satisfaction of decrees, &c., are to be determined.

149); and it has been followed and applied in the sense I have indicated in several subsequent cases in this country—*Oseemunnissa Khatoon* v. *Ameerunnissa Khatoon* (20 W. R., 162); *Arundadhi Ammyar* v. *Natesha Ayyar* (I. L. R., 5 Mad., 391); *Nimba Harishet* v. *Sitaram Paraji* (I. L. R., 9 Bom., 458).

The second class of cases consists of those in which the representatives have not been made parties to the suit before decree; but in which, in consequence of the death of the judgment-debtor after decree, a question arises as to the rights of the [7] decree-holder to execute the decree against the representatives or the property said to have descended to them.

Under Act XXIII of 1861 it was held, both by the Madras High Court in *Buddu Ramaiya* v. *Venkaiya* (3 Mad., 263), and by this Court in *Ameerunnissa Khatoon* v. *Mozuffer Hossein Chowdhry* (12 B. L. R., 65), that representatives proceeded against in execution of a decree against the person they represented were parties to the suit within the meaning of the section corresponding to the present s. 244. That question, it seems to me, no longer arises, because in s. 244 the representatives are expressly mentioned. In both of those cases, and in a series of subsequent cases, it has been held, in accordance with the analogy of the other class of decisions already mentioned, that questions arising between a decree-holder and the representatives of the judgment-debtor as to whether property has come to the representatives as such, and so is liable to be taken in execution, or is their own property derived from any other source, and therefore not so liable, must be decided in the execution proceeding and not by suit. *Kuriyali* v. *Mayan* (I. L. R., 7 Mad., 255); *Ram Ghulam* v. *Hazaree Kuar* (I. L. R., 7 All., 547); *Sitaram* v. *Bhagwan Das* (I. L. R., 7 All., 733).

I only know of two cases which seem to me distinctly inconsistent with the law established, as I think by the two classes of decisions to which I have referred--*Abdul Rahman* v *Muhammad Yar* (I. L. R., 4 All., 190); and *Awadh Kuari* v. *Raktu Tewari* (I.L.R. 6 All., 109). I prefer to follow the view which seems to me most naturally to follow from the language of the Act, and which is supported by the preponderance of authority.

Several cases were cited to us to which I think it unnecessary to do more than refer, because the decisions turned upon considerations which do not apply to the case now before us. They are cases in which it has been held that a claim either by the judgment-debtor or by his representatives to property attached in execution, made not in his own right but as a trustee, does not fall within s. 244. *Shanker Dyal* v. *Amir Haidar* (I. L. R., 2 All., 752); and [8] *Nath Mal Das* v. *Tajammul Husain* (I. L. R., 7 All., 36). The more recent case of *Bahori Lal* v. *Gauri Sahai* (I. L. R., 8 All., 626), in which the facts were very peculiar, and quite unlike those of the present case, was decided by one at least of the Judges before whom it came on the ground that it fell within the same principle. It remains to mention two other cases which have been relied upon as inconsistent with the general current of the authorities --*Kanai Lal Khan* v. *Sashi Bhuson Biswas* (I. L. R., 6 Cal., 777) and *Kameshwar Pershad* v. *Run Bhahadur Singh* (I. L. R., 12 Cal., 458). The first of these cases seems to me to decide nothing touching upon the present question except this, —that where a defendant dies, and some one is substituted, rightly or wrongly, as being his representative, the latter, though he becomes a party, becomes a party to the original suit, the character and scope of which are not enlarged, but remain the same as they were before; and that therefore the person so brought in is not bound to raise in that suit, either before decree or in execution proceedings, any question not properly within the scope of the suit,

and not arising out of the execution of the decree actually passed. In *Kameshwar Pershad* v. *Run Bahadur Singh* (I. L. R., 12 Cal., 458) what was decided, and decided in the execution proceedings, was that a man cannot be made liable in execution as the representative of a deceased judgment-debtor, in respect of property which he has obtained from the judgment-debtor by a title prior to decree, or inherited from somebdoy else, though he may be so made liable in respect of property inherited from the judgment-debtor after decree.

I am of opinion that the present suit is barred by s. 244, and that the order of the District Judge should be set aside, and the decree of the Subordinate Judge maintained with costs in both Appellate Courts.

Macpherson, J.—I am of the same opinion, and hold that the suit is barred by s. 244, and that consequently the order of the District Judge must be set aside, and the decree of the Subordinate Judge restored with costs in both Appellate Courts.

J. V. W. *Appeal allowed.*

NOTES.

[Similar decisions were given in (1890) 17 Cal., 711; (1889) 16 Cal., 603; (1896) 23 Cal., 454; (1901) 6 C.W.N., 63; (1889) 12 All., 313; (1899) 21 All., 323; (1905) 28 All., 51; (1902) 26 Mad., 501; (1898) 23 Bom., 237.

Questions relating to properties held in trust for another by the judgment-debtor himself are not within sec. 244: see. 47 C.P.C., 1908, (1899) 23 Mad., 195; **(1911) 39 Cal., 298 F.B.**]

[9] CRIMINAL MOTION.

The 6th August, 1888.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE RAMPINI.

In the matter of the petition of Parbutty Charan Aich.

Parbutty Charan Aich

versus

Queen-Empress.*

Criminal Procedure Code, ss. 134, 144—Penal Code, s. 188—Disobeying order of Public Servant—Trader at Hat—Order prohibiting holding of Hát.

A District Magistrate, by an order made under s. 144 of the Criminal Procedure Code, after stating that it appeared that one "*G C S* has recently established a hat at *S* in the vicinity of *K*, an old established hat, and hold it on the same days, and that in consequence of the establishment of the new hat, and the endeavours made to induce or force people to frequent the new hat instead of the old one, a serious breach of the peace or riots are imminent," ordered "that the said *G C S* and all other persons abstain from holding such hat" on those days. The order was duly made and promulgated, but not strictly in accordance with s. 134† of the Code, and the orders of Government made thereunder.

* Criminal Motion No. 238 of 1888, against the order passed by J. Posford, Esq., Judge of Backergunge, dated 21st June 1888, modifying the order passed by F. A. Hossein, Deputy Magistrate of Patuakhally, dated the 12th May 1888.

Service or notification of order.

† [Sec. 134:—The order shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons.

If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.]

Notwithstanding the order, one *P C A* was found exposing goods for sale as a trader at the hat on one of the prohibited days, and he was thereupon charged with disobeying the order of the Magistrate, and convicted of an offence under s. 188 of the Penal Code. *Held*, that the conviction was bad, as *P C A* did not come within the description of the persons intended by the order to be prohibited from "holding" the hat, which referred to "holding" as owner or manager, not as a trader.

***Held*, also, that the terms of s. 134 of the Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order; where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code.**

THE appellant Parbutty Charan Aich was charged with having disobeyed an order made by the Magistrate of Backergunge, and with having in consequence been guilty of an offence under s. 188 of the Penal Code.

It appeared that one Gobinda Chunder Sahu had established a hat in a village called Singhrakati in the District of Backergunge. The Magistrate of the district, finding that such a hat [10] interfered with the previously established hat in the neighbouring village of Krishnagunge and that a breach of the peace was thereby imminent, issued the following order: "Whereas it appears from the report of Sub-Inspector Prosonno Coomar Mookerjee, and from the affidavit of Baikanto Chunder Gangooly filed herewith, that Gobinda Chunder Sahu has recently established a new hat at Singhrakati in the vicinity of Krishnagunge hat, an old established hat, and held it on the same days, viz., Tuesdays and Saturdays, and that in consequence of the establishment of the new hat, and the endeavours made to induce or force people to frequent the new hat instead of the old one, a serious breach of the peace or riots are imminent, it is hereby ordered that the said Gobinda Chunder Sahu and all other persons abstain from holding such hat, or any hat whatever, near or within the hat at Krishnagunge on any Tuesday or Saturday. This order is made under s. 144 of the Criminal Procedure Code and will remain in force two months."

The order was not served personally on Parbutty Charan Aich, nor was it duly promulgated in the hat by beat of drum, or as provided for by s. 134 of the Code and by Government notification made under that section Notwithstanding this order the hat at Singhrakati still continued to be held, and on Saturday, 21st January, Parbutty Charan Aich, being found exposing goods for sale in the hat, was charged under s. 188 of the Penal Code with disobeying the above order, and on conviction was sentenced by the Deputy Magistrate to rigorous imprisonment for three months—a sentence which was altered on appeal to the Sessions Judge to seven days' imprisonment and a fine of Rs. 30. The Judge said: "As to Parbutty Charan Aich I see no reason to doubt the propriety of the conviction; but I do not find any satisfactory proof of his being more than a trader who comes to the hat and offers goods for sale there. He does not appear to be one of the hat proprietors or managers, though he is said to have been a *tadbirkar*." Parbutty Charan Aich appealed to the High Court on the grounds that the order of the Magistrate prohibiting the hat was not promulgated in the manner provided by law; that the order being therefore bad, the disobedience of such an order was not punishable under s. 188 of the Penal Code; and that [11] the act imputed to him did not constitute a disobedience of the order.

Baboo *Umbica Churn Bose* and Baboo *Baikanto Nath Doss* for the Appellant.

The Officiating Deputy Legal Remembrancer (Mr. *Beeby*) for the Crown.

The **Judgment** of the Court (WILSON and RAMPINI, JJ.) was as follows :—

Wilson, J.—The conviction in this case is under s. 188 of the Indian Penal Code, which says that whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, disobeys such direction, shall be liable to certain punishment. Now, the order which the accused in the present case was charged with disobeying was an order by the District Magistrate under s. 144 of the Code of Criminal Procedure. It was an order made with relation to a hat It appears that there was an old-established hat, and that certain persons, acting for, or with, one Gobinda Charan Sahu opened a new hat in the vicinity of the old one, and held it on the same days. This action, in the opinion of the Magistrate, made a serious breach of the peace imminent ; and therefore having made the necessary inquiries he passed this order. [After reading the order (*Ante*, p. 10), His Lordship continued] :

It has been found that notwithstanding that order the new hat was nevertheless held on Tuesdays and Saturdays ; and the present accused has been convicted of disobeying that order. The fact found is that he sold goods in the hat, not that he was a proprietor of the hat, or was one of those who promoted or managed or had any control of it, but simply that as a trader he sold goods at the hat.

Two points have been raised before us. The first is, whether there was an y such service or promulgation of the Magistrate's order as to bring the case within s. 188. With regard to that it would appear that the mode of service was not in accordance with the Criminal Procedure Code, because s. 144 **[12]** says that a Magistrate may, by a written order stating the material facts of the case and served in manner provided by s. 134, direct any person to abstain from a certain act, and so forth. And what s. 134 says is, that " the order " that is an order under s. 133, " shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons. If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person." In the present case, there was evidence probably that there was personal service on Gobinda Chunder Sahu. But there was no personal service on the present accused ; nor was the service or promulgation in accordance with s. 134. The Bengal Government has gazetted an order to the effect that, when personal service cannot be made, the order shall be notified by beat of drum at the place in question. That was not done in the present case. Therefore the notice was not served according to the directions of the Criminal Procedure Code as amplified by the order in the Gazette. But I do not think that *that* is fatal in the present case, because I do not think that it is necessary for us to read the direction as to the mode of service as going absolutely to the validity of the order. I think we may fairly say that the terms of s. 134 and the notification in the Gazette are directory, and ought to be followed, and that it is an irregularity when they are not ; but it does not follow that the order is a nullity in consequence, and I think that when the order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under s. 188 of the Indian Penal Code. The first objection therefore seems to me to fail.

The other objection is more serious, and goes much more to the solid merits of the case. It is this, that what the present accused is found to have done is no breach of the Magistrate's order. It is obvious that before you can proceed criminally [13] against a man for breach of an order you must show that the order clearly and unequivocally prohibits the thing which he is said to have done. If the order be ambiguous and open to two interpretations, you must adopt the one most favourable to the accused, and not the other. In the present case the earlier part of the Magistrate's order shows, we think pretty clearly what he was thinking of when he came to the conclusion that the new hât should be prohibited. He was thinking of the action of Gobinda Chunder Sahu, and of the people who were acting for or with him, that is to say, he was thinking of the conduct of persons who established the hât, opened it, managed it and tried to bring people to it to buy and sell; and having described their action as likely to induce a serious breach of the peace, he proceeds to prohibit Gobinda Chunder Sahu and all other persons from *holding* the hât. In that connection it is almost impossible to read the words "holding the hât" in any other sense than that which we have described, that is, in the sense of holding as owner or manager. It is almost impossible to read the words as including the conduct of people who do not hold the hât as owners and managers, but who frequent it as buyers or sellers. But if we are wrong in this interpretation of the words, at any rate it is clear that the order, looking at it in the most favourable light for the prosecution, is ambiguous, and does not clearly and unmistakably prohibit traders from buying and selling in the hât.

That being so, the conviction cannot stand, and must be set aside.

J. V. W. *Conviction set aside.*

NOTES.

[*See* also 30 All., 364 ; (1900) P.R., 2 as regards irregularity in the service ; (1904) 31 Cal., 990 as regards restrictions as to the mode of holding *hâts*.]

[16 Cal. 13]

APPELLATE CIVIL.

The 10th August, 1888.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE RAMPINI.

Joynarayan Singh............Judgment-debtor

versus

Mudhoo Sudun Singh............Adjudicating-creditor.*

Jurisdiction—Deputy Commissioner—District Court—Insolvent Judgment-debtors—Civil Procedure Code, 1882, ss. 344, 360—Application to be declared insolvent.

The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District court" in Chota Nagpur under ss. 2 and 344 of the Civil

---

* Appeal from Order No. 187 of 1888, against the order of E. N. Baker, Esq., Deputy Commissioner of Manbhoom, dated the 28th of April 1888.

[14] Procedure Code. A Deputy Commissioner therefore invested by the Local Government with powers under s. 360 of the Code has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent.

In re Waller (I. L. R., 6 Mad., 430), and *Purbhudas Velji* v. *Chugun Raichand* (I. L. R., 8 Bom., 196), followed.

The question of jurisdiction not having been raised in the lower Court the order was set aside without costs.

THIS was an application under the second clause of s. 344 of the Civil Procedure Code by the holder of a decree for money, praying that the judgment-debtor might be declared insolvent.

The only question material to this report was as to the jurisdiction of the Court of the Deputy Commissioner to entertain the application.

Mr. *R. Allen*, Baboo *Ashutosh Dhur*, and Baboo *Rajendronath Bose* for the Appellant.

The Advocate-General (Sir *G. C. Paul*), Mr. *Woodroffe*, and Baboo *Pran Nath Pandit* for the Respondent.

The **Judgment** of the Court (WILSON and RAMPINI JJ.) was as follows :—

Wilson, J.—This is a matter brought before us by way of appeal from an order of the Deputy Commissioner of Manbhoom in Chota Nagpur. Acting under Chapter XX of the Code of Civil Procedure he made an order adjudging a judgment-debtor to be an insolvent, and he did so on the application of the judgment-creditor.

We find ourselves constrained to set aside that order on a ground which unfortunately has no relation to the merits of the case. The ground upon which we are obliged to set aside the order is that the Deputy Commissioner had no jurisdiction to make it.

Under s. 344 of the Civil Procedure Code "any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent; " and "any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent:" and "every such application shall be made to the District [15] Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody." "District Court" is defined thus in s. 2 of the Code: "District means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a District Court)." So that in order to see whether the Deputy Commissioner's Court is a District Court, we have to inquire whether it is a principal Civil Court of original jurisdiction within the district. We find that it is not so. The principal Civil Court of original jurisdiction throughout Chota Nagpur is the Court of the Judicial Commissioner. By gazetted order of the Local Government the Judicial Commissioner is given the jurisdiction of a District Judge throughout Chota Nagpur, and the Deputy Commissioners are given the jurisdiction of Subordinate Judges. It follows that the Deputy Commissioner was not empowered to make such an order as this by the operation of s. 344. But then we have to turn and see whether he has power under s. 360. Under that section "the Local Government may, by notification in the Official Gazette, invest any Court, other than a District Court, with the powers conferred on District Courts by ss. 344 to 359 (both inclusive), and the District Judge may transfer to any Court, &c."

We find by reference to the Gazette that the Deputy Commissioner's Court has been invested by the Local Government with the powers that s. 360 authorises that Government to confer. But then in order to see what the powers conferred are we must look at the latter part of s. 360, which says, when such notification has been issued "the District Judge may transfer to any Court situate in his district and so invested any case instituted under s. 344. Any Court so invested may entertain any application under s. 344, by any person arrested in execution of a decree of such Court." So that when a Court, other than a District Court, is specially invested with powers under s. 360, those powers authorise it to deal with two classes of cases: First, cases transferred by the District Court; and, secondly, cases of persons who are in custody in execution of its own decree and who apply under the insolvency section. But there is no power given by s. 360 to any Court other [16] than the District Court itself to entertain, apart from any transfer by the District Court, an application by a judgment-creditor to have his judgment-debtor declared an insolvent. This appears clear from the language of the section itself; and the same view has been taken by the Madras and Bombay High Courts. See *In re Waller* (I. L. R., 6 Mad., 430), and *Purbhudas Velji* v. *Chugun Raichand* (I. L. R., 8 Bom., 196). It follows therefore that there was no jurisdiction in the Deputy Commissioner to make the order he has made. On that ground we set his order aside.

We find that this objection to jurisdiction was never taken in the first Court. It was not taken in the grounds of appeal to this Court, and indeed it was raised by the Court itself, and not by either of the parties. Under these circumstances, we may fairly set the order aside without costs.

Then an application was made to us by the Advocate-General to order the return of the petition presented to the lower Court, in order that it might be presented again to the Court which has jurisdiction. That is a matter with which we think we ought not to interfere. It should be dealt with by the lower Court.

J. V. W. *Appeal allowed.*

[16 Cal. 16]

APPELLATE CIVIL.

The 2nd August, 1888.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE RAMPINI.

Jogobundhoo Dass and another............Judgment-debtors .

versus

Hori Rawoot and another............Decree-holders.*

Civil Procedure Code, 1882, s. 230, cl. (b)—Limitation—Execution of decree—Order directing payment of money at a certain date.

A judgment-debtor on being arrested in execution of a decree presented a petition asking for fifteen days' time to pay the amount of the decree, and, the decree-holders consenting, the Court made an order in the terms, "let the petition be filed." *Held*, that this order did not amount to one directing payment of money to be made at a certain date within the meaning of s. 230, cl. (b) of the Civil Procedure Code.

Bal Chand v. *Raghunath Das* (I. L. R., 4 All., 155) followed.

[17] THIS was an application made on the 18th November 1886 for execution of a decree dated 9th January 1874. It appeared that on the 21st August 1882 one of the judgment-debtors, on his being arrested in execution of the decree, had presented a petition to the Court for fifteen days' time to pay up the amount of the decree, which petition (the decree-holder consenting) was ordered to be filed, and the time was allowed, the judgment-debtor being released from arrest. He failed, however, to pay the amount of the decree. The only question material to this report was whether the order made on this petition amounted to a direction by the Court for "the payment of money on a certain date" within the meaning of s. 230, sub-section (b).

The decree-holder contended that it did, and that he was therefore entitled to reckon the twelve years' limitation from the expiration of the fifteen days' time when default was made in paying the amount of the decree. The judgment-debtor contended that execution of the decree was barred by limitation which was to be reckoned from the date of the decree and that the order made on the petition did not create a new starting point from which the time could run.

The Lower Appellate Court (reversing the decision of the Munsif, before whom, however, the point as to the effect of the order on the petition was not raised) held that the order was virtually one under s. 230, cl. (b), and that execution of the decree was therefore not barred.

From this decision the judgment-debtors appealed to the High Court.

Baboo *Mon Mohun Dutt* for the Appellants.

Dr. *Guru Dass Banerji* for the Respondents.

For the appellants the case of *Bal Chand* v. *Raghunath Das* (I. L. R., 4 All., 155) was relied on, and for the respondents the case of *Jhoti Sahu* v. *Bhubun Gir* (I. L. R., 11 Cal., 143) was referred to.

The **Judgment** of the Court (WILSON and RAMPINI, JJ.) was as follows :—

Wilson, J.—In this case we think that the Lower Appellate Court is in error in the view it has taken of the law.

* Appeal from Order No 7 of 1888, against the order of J. B. Worgan, Esq., Judge of Cuttack, dated the 8th of September 1887, reversing the order of Baboo Mati Lal Singh, Munsif of that district, dated the 29th of March 1887.

[18] The application was one for execution, and was made more than twelve years after the date of the decree. In the first Court the Munsif dismissed the application on that ground, the application being, in his opinion, too late under s. 230 of the Code of Civil Procedure. The Lower Appellate Court has considered that the application is saved from the bar of limitation by reason of sub-section (b) of s. 230, which says: "Where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date, 'the twelve years is to run from the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.'"

Now, it is sought to show that there was a subsequent order directing payment to be made on a certain date by reason of these circumstances: A prior application for execution by attachment of the person of one of the judgment-debtors was made within twelve years of the date of the decree and within twelve years previous to the date of the present application. When that judgment-debtor had been arrested he put in a petition asking that he might have fifteen days' time within which to pay up the amount of the decree and so escape committal to prison. That petition was consented to, and the order made on it was, "let the petition be filed." The Lower Appellate Court has considered that that order amounts to an order to pay on or before the 15th day. We think that *that* is a very considerable extension of the order. In form certainly it is nothing of the kind; and even if we could suppose that the order adopts the terms of the petition, and can be read as embodying what appears in the petition, still it would not be an order for payment. The petition contains no new promise to pay; it simply asks for a stay of proceedings for fifteen days to enable the petitioner to pay up the amount of the decree—the alternative obviously being that on expiry of the fifteen days, if the money was not paid, the execution proceedings should go on. This case therefore differs materially from the case of *Jholi Sahu* v. *Bhubun Gir* (I. L. R., 11 Cal., 143). In that case there was not a mere petition for time, but an actual agreement by way of compromise entered [19] into between the parties for payment in certain ways; and the order was, that it should be recorded. The learned Judges in that case considered that the order there might be regarded as one embodying the compromise, and that, the compromise being an actual undertaking to pay, the order was an order to pay. On the other hand, in the case of *Bal Chand* v. *Raghunath Das* (I. L. R., 4 All., 155) the facts are precisely similar to those of the present case; and the learned Judges there took the same view as we have taken here. For these reasons we think that the view taken by the Lower Appellate Court cannot be supported.

The result is that the order of the Lower Appellate Court must be set aside, and the order of the first Court, the Munsif, affirmed, with costs.

J. V. W. *Appeal allowed.*

NOTES.

[In the corresponding section of the C.P.C., 1908 viz. sec. 48, the words '*or at recurring periods*' were inserted to give effect to the decisions like (1888) 12 Bom., 65; (1891) 14 Mad., 396; (1891) 19 Cal., 139.]

[16 Cal. 19]

APPELLATE CIVIL.

The 10th August, 1888.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Horendranarain Acharji Chowdhry.................Plaintiff

versus

Chandrakanta Lahiri and another............Defendants.*

Will—Attestation of will—Purdanashin lady—" In the presence of" — Succession Act (X of 1865), s. 50.

After execution of her will by a testatrix, a *purdanashin* lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the Registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the Registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the Registrar and the person who identified her at the same time. *Held*, that the witness was " in the presence of " the testatrix within the meaning of s. 50 of the Succession Act (X of 1865).

THIS appeal was brought in the matter of an application for probate of the will of one Rudramani Dobya, a *purdanashin* lady, widow of one Kalichundra Lahiri. The will was executed on the 24th Kartick 1291 (8th November 1884), and the testatrix died on the 24th Aughran 1291 (8th December 1884).

[20] The only question material to this report was whether the attestation of the will was sufficient to satisfy the requirements of s. 50 † of the Succession Act (X of 1865). The evidence showed that, though the will was executed in the presence of the witnesses, only one of the witnesses, viz., Shurut Chunder Bandopadhya, who was also the writer of the will and had signed it for the testatrix in her presence and by her direction, signed it in the presence of the testatrix ; the other witnesses having been told by the testatrix to go and sign it downstairs because she wanted to perform her *puja*. A commission was issued for the examination of other witnesses, one of whom stated that one of the other witnesses to the will also signed the will in the presence of the testatrix, but his evidence as to this was disbelieved by the Judge. It appeared, however, that the Registrar of Calcutta having been sent for, the will was on the same day presented for registration, when execution was

* Appeal from Original Decree No. 67 of 1887, against the decree of J. R. Hallett, Esq., Judge of Rungpore, dated the 5th of February 1887.

† [Sec. 50 :—Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules :—

Execution of unprivileged wills.

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person ; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.]

admitted to the Registrar by the testatrix, who was identified by her medical attendant Kedarnath Singha, both the Registrar and Kedarnath Singha signing their names as witnesses. At the time of the registration the testatrix was inside a room behind one fold of a door, the other fold of which was open, and the Registrar and the other witnesses were in the verandah into which the door opened.

The cases of *In the goods of Raymony Dossee* (I. L. R., 1 Cal., 150), *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (I. L. R., 6 Cal., 17), and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (I. L R., 11 Cal., 429), have decided that if a signature on a will is admitted by the testator to be his, and he is identified before the Registrar by one of the witnesses to the signature, and both the Registrar and identifier sign their names as witnesses to the admission made, such an attestation is sufficient to satisfy s. 50 of the Succession Act. The only question in the present case was whether the signatures were affixed "in the presence of" the testatrix within the meaning of that section. The evidence of the Registrar was not before the lower Court, and that Court thought the evidence of the witness examined on the commission, who stated he had signed the will in the presence of the testatrix, unsatisfactory, and refused the application for probate.

[21] The applicant appealed to the High Court.

Mr. *Woodroffe*, Baboo *Grish Chunder Chowdhry* and Baboo *Horendro Nath Mukerji* for the Appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Jadub Chunder Seal* for the Respondents.

For the appellant it was contended that the attestation was sufficient. The test is whether the testatrix could have seen the witnesses had she chosen to look—Williams on Executors, 8th Ed., p. 93; *In the goods of Piercy* (1 Robert 278); *Newton* v. *Clarke* (2 Curt., 320); *Casson* v. *Dade* (1 Bro. C. C., 99); *In the goods of Trinmel* (11 Jur. N. S., 248); *Shires* v. *Glascock* (2 Salk., 688); *Day* v. *Smith* (3 Salk., 395); *Todd* v. *Winchelsea* (M. and Malk., 12; s. c., 1 C. &. P., 488); *Norton* v. *Basset* (Dea and Sw., 259). The cases on this point where the attestation was held to be insufficient are cases where, under the circumstances, the testator could not have seen the witnesses even had he desired to do so.

It was only absolutely necessary at the registration of the will that there should be *one* witness, as the execution had already been attested by one witness, and it is not necessary that both the witnesses should sign at the same time.

For the respondents on this point the following cases were cited: *Doe* v. *Manifold* (1 M. and S., 249); *Winchelsea* v. *Wauchope* (3 Russ., 441); *In the goods of Killick* (10 Jus. N. S., 1083); *In the goods of Newman* (1 Curt., 914); *In the goods of Ellis* (2 Curt., 395); *In the goods of Colman* (3 Curt., 118); *Tribe* v. *Tribe* (1 Robert, 775).

The **Judgment** of the Court (TOTTENHAM and GHOSE, J.J.) was as follows:—

This is an appeal against a decree of the District Judge of Rungpore, refusing probate of a will alleged to have been executed by Rudramani Debya. The judgment of the Court below is very short; and it is not quite clear from that judgment whether **[22]** the Court below disbelieved the factum of the will or refused probate merely because the requirements of the law, as stated in s. 50 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, had not been fulfilled in the matter of attestation.

The learned Counsel, who argued the appeal on behalf of the appellant-petitioner for probate, assumed in opening that the factum of the will

was undisputed, and that it was left to him to argue only the point as to due attestation.

The learned vakil, however, who appeared for the respondents, strenuously contended that the will was not genuine, in addition to the defect in attestation. Section 50 of the Indian Succession Act requires, for the due execution of a will, that it shall be signed or marked by the testator, or, at his request, by somebody on his behalf, in the presence of two witnesses, and that the witnesses who attest it must sign the will in the presence of the testator. In the present case it appeared at the trial that only one of the attesting witnesses had signed the will in the actual presence of the testatrix. The first witness examined stated that, when the testatrix had signed the will, she desired the rest of the persons present to go downstairs, as she wished to perform her *puja*, and that the other witnesses signed in a room below, where the testatrix could not see them. This being the state of things shown in the District Court at the first hearing, a commission was issued to examine certain witnesses in Calcutta. One of these witnesses supplemented the case of the petitioner, so far as he said that one of the witnesses signed in the presence of the testatrix; but the District Judge disbelieved his evidence on this point, and possibly disbelieved the whole evidence in support of the will. But in the result he held that probate should not be granted, and dismissed the application.

At the close of the learned Counsel's address for the appellant we were prepared to call for further evidence as to the attestation, because it appeared that the will itself had been registered, and the endorsements on the back purported to show that the will having been acknowledged by the testatrix in the presence of the Registrar and other persons, the Registrar and another witness signed the endorsement showing that she had admitted the [23] execution. And previous cases, decided in this Court, have held that such attestation by the Registrar would be sufficient. We have been referred to the case of *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (I. L. R., 6 Cal.,17) and to another case, *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (I.L.R., 11 Cal. 429), in which we ourselves were Judges, and in which we followed the law as laid down in the previous case. But upon hearing the respondents' pleader we found that he disputed the factum of the will itself. Therefore, before making up our mind to have further evidence, we thought it proper to hear him out. He urged many points against the will being accepted as a genuine document. He pointed out that the applicant for probate himself did not come forward to depose, nor did any other member of the family. He also pointed out discrepancies in the evidence, and he relied upon the state of the record, as it stood, as fully supporting the judgment of the lower Court. Assuming that judgment to be one against the factum of the will itself, he of course also relied upon the defect in the attestation which the learned Counsel for the appellant had been compelled to admit. But upon a full consideration of the evidence we came to the conclusion that the document was unquestionably genuine, that is, the testatrix had really and intentionally signed it herself, fully knowing what its purport was. That being so, we considered it necessary, in order to come to a proper judgment in the case, to obtain the evidence of the Registrar of Calcutta and the other witness whose name appears on the endorsement. It seemed to us that, if the Registrar was in a position to prove beyond doubt that he had actually signed this endorsement in the presence of the testatrix, his evidence would be sufficient to complete the case of the petitioner. We accordingly adjourned the hearing to this day. And to-day we have examined the Registrar and Baboo Kedarnath Singha, the other witness.

As regards Baboo Kedarnath Singha, we are not able to place any great reliance upon his statement. But as regards the evidence of Baboo Pertap Chunder Ghose, the Registrar of Calcutta, we think it unexceptionable, excepting so far as his **[24]** memory, after the lapse of four years, has deceived him. There is a discrepancy between his evidence and that of Kedarnath Singha as to the particular place in which the registration was effected, that is to say, whether it took place upstairs or downstairs, and whether the Registrar was in the verandah outside the room in which the testatrix sat, or in the same room. Speaking for myself, what weighs with me most in the Registrar's evidence is his positive assurance that in such a case as this he never omits to make the endorsements and sign them then and there in the presence of the executant. He was asked if he had ever postponed making the endorsements until he returned to his office, then filling up the endorsements at his leisure; and he said that he never did so: and he also stated that he was especially careful in the case of a will to satisfy himself that the executant knew what the contents of the document were. He tells us that the testatrix in this case was decidedly an intelligent lady, and she repeated the substance of the contents of the will. From his evidence it would appear that he and the other witness were in the verandah outside the room, behind the door of which the lady sat. He remembers that she sat behind one fold of the door which was closed, and the other fold open, she being seated behind the fold closed; he also stated that all he saw of her was her hand. The question is therefore whether he was in her presence within the meaning of s. 50. It seems to have been held in English cases that "in the presence of the testator" would include his being in such a position that he could, if he chose, see the witnesses. We think that the testatrix in this case, if she sat behind one fold of the door, the Registrar being admittedly outside in the verandah, might, if she chose, without leaving her seat, have seen him by putting her head forward. It is obvious that it is not absolutely necessary that the testator should actually see the witnesses who attest the will, because a blind person may execute a will. It has been held in England that if a blind person is so placed as, if he had not been blind, he could have seen the witnesses, these witnesses were in his presence within the meaning of the law. That is the case of *In the goods of Piercy* (1 Robert, 278). There is another case—*Newton* v. *Clarke* (2 Curt., 320) —**[25]** in which the testator signed his will while lying in his bed. There were two attesting witnesses, one of whom the testator could see and could be seen by him, and the other witness was so placed behind a curtain that neither could he see, nor could be seen by, the testator; it was held, however, that both witnesses were sufficiently in the presence of the testator to make their attestation valid. That we think is a very fair case to follow in the case of a *purdanashin* lady. It is unquestionable that had the fold of the door been removed the testatrix in this case would have been able to see the witnesses who signed and attested her will. It also appears to our mind that the testatrix could have seen them by putting her head forward.

That being so, we think probate of the will should be granted.

We accordingly set aside the decree of the lower Court and decree the appeal. But under the circumstances we do not think we ought to make the respondent pay the costs, for upon the evidence before the District Judge he was right in refusing probate.

J. V. W. *Appeal allowed.*

NOTES

[*See* also as regards execution by pardanashins, (1907) 13 C. W. N., 40; (1899) 27 Cal., 190; (1898) 26 Cal., 78; (1901) 4 O. C., 408; (1909) 14 C. W. N. 165; (1910) 37 Cal., 526.]

[16 Cal. 25]

APPELLATE CIVIL.

The 27th July, 1888.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE O'KINEALY.

Ishur Chunder Bhaduri............Plaintiff

versus

Jibun Kumari Bibi............Defendant.*

Limitation Act, 1877, Arts. 59 and 60—Money deposited—Banker and Customer—Money lent—" Deposit "—" Trust "—Cause of action—Demand.

The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that s. 60† and not s. 59‡ of the Limitation Act was applicable to the case ; the cause of action therefore arose at the date of the demand and the suit was not barred.

[26] The *dictum* of WHITE, J., in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (6 C. L. R., 470), that " the word ' deposit ' in the Limitation Act as distinct from ' loan ' points to cases where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from.

IN this case the plaintiff in his plaint stated that there was a money-lending business carried on in the names of the defendant's husband Moher Chand and

* Appeal from Appellate Decree No. 1933 of 1887, against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 29th of June 1887, reversing the decree of Baboo Bulloram Mullick, Subordinate Judge of that district, dated the 29th of December 1886.

† [Art.— 60.

Description of Suit.	Period of limitation.	Time from which period begins to run.
For money deposited under an agreement that it shall be payable on demand.	Three years ...	When the demand is made.]

‡ [Art. 59 :—

For money lent under an agreement that it shall be payable on demand.	Three years...	When the loan is made.]

her son Golap Chand Nowlakha at Bander Nil, Serajgunj; that his brother, the late Brojo Sunder Bhaduri, used "to deposit money from a long time in the *tahabil* of the said business," in the name of his eldest brother, the late Ram Sunder Bhaduri, and in his own name, and he used to draw interest, &c., on the same; that after the death of the said Brojo Sunder Bhaduri in 1282 (1875) the plaintiff used to deposit money with the defendant's firm, and received up to the month of Bysakh 1290 (April 1883) interest, &c., from the same through his brother Grish Chunder Bhaduri; that the amount of interest on the money deposited was at the rate of eight annas per cent. per mensem, and that the sum of Rs. 3,866-4-7½ was due to him on account of principal and interest; that a hundi was drawn on the 22nd Srabun 1292 (6th August 1885) on the defendant's firm at Calcutta, but that it was dishonoured, and that subsequently in Bhadro 1292 (August 16th—September 16th, 1885) Grish Chunder Bhaduri went to the defendant's place of business in Calcutta, and demanded the money, which, however, was not paid. The plaintiff consequently on 8th March 1886 instituted this suit for the amount claimed, stating that his cause of action arose in Bhadro 1292, when the demand was made.

The only defence material to this report was that the suit was barred by limitation, the defendant not admitting the statements in the plaint "as to the time when and circumstances under which the cause of action arose."

The Subordinate Judge, as to the facts of the case, said in his judgment:—

"It is admitted that defendant owned and carried on banking business at Serajgunj under the name of Meher Chand and Golap Chand. The firm used to receive deposits of money from various parties, and paid interest thereon [27] at stipulated rates. In respect of petty deposits no interest was paid. It appears that the firm closed business about the end of 1288 B. S. (March—April 1882), when the manager left Serajgunj and a subordinate officer was left in charge for purposes of a winding up. There is no dispute that one Brojo Sunder Bhaduri deposited in the firm divers sums of money in the name of Ram Sunder Bhaduri and Brojo Sunder Bhaduri. The date of the first deposit is not known, but it is manifest from the proceedings that the amounts deposited carried interest, that divers sums were withdrawn, and an account was struck at each year's end. An abstract of the account was furnished to the depositors under the hand of the defendant's servant. In 1282 B. S. Brojo Sunder died, but the account was continued by his brother Grish Chunder, who followed the footsteps of his deceased brother till the collapse of the firm. It is alleged in the plaint that the business carried on with defendant's firm partook of the nature of a trust, that the rate of interest stipulated for was 8 annas per cent. per month, and that it lasted until Bysakh 1290 B. S., when interest was paid for the last time. It is alleged that on the 22nd Srabun 1292 defendant dishonoured a hundi for Rs. 2,000 drawn upon her; and a demand for the withdrawal of the whole of the deposit, including interest, made in Bhadro following not having been complied with, the present suit has been brought for its recovery. Certain damages are also claimed as having been sustained in consequence of the dishonour of the hundi and non-compliance with the demand. The present suit has been brought by the plaintiff as executor to the estate of Brojo Sunder Bhaduri, deceased. Defendant, in her written statement, has little to say against the claim of the plaintiff on the merits, and her vakil has distinctly given me to understand that in regard to the merits it is not her intention to raise a contest."

On the question of limitation the Subordinate Judge held that the case was governed by Article 60 of schedule II of the Limitation Act of 1877; that the period of limitation ran from the date of the demand; and that, the demand having been made within three years before the institution of the suit, the suit was in time. He accordingly gave the plaintiff a decree for the amount due.

The Judge on appeal held that the suit was one for money lent, and was governed by Article 59, Schedule II of the Limitation Act, under which limitation

began to run from the time when the loan was made. He, therefore, held that the suit was barred, and reversing the decision of the Subordinate Judge dismissed the suit.

From this decision the plaintiff appealed.

Baboo *Jadub Chunder Seal* for the Appellant.

[28] Baboo *Mohesh Chunder Chowdhry*, Dr. *Rash Behari Ghose*, and Baboo *Sharoda Churn Mitter*, for the Respondent.

The following cases were referred to:

Hingun Lall v. *Debee Pershad* (24 W. R., 42); *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (6 C. L. R., 470); *Tarini Prasad Ghose* v. *Ram Krishna Banerjee* (6 B. L. R., 160); *Brammayi Dasi* v. *Abhai Churn Chowdhry* (7 B. L. R., 489); *Nasir bin Abdul Habib Fazal* v. *Dayabhai Itchachand* (10 Bom., 300); *Jaffree Begum* v. *Mahomed Zahoor Ahsun Khan* (2 N. W., 409).

The **Judgment** of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

This is a suit against a banker, or his representative by the representative of an alleged customer of the bank, to recover money deposited with interest.

(After stating the facts as above, and noticing other grounds on which the Lower Appellate Court had reversed the decision of the first Court, the judgment continued).

The remaining ground on which the decree of the first Court was reversed, the ground of limitation, gives rise to more difficulty. The question is whether the case is governed by Art. 59 or Art. 60 of Sch. II of the Limitation Act. Art. 59, dealing with "money lent under an agreement that it shall be payable on demand," prescribes a period of three years from the time "when the loan is made." Art. 60, dealing with "money deposited under an agreement that it shall be payable on demand," prescribes three years from the time "when the demand is made." If the former of those articles governs the case as held by the Lower Appellate Court, the suit is barred. If the latter governs, as held by the first Court, the suit is in time.

There can be little doubt probably that the money of a customer in the hands of his banker is money lent. And that Art. (59) might apply to the case if Art. 60 were not present. Probably too on the same supposition such money would often be money received to the use of the customer within the meaning of Art. 62. But the question is not whether such a case is **[29]** covered by the words of Art. 59 or any other article, but whether Art. 60 applies to it; for if it does, the more specific provision must prevail.

Assuming money paid to a man's credit with his banker to be money lent to the latter, the loan is at least of a very special kind, having many peculiarities, which have often been pointed out. And the question is whether such a transaction is a deposit within the meaning of Art. 60. That in ordinary and popular language it is so there can, we think, be no doubt. Take up a newspaper, and look at the returns of any bank which publishes the details of its position, and you will always find public and private deposits used in the sense of balances. Indeed "deposit" seems to us the word which any one not a lawyer would be more likely to use than any other to express money in a bank.

In the schedule in question the term "deposit" or its correlatives are used in the article now in question, and in Arts. 133 and 145. In the latter two instances, which have to do with moveable property, it is clear from the context that the deposit meant is a deposit of goods to be returned in specie, and that is in accordance with the old use of "deposition," with which all lawyers are

familiar. In art. 60, dealing with money, it is equally clear that a return in specie is not contemplated. It is so first, because it would be contrary to the ordinary usage of the language to hold such a thing; deposits of money are made, for instance, under many Acts of the Legislature with public officers and others, and no one ever heard of the idea of the return of the identical coins deposited. It is clear, secondly, because the word "payable" excludes such an idea.

So far as the Act itself is concerned then, we have, in order to give a meaning to art. 60, to find a case in which one man places his money in the hands of another, on the terms that an equivalent sum is to be paid back on demand, and a case to which, according to the ordinary usage of the language, the term "deposit" is applicable. And we think the case of the banker and his customer is exactly such a case.

Turning to the authorities, the decisions upon the earlier Limitation Acts do not seem to afford any assistance. There was in them no provision like that in art. 60. The only **[30]** provisions as to deposits corresponded rather to art. 145 and clearly contemplated the return of goods in specie.

The meaning of art. 60 in the schedule to the present Act has been considered in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (6 C. L. R., 470). That case came on second appeal before WHITE and MACLEAN, JJ. The facts are thus stated in the judgment of WHITE, J. "It has been found by the Lower Appellate Court that in 1861 the plaintiff deposited Rs. 1,000 with the defendant's father, who was to pay upon it interest, which was originally fixed at 15 per cent., but was subsequently reduced to 12 per cent., and that up to the close of the year 1282, corresponding with 1876, the plaintiff regularly received her interest. The agreement made at the time of the deposit was that the money be repayable on demand." That learned Judge then says that "the Lower Appellate Court considers that the transaction was a deposit, and that as the demand was alleged to have been only recently made, the plaintiff is not barred." He dissents from the view that the transaction was a deposit; but he held that, viewing the case as one of loan, the same result followed, for interest had been paid within three years. In giving his reasons for not regarding the case as one of deposit under art. 60 the learned Judge said: "In my opinion the transaction, though called a deposit, was in point of law a loan upon which interest was to run." We quite concur in thinking that the mere use of the term "deposit" cannot alter the substance of the transaction. And in that case, so far as appears from the report, the borrower was not a banker or a person carrying on any business analogous to banking; nor did the lender keep with him anything similar to a banking account. But the learned Judge added: "I think that the word 'deposit' in the Limitation Act, as distinct from 'loan,' points to cases where money is lodged with another under an express trust, or under circumstances from which a trust may be implied." MACLEAN, J., is only reported to have said: "I concur in dismissing the appeal." There is nothing to show whether he concurred in the view just cited as expressed by WHITE, J., and that view was obviously not necessary to the decision of the case. We are unable **[31]** to concur in the view there expressed by WHITE, J. Had it amounted to a decision of the Bench, we should have thought it necessary to refer the present case to a Full Bench, but as it does not do so, we are bound to act on our own view of the law.

For several reasons we think "deposit" cannot have been used to mean "trust." In the first place, so to hold appears to be giving a wholly new meaning to the word, for which there is no sanction in popular usage or in the ordinary

terminology of the law, or in the context in which the word occurs. In the second place, the case of trust is elsewhere provided for in the Limitation Act. Thirdly, to apply art. 60 to express trusts might lead to great confusion, and might curtail very seriously the beneficial effects of s. 10 of the Act.

We think, therefore, that the suit is not barred by limitation, and that the decree of the Lower Appellate Court must be set aside and that of the Subordinate Judge affirmed with costs in all the Courts.

J. V. W. *Appeal allowed.*

NOTES.

[The Legislature in the Indian Limitation Act, 1908, Art. 60 adopted the view of WILSON J. in this case in preference to the contrary views held in 13 Bom., 338; 4 A. L. J. 628; 29 All.,773 [*see* also 19 Bom., 775; 18 Mad., 390; (1885) P.R. 95; 15 C.P.L.R. 147; 19 Bom., 352; 6 C.L.J., 535; 28 Cal., 393; 18 Cal., 234] and accordingly added these words in that Article, "*including money of a customer in the hands of his banker so payable.*" *See* also (1913) 19 I.C. 3 (Mad.).]

[16 Cal. 31]

APPELLATE CIVIL.

The 3rd August, 1888.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE GORDON.

In the matter of the application of Poresh Nath Chatterjee

versus

Secretary of State for India in Council............Represented by the Collector of 24-Pergunnahs and others.*

Appeal—Additional Judge—District Judge—Land Acquisition Act (X of 1870), s. 39—Civil Procedure Code (Act XIV of 1882), s. 647.

An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of s. 39 of the Act. Under s. 647 of the Civil Procedure Code an appeal from the decision of an Additional Judge so appointed lies to the High Court.

THIS was an appeal to the High Court from the order of the Additional Judge of the 24-Pergunnahs, hearing cases under the Land Acquisition Act, 1870, dated the 6th March 1888, refusing to set aside his order of the 1st March made *ex parte*.

Baboo *Horendra Nath Mukerji* for the Appellant.

[32] Baboo *Unnoda Prosaud Banerji* and Moulvie *Seraj-ul-Islam* for the Respondents.

Moulvie *Seraj-ul-Islam* took a preliminary objection that an appeal did not lie to the High Court. He contended that an Additional Judge was not a District Judge within the meaning of s. 39 of the Land Acquisition Act, 1870; and that, therefore, an appeal did not lie to the High Court, but to the District Judge. He further contended that the only section of the Civil Procedure which gave a right of appeal against an order rejecting an application to set aside an *ex parte* order or decree was s. 588, cl. 9; but that this section was not applicable to proceedings under the Land Acquisition Act, inasmuch as the sections of the Civil Procedure Code applicable to such proceedings were specified in s. 36 of the Land Acquisition Act and s. 588 was not included in it.

* Appeal from Order No. 209 of 1888 against the order of R. F. Rampini, Esq., Additiona Judge of 24-Pergunnahs, dated the 6th of March 1888.

Baboo *Horendra Nath Mukerji* was not called upon to argue this point.

The **Judgment** of the Court (PIGOT and GORDON, JJ.) was as follows:—

As to the preliminary objection taken, we hold that an Additional Judge appointed to sit to hear cases under the Land Acquisition Act is a District Judge within the meaning of s. 39, and we think that, having regard to the provisions of s. 647, Code of Civil Procedure, an appeal lies to this Court.

As to the appeal itself, we think that there is no ground on which it can be sustained, and we therefore dismiss the appeal with costs to the respondent, who appears, other than the Secretary of State. We give no costs to the Secretary of State, who appeared, but stated that he had no interest in the matter.

C. D. P. *Appeal dismissed.*

NOTES.

[*See* also (1906) 3 L.B.R. 203.]

[33] APPELLATE CIVIL.

The 4th August, 1888.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE BEVERLEY.

Bhim Singh............Plaintiff

versus

Sarwan Singh............Defendant.*

Sale in execution of decree—Failure by purchaser to make the deposit required by s. 306 of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of 1882), ss. 244, 306, 308, 311 and 312.

Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per centum on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie.

Intizam Ali Khan v. *Narain Singh* (I. L. R., 5 All., 316) dissented from.

THE facts of the case which gave rise to this appeal were as follow:—

The defendant Sarwan Singh and one Kashi Nath Pandey had both obtained money-decrees against the plaintiff Bhim Singh, and had proceeded to execute them at the same time. The plaintiff's 8 annas share in mouzah Manamath being attached in execution of one of the decrees, an order was passed under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders; and thereafter the property was

* Appeal from Appellate Decree No. 436 of 1888, against the decree of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 25th of November 1887, reversing the decree of Syed Abdul Aziz, Munsif of Chatra, dated the 31st March 1887.

advertised for sale in the month of October 1885. On the application of the plaintiff Bhim Singh, the sale was postponed till the 9th November 1885, and without any fresh sale proclamation being made it actually took place on the 10th November. The plaintiff alleged that, owing to the date of the sale not being known, no bidders attended, and as a matter of fact the only persons who did bid for the property were the defendant's karpardaz and his pleader, and the property was knocked down to the defendant Sarwan Singh for Rs. 150. It was further alleged by the plaintiff, and found as a **[34]** fact by the Court of First Instance, that no earnest money was deposited. by the defendant, as required by s. 306 of the Code, and that he did not deposit the purchase-money in Court, and the plaintiff complained that, notwithstanding that fact, the Court passed an order on the 9th January 1886 confirming the sale, and that thereafter the defendant applied for leave to deposit the purchase-money and earnest money, which was granted.

The plaintiff contended that owing to the irregularities in publishing and conducting the sale the property had been sold at a gross under-value, and that instead of Rs. 150 it ought to have fetched Rs. 1,000, and he accordingly prayed that the sale might be set aside.

The defendant denied, amongst other things, that any irregularity had taken place or that the plaintiff had suffered any loss, and contended that the suit would not lie having regard to the provisions of ss. 311 and 312 of the Code of Civil Procedure. The other contentions raised by the defendant are not material for the purpose of this report.

Kashi Nath Pandey, at the time the plaintiff instituted this suit, also instituted a suit to have the sale set aside on similar grounds to that urged by the plaintiff, and by the consent of the parties both suits were tried together.

Amongst the issues raised in the case was one as to whether the question between the parties was not one that should have been decided in the execution proceedings, and whether the suit was not on that account barred. This was the only issue material for the purpose of the decision of the appeal by the High Court.

The Munsif, having decided the other issues in favour of the plaintiff and Kashi Nath, and having held upon grounds which fully appear in the judgment of the High Court that the suit was not barred, set aside the sale, and ordered the defendant to pay the costs of the two suits, and declared that Kashi Nath Pandey was entitled to have the property sold in execution of his decree.

The defendant Sarwan Singh thereupon appealed against the decree in Bhim Singh's suit, and at the hearing of the appeal Bhim Singh failed to appear either in person or by pleader, though he had filed a vakalutnama.

[35] The Judicial Commissioner reversed the decree of the Munsif for reasons which are fully stated in the judgment of the High Court, and dismissed the plaintiff's suit with costs.

The plaintiff Bhim Singh now preferred this second appeal.

Baboo *Jogesh Chunder Roy* for the Appellant.

Baboo *Dwarka Nath Chuckerbutty* and Baboo *Surendra Nath Roy* for the Respondent.

The following **Judgments** were delivered by the High Court (NORRIS and BEVERLEY, J.J) :-

Norris, J. —The facts of this case are as follows:—

The defendant and one Kashi Nath Pandey had each obtained a money decree against the plaintiff; either one or both of the judgment-creditors attached

8 annas of mouzah Manamath, the property of the plaintiff, the judgment-debtor. After the attachment, the Court executing the decree made an order under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders. The attached property was sold and purchased by the defendant, who however did not make the deposit required by s. 306 of the Code.

The plaintiff and Kashi Nath each brought a suit to have the sale set aside. The two suits were tried together by the Munsif, who set aside the sale.

The defendant appealed to the Judicial Commissioner against the decree setting aside the sale passed in the suit brought against him by the plaintiff. The plaintiff-respondent did not appear at the hearing of the appeal, and the Judicial Commissioner decided the case *ex parte*; he reversed the Munsif's decree, and dismissed the suit with costs.

The issues framed by the Munsif were applicable to both suits; the only one which it is material to consider is the first, which ran thus: "Whether the suit for setting aside the sale will lie, or ought the plaintiff to have given petition for setting aside the sale under s. 312 of the Civil Procedure Code?"

Upon this issue the Munsif's judgment was as follows: "As regards the issue No. 1, I am of opinion that neither Kashi Nath Pandey nor Bhim Singh (the plaintiff) were precluded from **[36]** bringing a suit, as the facts of the case show that in consequence of the earnest money and the purchase money not being paid in time, there was in fact no sale—see *Intizam Ali Khan* v. *Narain Singh* (I. L. R., 5 All., 316)." On appeal to the Judicial Commissioner only one ground of appeal apparently was argued, which in effect ran thus: "The Munsif in deciding issue No. 1 has held that plaintiff was entitled to sue to set aside the sale of 8 annas of Manamath, but this is wrong, because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." Upon this point the Judicial Commissioner said: "It seems to me that this plea is good under cl. (*c*) of s. 244 of the Code of Civil Procedure. The question whether there had in law been a sale of Bhim Singh's property in execution of the decree held by Sarwan Singh against Bhim Singh was one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, and was consequently one to be determined by order of the Court executing the decree and not by separate suit. I set aside the Munsif's decree in this suit in which Bhim Singh was plaintiff and Sarwan Singh defendant, and direct that this suit be dismissed."

In special appeal two points were raised: First, that the Lower Appellate Court was in error in holding that the suit would not lie, and that it was barred under clause (*c*) of s. 244 of the Civil Procedure Code; second, that no issue having been raised as to the suit being barred under clause (*c*), s. 244 of the Civil Procedure Code, and no such grounds having been taken in the petition of appeal, the Lower Appellate Court ought not to have allowed the defendant to urge that point.

I do not think that there is anything in the second objection.

It is true that no issue was raised as to the suit being barred under clause (*c*) of s. 244 of the Code of Civil Procedure; but the determination of the point did not depend upon evidence; it was a pure point of law, and I think the Judicial Commissioner was justified in dealing with it if it was properly raised before him by the grounds of appeal.

It is not I think correct to say "that no such grounds were taken in the petition of appeal," for, though there is [37] no distinct reference to clause (c) of s. 244, there is in the petition of appeal a distinct allegation that the Munsif was wrong in decreeing the suit, "because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." This I think meant "the question raised is one between the parties to the suit and no separate suit will lie."

The decision of the first point taken before us is not free from difficulty and involves a careful consideration of ss. 244, 311, and 312 of the Code.

Two questions seem to arise upon a consideration of these sections with reference to the facts of this case; first, does a decree-holder cease to be "a party to the suit in which the decree was passed" if he becomes an auction-purchaser? and second, when do "questions relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof" cease to arise for determination?

Upon the first question there is a conflict of authority—see *Viraraghava Ayyangar* v. *Venkatacharyar* (I. L. R., 5 Mad., 217) and *Hera Lal Chatterjee* v. *Gourmoni Debi* (I. L. R., 13 Cal., 326).

The second question has lately been discussed by MAHMOOD, J., at great length in *Ramchhaibar Misr* v. *Bechu Bhagat* (I. L. R., 7 All., 641).

I have carefully considered both these questions; and had it been necessary to decide them, I should have thought it well to refer them to a Full Bench; but in the view I take of the applicability of ss. 311 and 312 to this case, I do not think it is necessary.

There remains one more question for consideration, viz., does a non-compliance with the provisions of s. 306 of the Code constitute "a material irregularity in conducting the sale" which must be inquired into upon an application under s. 311, or does it furnish ground for a suit to set aside the sale? I am of opinion that such non-compliance is "a material irregularity" in conducting the sale which must be inquired into upon an application under s. 311.

It is to be observed that s. 306 deals with two persons present at a sale of immoveable property under Chapter XIX of the Code, [38] viz., "the person declared to be the purchaser" and "the officer conducting the sale." The duty of "the person declared to be the purchaser" is "to pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale."

The duties of "the officer conducting the sale" are of a twofold character. In the first place there are the duties which are inherent to his position as an auctioneer; and, in the second place, there are the duties prescribed to him by the Code. Amongst the duties inherent to his position as an auctioneer are—(a) the duty of knocking down the property to the highest bidder, and (b) the duty of demanding the deposit of twenty-five per centum. Amongst the duties prescribed to him by the Code is that of "*forthwith* putting up the property again and selling it" if default is made in making the deposit. The word *forthwith* is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit.

This I think is the clear meaning of s. 306.

And this view is strengthened by a reference to s. 308, which regulates the procedure upon default being made in payment of the balance of the purchase-money. In that case the property is to be *re-sold*, and such re-sale cannot take place without the issue of a fresh sale-proclamation and the performance of all the other conditions precedent to a sale prescribed by the Code.

It may be if the Legislature had been silent as to the duty of the officer conducting the sale upon default being made in making the deposit, that the failure of the person declared to be the purchaser to make the deposit would not have been an irregularity in conducting the sale: but it seems to me impossible to conceive of a greater irregularity in the conduct of a sale than the failure of the officer conducting it to do what the Legislature has in express terms told him to do on a default being made in the making of the deposit.

[39] I am aware that this view is opposed to that taken by the Allahabad High Court in *Intizam Ali Khan* v. *Narain Singh* (I. L. R., 5 All., 316), but I venture respectfully to think that an examination of the facts of that case will show that the judgment cannot be treated as an authority.

In that case Intizam Ali Khan, the judgment-debtor, had applied to have a sale of his property, which had been sold in execution of a decree, set aside, *inter alia*, on the ground of a non-compliance with the provisions of s. 306. The application was made and could only have been made under s. 311; and although the Court held that, "inasmuch as the indispensable conditions of the law as contained in s. 306 of the Civil Procedure Code were not fulfilled by the person declared to be the purchaser, the sale was not bad by reason of an irregularity in publishing or conducting it, but was no sale at all," it yet set aside the sale under s. 312, which only authorizes the setting aside of a sale on the ground of a material irregularity in publishing and conducting it.

In the result, therefore, I am of opinion that the plaintiff's suit and this appeal should be dismissed, but under the circumstances of the case without costs.

Beverley, J.—I concur in holding that the present suit will not lie for the following reason:—

The ground upon which it is sought to set aside the sale is the non-compliance with the provisions of s. 306 of the Code. I concur with my learned colleague in holding that such a non-compliance, if substantiated, would amount to an irregularity in conducting the sale such as is referred to in s. 311. It should, therefore, in my opinion have been made the subject of objection under that section before the sale was confirmed. Sections 311 and 312 provide a special procedure, open to both the decree-holder and the judgment-debtor, for the determination of disputes arising out of irregularities in publishing and conducting sales, and I am of opinion that it was the intention of the Legislature that all such disputes should be determined under the provisions of those sections in the course of the execution [40] proceedings, and not by way of a regular suit after the sale has been confirmed. Section 312 distinctly bars a suit to set aside, on the ground of irregularity, an order made under that section, and that includes an order confirming the sale, even when no application has been made under s. 311 to have it set aside. That being so, I am of opinion that the present suit cannot be maintained, and I agree in dismissing the appeal without costs.

H. T. H. *Appeal dismissed.*

NOTES.

[As regards when the sale is concluded in such cases see also (1912) 35 All., 65; (1911) 15 C. W. N., 850; (1905) 28 All., 238; (1906) P. R., 182; (1889) 12 Mad., 464.]

[16 Cal. 40]

PRIVY COUNCIL.

The 8th and 9th March and 21st April, 1888.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Hari Saran Moitra............Petitioner

versus

Bhubaneswari Debi (for herself and as guardian of Jotindramohun Lahiri, a minor) and another............Objectors.

[On appeal from the High Court at Calcutta]

Execution of decree—Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon devested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey* v. *Shamasoondery Debia* (3 Moore's I. A., 229) referred to, and applied in this case.

[41] *Held*, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor.

Sureshchunder Wum Chowdhry v. *Jugutchunder Deb* (I. L. R., 14 Cal., 204) approved.

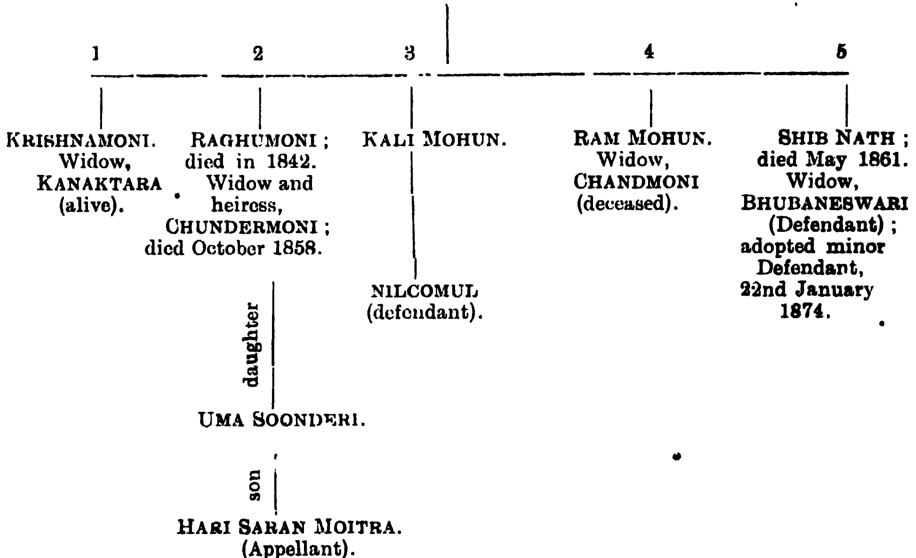
CONSOLIDATED appeals from two decrees (June 9th and 10th, 1884) of the High Court, reversing an order made in execution, and a decree for mesne profits (10th January 1882), by the Subordinate Judge of Rungpore.

The principal question on these appeals related to the enforcement of a decree against a minor, as a consequence of his adoption by the judgment-debtor, a widow, against whom, as representing the deceased manager of family estate, a decree had been obtained by another member of the family for a share. Whether that decree was enforcible against, and mesne profits were claimable from, the adopted minor, through his adoptive mother as his guardian, the above decree having been made without his having been formally made a party thereto, was the first question. Other points were in dispute, viz., as to what property was to be included in the execution; as to the relative liability of the judgment-debtors among themselves; and as to whether their liability was joint, or several.

The first of these appeals arose out of a petition by the present appellant, as decree-holder, for execution of a decree (22nd December 1874), made in his favour by the High Court in a suit brought in 1870 against Bhubaneswari

Debi, Nilcomul Lahiri, and Kanaktara Debi; and affirmed by an order (20th November 1880) of Her Majesty in Council. This decree declared his mother, Umasoonderi, whom he now represented, to be entitled on partition to the possession of a share in the joint family estate. The other appeal was from a decree (10th January 1882) in a suit brought by the present appellant for mesne profits of the share in lands to which the decree of 1874 had established his title. Execution was sought, and the suit for mesne profits was brought, against the present respondents, Bhubaneswari Debi, for herself, and as guardian of the minor Jotindramohun Lahiri, and Nilcomul Lahiri.

[42] The relationship of the parties appears in the following table:—



In the suit brought in 1870 Umasoonderi claimed to establish her title, as heiress of her father, Raghumoni, to a one-fifth share of the estate which had been Romanath's, together with the accretions thereto made by Shibnath, as manager of the family till his death, and she asked to have set aside as against her a partition alleged by the defendants to have been made by Romanath on October 26th, by which he purported to give a 3-anna share of his estate to his eldest son, Krishnamoni, and shares of 2½ annas to his other sons, and to reserve the remaining 3 annas for himself, and also to set aside a deed of sale, dated 2nd March 1856, by which Chundermoni, the plaintiff's mother, purported to sell to Shibnath a one-fifth part of her 2½ anna share.

The details of the property, claimed as being subject to partition, were given in two schedules, the first of which comprised inherited land belonging to the family, and the second stated the property acquired by the family whilst joint.

The decree of the Subordinate Judge of Rungpore (13th December 1872) was in favour of the plaintiff as to part of her claim; and it was, in the main, affirmed by the High Court (24th December 1874), the decree being in the terms set forth in their Lordships' judgment below.

The adoption of Jotindramohun, meantime, and pending the proceedings by Bhubaneswari in appeal, took place (under an [43] *anumati patro* contained

in the will of Shib Nath) on 22nd January 1874.* But Jotindramohun was not made a party to the appeal by any proceeding before the Court. And from the decree of the High Court, Bhubaneswari alone appealed to Her Majesty in Council, whose order (20th November 1880) followed the judgment reported in *Bhubaneswari Debi* v. *Hari Saran Moitra* (I. L. R., 6 Cal., 720).

Application for execution was made by the present applicant, whose name had been substituted for that of his mother, by that time deceased, on the 9th April 1881.

This application was against " Bhubaneswari for herself, and as guardian on behalf of the minor Jotindramohun Lahiri," and also against Nilcomul to recover possession of the immoveable properties mentioned in the plaint, and in the decree, as also of certain moveable properties, or their value. As to the last, the moveables, there was no dispute on this appeal.

The suit for mesne profits was brought on the 12th April 1881 against the same parties as defendants, so as to include Bhubaneswari in her individual capacity, and the minor through her as guardian together with Nilcomul.

Bhubaneswari objected that she was not liable in the execution proceedings, having, before the decree of 1874, adopted the minor, who, on the advice of Nilcomul, was not made a party in the appeal of the principal suit; and she defended the suit for mesne profits on similar grounds, throwing the liability on to Nilcomul. In neither of these proceedings, nor in the execution nor in the suit, could the minor be held liable, because he had not been a party to the decree of 1874. On the merits, Bhubaneswari represented that Nilcomul was entitled, on the whole, to no more than a four annas thirteen gundas share, while she herself was entitled to an equal share, with some addition ; and she alleged that Nilcomul had admitted, in the previous litigation, possession of six annas ten gundas, showing thereby that he had, without title, an excess of one anna seventeen gundas.

[44] Nilcomul, by his objections to the execution and in his defence to the suit for mesne profits, insisted that he was in possession of only his rightful share, and that the decree-holder should look only to Bhubaneswari, who was in possession of a five annas share: whereas, at the outside, she had only a right to her husband's quota of three annas and four gundas, together with what the latter might have obtained from Kanaktara's share. This objector further alleged that, if he should be held at all liable, such liability would be limited to the two gundas share, held by him in excess of the six annas eight gundas share. to which, under the decree itself, he was entitled.

One Rudrachunder Roy also filed objections on behalf of the minor, founded, like those taken by Bhubaneswari on his behalf, on his not having been a party to the decree of 1874.

The Subordinate Judge of Rungpore, Bhugwan Chunder Chukerbati, on the question of the minor's liability through his guardian, both in the execution, and in the suit for mesne profits, was of opinion that Bhubaneswari having acted for the minor's interests, he was bound by the result of her appeals. His judgment on this point was as follows: " In fact, the appeals were prosecuted and defended by her with the *bona fide* intention that her husband's real rights had been interfered with. On that understanding she went up even to the Privy Council, without alluding to the fact of her having adopted a son. There is no reliable evidence that the plaintiff knew of the adoption having been validly effected. I am inclined, therefore, to follow the rulings in *Ramkishore*

* See *Bhubaneswari Debi* v. *Nilcomul Lahiri*, I. L. R., 12 Cal., 18, and *Sotishchunder Lahiri* v. *Nilcomul Lahiri*, I. L. R., 11 Cal., 45.

Chuckerbutty v. *Kally Kanto Chuckerbutty* (I. L. R., 6 Cal., 479; 8 C. L. R., 1) and *Jotendro Mohun Tagore* v. *Jogul Kishore* (I. L. R., 7 Cal., 357; 9 C. L. R., 57), and to hold that the minor Jotindramohun will be liable for the wasilat, which tantamounts in substance to the effect that the estate of his adoptive father will be virtually liable, inasmuch as it was for his interest that the suit was defended, and the appeal carried up to the highest tribunal; and so he cannot evade the consequences of the act which was done with a motive to render his future good, though the result turned out otherwise than was anticipated."

[45] The Subordinate Judge was of opinion, also, that the liability of the defendants was several, as they were severally in possession, and he awarded to the decree-holder "possession and wasilat of his decretal share from each of them exclusively and separately."

Finding that Bhubaneswari held, for herself, and as guardian of the minor, five annas, that Nilcomul had six and a half annas and Kanaktara two and a half annas, while the decree-holder had two annas only, the Subordinate Judge decreed that "possession be given to the decree-holder of his remaining one anna and four gundas in the following proportion, viz., thirteen and two-third gundas from Bhubaneswari, representing the minor adopted son, and ten and one-third gundas from Nilcomul. As respects properties which each of the judgment-debtors holds in his exclusive possession, he or she should make over to the decree-holder the full decretal share, which is three annas four gundas."

The Subordinate Judge also decreed to this appellant interest upon wasilat to the end of each year, and describing the properties or plots of land for which wasilat was due, and in whose possession they respectively were, he made a decree for payment to the plaintiff by Bhubaneswari, as guardian of the minor Jotindramohun, for mense profits with interest, the sum of Rs. 3,297, and by Nilcomul, the sum of Rs. 2,394; adding interest to the date of payment.

In a separate judgment in the execution case, the Subordinate Judge decided against this appellant as to the building being included in the execution; being of opinion that the High Court, in awarding to the then plaintiff, a share "of all the property" named in the two schedules, intended to include only the landed property therein, and not the buildings and moveables.

Rudrachunder Roy was not recognized by the Subordinate Judge as a party to the proceedings in the character of next friend of the minor, the Judge being of opinion that in the execution proceedings he should not be allowed to appear on behalf of the minor, whose interests the adoptive mother could sufficiently protect. Rudrachunder, however, filed a petition of appeal to the High Court, in the execution case, on behalf of the minor. Bhubaneswari also appealed, taking the same objections as were [46] taken by Rudrachunder to the execution against the minor. She appealed also on her own behalf. Nilcomul Lahiri also appealed against the order in execution; and the petitioner, Hari Saran Moitra, filed objections in the form of a cross-appeal, from the order as to the buildings and the moveables. Against the decree for mesne profits, both Bhubaneswari, for herself and as guardian of the minor, and Nilcomul Lahiri appealed.

A Division Bench of the High Court (McDONELL and FIELD, JJ.) reversed the decision of the first Court on the question of the minor's liability upon execution of the decree of 1874, and in the suit for mesne profits. They held that making a person's guardian defendant to a suit was not the same thing as making that person himself a party, and that this was not affected by the fact of his being a minor. The procedure of the Code had not been followed,

and it contemplated a minor being made a party to the suit in his own name, directing that the Court, on being satisfied of the fact of his minority, should appoint a proper person to conduct his defence. They added: "In this case the plaintiff did not make any application to the Court to have a guardian *ad litem* appointed for the minor. There was an application made by a third person, who urged that he, and not Bhubaneswari, ought to be appointed guardian of the minor; but this was rejected, and the Subordinate Judge thought that Bhubaneswari was the minor's proper guardian. The Subordinate Judge was thus aware of the fact of Jotindramohun's minority, and being so aware, it was his duty to follow the procedure provided by s. 456. This, however, he did not do. Bhubaneswari then objected, and still objects, to being made a guardian *ad litem*. No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to become bound by the decree."

In regard to Bhubaneswari's individual responsibility under the decree, the Judges said: "But then it is contended that Bhubaneswari Debi is bound. She was made a defendant in a double capacity, for self and as guardian on behalf of the minor. In her personal capacity no decree has been passed against her...If the decree [47] against Bhubaneswari Debi, in the form in which it has been made, that is, in her capacity as agent or manager, is allowed to stand, it is clear that the Court would have no authority to enforce it as against the minor, who was not a party to the suit, and who cannot be affected by this decree. We think, therefore, that the decree as made against Bhubaneswari Debi, guardian or manager of the minor, cannot be allowed to stand."

The Judges held that the Subordinate Judge was wrong in dealing with the decree of 1874, as if it had been a separate decree against each of the two judgment-debtors. In their opinion it was a joint decree and should be so executed as to give this appellant possession of an undivided share of three annas four gundas in every plot of the immoveable property.

As to the buildings, the decree-holder had, the Judges found, taken no steps either under the Code (s. 137) to have the original plaint made part of the execution record, or to file a certified copy of the two schedules. They, therefore, left this matter for the Subordinate Judge to see that a certified copy of the schedules annexed to the plaint was filed.

Dealing with Nilcomul's appeal, the Judges held that he was rightly entitled to a six annas eight gundas share, being three annas four gundas inherited by him from his father, and a similar share, which fell to him on the death of Chandmoni; so that, being in possession of six annas ten gundas, he held only two gundas over and above his proper share. Their judgment on this point was the following: "As regards these two gundas, the possession of Nilcomul being admitted, there must be a decree for mesne profits, and these mesne profits will be calculated upon the figures which the Subordinate Judge has taken in his decree. The result will be, that the appeal of Bhubaneswari will be decreed, and so far as she is concerned, the decree of the lower Court will be set aside. There will be a declaration that the minor Jotindramohun Lahiri has not been properly made a party to these proceedings and is in no way affected by the result. As regards Nilcomul, there will be a decree for mesne profits for four years, 1284 to 1287, upon two gundas of the property only."

[48] The decree on Nilcomul's appeal was that, in lieu of the award to the plaintiff of Rs. 5,692, as mesne profits, the sum of Rs. 475 was payable only in respect of the two gundas share. In regard to the possession to be given to the decree-holder, under the execution order, the order of the lower

Court was varied by awarding to the decree-holder possession, as against both Bhubaneswari and Nilcomul jointly of an undivided three annas and four gundas share in every plot of land in dispute, giving to the decree-holder a one anna four gundas share in the plots in which he, or his mother, had possession of a two annas share before suit, and a three annas four gundas share of those plots in which he, or she, had no previous possession.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the Appellant, argued that the Appellate Court should have held that the minor, having become to all intents a party to the decree of 1874, upon the devolution of estate upon him, consequent on his adoption, the decree was enforceable against him; and that he was also liable in the suit for mesne profits. Whether Bhubaneswari sufficiently represented the minor as his guardian had been a question for the Subordinate Court before allowing the execution to proceed. The Court had allowed it to proceed, and thus the question had been disposed of. If any irregularity had taken place in the matter, it could not now be made a ground for reversing the order of the Court executing the decree, inasmuch as no material injury had been, or could be, shown to have resulted. At the time when the proceedings in appeal were taken, and the decree was passed, s. 11 of Act XXIII of 1861, amending Act VIII of 1859, was in force. The minor's liability, through his guardian, was not affected, either as regarded the proceedings against him in execution, or the suit for mesne profits; there being nothing to prevent that liability from devolving upon him, represented as he was by his guardian, along with the interest which he took in the estate. which was bound by the decree of 1874. The minor was substituted for Bhubaneswari from whom both interest and liability passed, on the adoption, in her capacity as representing the estate, to her as representing the minor as his guardian. The parties who for the time being were entitled to **[49]** the estate were those against whom the Subordinate Judge had rightly ordered execution, and the liability for mesne profits rested on the decree. The minor had not been precluded from taking any real objection if he had had one to maintain.

[Sir R. COUCH, in reference to the guardianship of the mother, referred to Sir T. Strange's Hindu Law, vol. 2, appendix to Chapter VIII, and vol. 1, cap. 3, para. 4.]

Any merely formal defect had been cured by the action of the first Court and the proceedings taken. Accordingly, both as to the execution by delivery of possession to the appellant, and as to the award of mesne profits, the decree of the High Court was erroneous and should be reversed. On the merits also, the appellant was entitled to the possession of the shares as ordered in the Court of First Instance against the defendants under the decree of 1874.

[In reference to the question of guardianship, Sir B. PEACOCK referred to *Doorgapersad* v. *Keshopersad Singh* (L. R., 9 I. A., 27; I. L. R., 8 Cal., 656)].

The following cases were referred to in the argument for the appellant *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (Marsh, 614); *Manager of Raj Dharbanga* v. *Coomar Ramapat Singh* (14 Moore's I. A., 605); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (L. R., 6 I. A., 233); *Hunoomanpersad Panday* v. *Munraj Konwaree* (6 Moore's I. A., 393); *Jogulkishore* v. *Jotendromohun Tagore* (L. R., 11 I. A., 166; I. L. R., 10 Cal., 983); *Jairam Rajah* v. *Joma Kondia* (I. L. R., 11 Bom., 361); *Kishen Singh* v. *Mareshwar* (I. L. R., 7 Bom., 91); *Komul Chunder Sen* v. *Surbessur Dass Gooptoo* (21 W. R., 298); *Jogi Singh* v. *Kunj Behari Singh* (I. L. R., 11 Cal., 509); *Alim Baksh Fakir* v. *Jhalo Bibi*

(I. L. R., 12 Cal., 48); *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (I. L. R., 14 Cal., 429).

[60] Mr. *R. V. Doyne*, for the Respondent, Nilcomul Lahiri, argued that the appellant's rights under the decree of 1874 were fully satisfied by the terms of the decrees of the High Court. Against him the appellant had not made out any further claim than to receive the three annas four gundas share decreed in 1874; and in finding that Nilcomul had obtained possession of no more than he was entitled to, with the small exception of two gundas, as to which the decree for mesne profits had been allowed to remain, the High Court had come to a correct decision.

Mr. *Lawrence Biale*, for the Respondents Bhubaneswari, and the minor adopted son Jotindramohun, argued that the decision of the High Court was correct. It could not be held that the minor had been constructively a party to the decree of 1874, and in consequence of his not having been represented by a duly constituted guardian *ad litem*, at the time when the proceedings took place, resulting in the decree of 1874, the decree could not be held to be binding upon him. The Minors' Act, XL of 1858, in s. 3,* required that a minor in a suit should be represented by his duly authorized guardian, and the procedure was prescribed accordingly. This was in accordance with general principles, and that Bhubaneswari, not being duly appointed, could yet be the guardian of Jotindramohun so as to represent him in the suit had not been shown. The main point was that all that had occurred before the decree of 1874 had been insufficient to bring the minor before the Court, or his name on to the record; and that, without having been properly represented and heard by his guardian, he could not be treated as one of the judgment-debtors, who were parties to that decree, which must receive effect, as it stood, against those who were parties in it. The High Court had correctly refused to allow execution of that decree to proceed on this application against Bhubaneswari in her personal capacity; for in that character she had ceased upon the adoption to be responsible; while, at the same time, the adopted son could not be held liable through her, inasmuch as she had not been appointed his guardian *ad litem*; and there had been no formal appointment made, such as alone could empower her to act in defending the minor's interest. This was a point on which an order was required at the proper stage, when application [61] should have been made. And it was not apparent that Bhubaneswari was in a position to represent the minor's interests as well as her own. It was, at all events, against the minor's interest that he should be taken to have been made a party, without the necessary and proper steps having been taken to make him one, and to give him an opportunity of being heard. This was the irregularity, and a most material one. In the case of a minor, the strict rule as to the joinder of parties should have been applied, and it could not be said that the omission was an immaterial one. True it was that the enforcement of decrees against persons upon whom interests had devolved, after such

---

*[Sec. 3:—Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate.

Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.]

What persons claiming to have charge of property in trust for a minor may apply for certificate of administration.

No person competent to institute or defend a suit without such certificate.

Proviso.

decrees had been passed, was a proceeding permitted in some well-ascertained cases of successive liability. This appeared from the cases decided under Act VIII of 1859, chap. IV, ss. 109-206. See the note, collecting the cases, in Mr. W. Macpherson's edition of 1871, of the Code of Procedure. But there was no case in which a minor, without having been represented by a duly appointed guardian, had been held to be a party to a decree only by reason of his adoption. The High Court might have said that the minor was not liable in either the suit for mesne profits, or in the execution proceedings, as the same considerations applied in regard to the minor's liability upon either the one or the other; but the result at which the Court had arrived was right. He referred to *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (Marsh, 614); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (L. R., 6 I. A., 233).

[Sir R. COUCH referred to *Dhurm Dass Pandey* v. *Shamasoondery Debia* (3 Moore's I. A., 299).]

The argument was that although, as in that case, the minor could receive a benefit, and an omission would not deprive him of an advantage, yet that, before his estate could suffer detriment, he must be represented and heard.

On the merits, as against Bhubaneswari and the minor, the actual rights of the appellant were, it was contended, fully satisfied by the decree of the High Court. In respect of mesne profits, Nilcomul, as in effect had been decided, should alone be held responsible.

[32] Mr. *J. D. Mayne* replied, pointing out that in the cases already cited in the argument for the appellant, the defendants, against whom execution was allowed, were not parties to the decrees, which, however, were held to bind the property in their hands. So here the property was bound by the decree of 1874. The appellant wanted nothing to be added to the decree to make it effective in his favour; the liability of the adopted son being correlative with his right to succeed, the latter right being shown on his taking the benefit of a decree in his guardian's favour in the case of *Dhurm Dass Pandey* v. *Shamasoondery Debia* (3 Moore's I. A., 299).

Their Lordships' **Judgment** was delivered, on a subsequent day (April 21st), by

Sir R. Couch.—In 1870 Uma Soonderi Debi, the mother of the appellant, and daughter and heiress of Raghumoni, who was one of five brothers, sons of Roma Nath Lahiri, forming a joint Hindu family, brought a suit against Bhubaneswari Debi, the widow of Shib Nath, one of the brothers, who had managed the family property, Nilcomul, the son of Kali Mohun, another brother, and Kanaktara, the widow of Krishnamoni, another brother. These were the only members of the family who were then alive, Ram Mohun, the fifth brother, having died without issue, leaving a widow, who was then also dead. In the suit Uma Soonderi claimed to recover possession of her father's share of the family property, which was said in the plaint to consist of land mentioned in schedules Nos. 1 and 2, and pucca buildings and personal properties. Schedule No. 1 contained the lands which the brothers had inherited from their father, and No. 2 the lands which were said to have been acquired whilst the members of the family were living in commensality. On the 13th December 1872 the Subordinate Judge of Rungpore made a decree in favour of Uma Soonderi in respect of part of the share which she had claimed. Thereupon Bhubaneswari, Uma Soonderi, and Nilcomul separately appealed to the High Court, which, on the 22nd December 1874, made a decree in the following terms: "It is ordered and decreed that the decree of the lower Court be varied, and in lieu thereof it is hereby decreed and declared that the plaintiff is entitled to 3 annas and 4 gundas share (the share claimed) of all the property which

[53] is named and described in the two schedules appended to the plaint.' And Uma Soonderi having before the suit been put in possession of 2 annas of the property named and described in the first schedule, it was ordered and decreed that she should recover from the defendants possession of the remaining 1 anna and 4 gundas, and possession of 3 annas 4 gundas of the property named and described in the second schedule. Thereupon Bhubaneswari appealed to Her Majesty in Council, who, by an order in Council, made on the 20th day of November 1880, affirmed the decree of the High Court. Whilst the appeals were pending in the High Court, Bhubaneswari adopted a son, Jotindramohun Lahiri, but she continued to prosecute her appeal in that Court, and appealed to Her Majesty in Council in her own name, taking no notice of the adoption. On the 9th April 1881, Uma Soonderi having died, the appellant as her heir made an application to the Court of the Subordinate Judge for execution of the decree. It stated that the enforcement of the decree was sought against Bhubaneswari for self and as guardian on behalf of the minor Jotindramohun Lahiri, and against Nilcomul Lahiri. Execution was not sought against Kanaktara, who was said in the judgment of the High Court to have made no defence to the suit. The reason of this may be that she was not in possession of more than her husband's share. On the 12th of April 1881 the appellant brought a suit in the same Court for mesne profits, naming as the defendants Bhubaneswari Debi, for self and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge, on the 10th January 1882, gave judgment in both cases, referring in one judgment to the other where the question appeared to him to be the same. The judgments will be more conveniently stated hereafter. In the execution case Jotindramohun, by his next friend Rudrachunder Roy, appealed to the High Court. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shown to have obtained any authority to act as next friend of the minor, and is said to have been a servant of Bhubaneswari. She also appealed, taking the same objections as regards the minor as were taken by the assumed next friend. Nilcomul also appealed, and Hari Saran [54] Moitra, the present appellant, filed objections by way of cross-appeal. In the suit for mesne profits both Bhubaneswari and Nilcomul separately appealed.

On the 9th of June 1884 the High Court gave judgment in the suit for mesne profits, and on the 10th in the execution case, and the present appeal is from the orders or decrees made upon those judgments.

In the execution case there are three questions: (1) whether execution can be had against the minor personally or against Bhubaneswari; (2) whether the pucca buildings and moveables are to be included in the execution; (3) whether possession in execution was to be given against the parties jointly or severally. Upon the first of these questions the Subordinate Judge said:—

"Whether the execution in this case should proceed against the minor personally or against his adoptive mother is a point which has been equally raised and decided in the decree-holder's suit for wasilat, No. 26 of 1881. The question being similar the same judgment should govern them both. I hold, therefore, under the decision I have this day delivered in the trial of issue 7 in the above suit for wasilat, that the execution should be carried out against the minor, and hence against the estate left by his adoptive father. Bhubaneswari, for herself, cannot be made personally liable when the assets of her husband are available at hand to fulfil the conditions of the decree. Then, as apparent from the record of the Suit No. 26, Bhubaneswari was a defendant in the original suit in the capacity of a representative and in possession of her husband's estate. That possession is still with her, though, since the adoption, it has been converted to one on behalf of her minor son. The minor is

also under her guardianship and protection. Bhubaneswari is, therefore, the proper person to represent the minor, and I do not think it equitable that Rudrachunder Roy, almost a stranger, should be allowed to stand on behalf of the minor when his connection is far remoter than that of Bhubaneswari, who protects the minor, and is his nearest kindred as the adoptive mother."

On the same question the High Court said:—

"The present appeal arises out of proceedings taken to execute the decree in the title suit passed by the High Court, and confirmed on appeal by the Privy Council. It is contended that that decree cannot be executed against the minor Jotindramohun Lahiri, because he was not a party to it, and those steps which, according to law, might have been taken to make him a party were not taken. Section 372 * of the Code of Civil Procedure provides for making the assignee or other transferee of the interest of a defendant a party to the suit when the assignment or transfer has been made during the pendency of the suit. No action was taken under this section. It has been [55] urged that the devolution of the defendant's interest upon the adopted son by reason of the adoption was not known to the decree-holder, and that therefore he could not take the necessary steps to make the minor a defendant. This may be so, but upon this point we pronounce no opinion. We further pronounce no opinion upon the question whether the minor is bound by the decree in the title suit. All we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record."

Their Lordships find a difficulty in understanding what the High Court meant by this judgment. The Code of Civil Procedure referred to must be Act X of 1877, as s. 372 of the previous Code relates to special appeals. Act X of 1877 came into force on the 1st October 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under s. 372, it appears to their Lordships that the question whether the adoption was or was not known to the decree-holder was a matter upon which an opinion should have been pronounced. What follows is still more difficult to be understood The Court say: "We pronounce further no opinion upon the question whether the minor is bound by the decree in the suit; all we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record." In the suit for mesne profits, where Bhubaneswari was sued as widow for self and as guardian on behalf of the minor, they say: "Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. . . . A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name," and decide that the minor was not bound by the decree. Their Lordships are unable to see why the High Court, having said in the suit for mesne profits that the minor was not bound by the decree, declined on the next day to pronounce an opinion upon the question.

It was just as necessary to decide the question in the execution proceedings as in the suit for mesne profits. The decree in the original suit was sought to be enforced against Bhubaneswari personally and as guardian of the minor. So far as he was [56] concerned the sole question was whether the decree

*[Sec 372:—In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require.]

Procedure in case of assignment pending the suit.

bound him. If it did, execution was rightfully sought against him through his guardian, and it was no answer that his name was not on the record.

The decree of the Subordinate Judge, made as it was before the adoption, when Bhubaneswari was the owner of the estate and fully represented it, was binding on the minor. It took away part of the estate of which Shib Nath was in possession when he died. After the adoption it was for the interest of the minor that Bhubaneswari's appeal should be prosecuted, and the appeals of Uma Soonderi and Nilcomul defended. Bhubaneswari's estate had been devested, and she could obtain nothing, but as the adoptive mother and guardian of the minor it would be right for her to continue to defend the suit. There has been no suggestion that it was improperly defended, or that the appeal to Her Majesty in Council was not proper. In his judgment in the suit for mesne profits the Subordinate Judge says: "In fact, the appeals were prosecuted and defended by her with the *bona fide* intention that her husband's real rights had been interfered with." If her appeal had been successful, Bhubaneswari, as the guardian of the minor, would have been kept in possession of the whole of what Shib Nath died possessed of, and would have been accountable to the minor for it. In *Dhurm Das Pandey* v. *Shama Soondery Debia* (3 Moore's I. A., 229) a Hindu widow brought a suit for partition, and to be put in possession of her husband's share in the joint undivided estate. Pending the suit she adopted a son, and notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put in possession. Their Lordships said (page 243): "All the facts being stated, it is assumed as matter of law that after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then, as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered for his benefit, and that she is put in possession as trustee for him." Their Lordships are of opinion that this principle is applicable in the present case, that the minor is bound by the decree in [57] the title suit, and the High Court was in error in allowing his appeal in the execution case, wich they have done by their decree in the Appeal No. 97.

The next question is as to the pucca buildings and moveables. The decree of the High Court in the original suit was: "It is ordered and decreed that the decree of the lower Court be varied, and in lieu thereof it is hereby decreed and declared that the plaintiff is entitled to 3 annas and 4 gundas share of all the property which is named and described in the two schedules appended to the plaint." The moveables were in a separate inventory, and it is now admitted that execution cannot be had in respect of them. As to the pucca buildings the Subordinate Judge said: "I consider it to have been purely the intention of the High Court that, in awarding a decree in favour of the plaintiff for a 3 annas 4 gundas share of all the property which is named in the two schedules, only the landed property was meant, and decided upon without relevancy to the buildings or moveables." But as it had been contended that the decree literally included the buildings, he thought it equitable that the decree should be returned to the decree-holder for amendment in the proper Court, and then the execution be revived in conformity with the judgment. The judgment of the High Court upon which the decree was drawn up used exactly the same words, and so there could be no amendment. The effect, therefore, was that execution in respect of the pucca buildings was refused.

The High Court dealt with the question in a rather singular way. They said that, in order to discover what the property was, they must refer to the two schedules appended to the plaint, and as the decree-holder had taken no steps to have the original plaint made a part of the execution record, or to file

a certified copy of the two schedules, they were unable to discover from the record whether the pucca buildings and the moveable property were or were not included in the schedules annexed to the plaint. The Subordinate Judge had inserted in his decree two schedules which were described as schedules of immoveable property under claim, and had awarded a 2½ annas share of the landed properties stated in those schedules. The High [58] Court varied the decree by giving a larger share. It was obvious that they intended this to be a share of the same property, viz., what was described in the decree of the Subordinate Judge as under claim, that is, claimed in the plaint. If proof of the contents of the schedules to the plaint was necessary, the Court might have postponed giving judgment, and allowed a certified copy to be filed. Their Lordships are of opinion that such proof was not necessary, and that the cross-appeal upon this question, which was No. 125, ought to have been allowed, and the order appealed from varied by including the pucca buildings.

As to the third question, namely, whether possession in execution was to be given against the parties jointly or severally, which was raised in the Appeal No. 126, the High Court decided that decree ought to be executed by giving the decree-holder as against Bhubaneswari and Nilcomul a 1 anna 4 gundas share in the plots of which he already had possession of 2 annas, and 3 annas 4 gundas of the plots in which he had no possession. They accordingly ordered, in the Appeals Nos. 125 and 126, that the objections or cross-appeal should be disallowed, and, except as aforesaid, the order of the Subordinate Judge should be varied by awarding to the decree-holder possession jointly as against Bhubaneswari and Nilcomul of an undivided share of 3 annas 4 gundas in every plot of the land in dispute.

The learned counsel for the appellant has not disputed that the possession is rightly awarded jointly against the parties liable to have it recovered from them.

So far, the decree of the High Court may stand; but their Lordships being of opinion, as has been stated, that the minor is bound by the decree, and that execution may be had against him, the decree in the Appeal No. 97 will be reversed, and the appeal dismissed with costs, and the decree in Nos. 125 and 126 will be varied by ordering that Appeal No. 125 should be dismissed with costs, and by allowing the plaintiff's objections or cross-appeal so far as regards the pucca buildings, and by including them in the award of possession. And their Lordships will humbly advise Her Majesty accordingly.

[59] The action for mesne profits has now to be considered. In this the questions are: (1) whether the liability was joint or several; (2) whether Jotindramohun was liable. In the title of the plaint the defendants are stated to be Bhubaneswari Debi, widow of the late Shib Nath Lahiri, for self, and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge decided that the liability of the defendants should be separately assessed, and looking at the possession of the joint ancestral property, which he said had been fully admitted in the suit by all the parties concerned in it, he found that out of the 1 anna 4 gundas share in the joint ancestral property which had been decreed in favour of the plaintiff, 13¾ gundas share was in possession of Bhubaneswari, and 10¼ gundas share in the possesion of Nilcomul. Accordingly he decided that with respect to the land held in common, the mesne profits were to be calculated and separately charged in these proportions. As to the second question, he said that the appeals to the High Court and Her Majesty in Council were prosecuted by Bhubaneswari "with the *bonâ fide* intention that her husband's real rights had been interfered with;" and inasmuch as it was for the interest of Jotindramohun that the suit was defended and the suit carried up to the highest

tribunal, he held him to be liable for the mesne profits. The decree awarded for mesne profits within the period allowed by the law of limitation a total sum of Rs. 5,692-7-2 pies, and ordered that the plaintiff should recover from Bhubaneswari as guardian on behalf of the minor Jotindramohun Rs 3,297-10-2 pies, and from Nilcomul Rs. 2,394-13 annas. Both Nilcomul and Bhubaneswari appealed to the High Court,--the former on the ground that the plaintiff was not entitled to recover from him the 10½ gundas share, and at the most he was not liable to make good more than 2 gundas, and Bhubaneswari on the ground that Jotindramohun was not properly made a party to the suit, and should not have been held liable.

The High Court in their judgment deal first with this question. They say: "In the plaint the minor is not made a defendant. The defendants are Nilcomul Lahiri and Bhubaneswari Debi as widow of the late Shib Nath Lahiri, and as guardian on behalf of the [60] minor Jotindramohun Lahiri. Now, there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. There is no excuse for ignorance as to the proper procedure in respect of minors, seeing that the provisions contained in the present Code of Civil Procedure became law nearly seven years ago, in 1877. A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name." And after referring to the provisions for the appointment of a guardian *ad litem* they say: "No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to be bound by the decree."

In *Sureshchunder Wum Chowdhry* v. *Jugut Chunder Deb* (I.L.R., 14 Cal., 204) a plaint in a suit described one of the defendants thus: "N. C., guardian, on behalf of her own minor son, S. C.," and it was held by a Full Bench of the High Court at Calcutta that, it appearing that the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, it could not, without proof of prejudice, invalidate a decree against him in the suit; also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit when it appeared on the face of the proceedings that the Court had sanctioned the appointment. Their Lordships are satisfied that the suit for mesne profits was substantially brought against the minor. The 7th issue decided by the Subordinate Judge contained the question whether he could be made liable when he was not a party in the former suit. And the grounds of appeal in Bhubaneswari's appeal to the High Court show that she appealed on his behalf as well as her own. It is also apparent that the Subordinate Judge treated her as appearing in the suit as guardian, and sanctioned it. This is very clear in his judgment in the execution case before quoted. He says: "The minor is also under her guardianship and protection; Bhubaneswari is therefore the proper person to represent the minor." Their Lordships, therefore, are of opinion that the High Court was in error in decreeing that the suit [61] should be dismissed as against Jotindramohun, and declaring that he was not a party to it and was not bound by the result of the proceedings.

In the appeal by Nilcomul, the High Court said that the Subordinate Judge did not find that Nilcomul was in possession of any portion of the property in excess of the share to which he was himself legally entitled, but that he had been in possession of 6 annas 10 gundas had been practically admitted before them at the hearing of the appeal, while a title to more than 6 annas 8 gundas was not asserted. It was also admitted in his written statement.

They thought, therefore, that, except as regards the 2 gundas, the plaintiff had not proved that Nilcomul was, during the years for which mesne profits were claimed, in possession of any portion of the property, the title to which was concluded by the decision in 1880. They therefore held that, as regards the 2 gundas, there must be a decree for mesne profits calculated upon the figures which the Subordinate Judge had taken in his decree. Accordingly they varied his decree by decreeing that Nilcomul should pay, instead of the sum awarded by that decree, the sum of Rs. 475 only, as mesne profits, with interest thereon from the 10th of January, 1882, the date of the decree of the lower Court. The learned Counsel for the appellant did not object to this decision, nor did the learned Counsel who appeared for Bhubaneswari and the minor object to it. Further, it is not disputed that the aggregate of the portions of the property of which Nilcomul and Bhubaneswari have been in possession during the years for which mesne profits have been awarded shows an excess over their lawful shares at least equal to the share of which the plaintiff has been wrongfully deprived. Consequently, if Nilcomul held only 2 gundas, Jotindramohun would be liable for the mesne profits of the remainder, and the plaintiff would be entitled to recover the balance of the total sum of Rs. 5,692-7-2 awarded for mesne profits from his estate. This would be Rs. 5,217-7-2. Therefore the decree of the High Court in the appeal by Bhubaneswari (Appeal No. 130 of 1882) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that the plaintiff do recover from **[62]** Bhubaneswari as guardian on behalf of the minor, Jotindramohun, the sum of Rs. 5,217-7-2, with interest at 6 per cent. per annum from the 10th January, 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court in Appeal No 121 of 1882, so far as it relates to payment by Nilcomul Lahiri and to costs, will be affirmed. Their Lordships will humbly advise Her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the appellant to pay the costs of the respondent Nilcomul, and that the appellant's costs, but not including what he is ordered to pay to Nilcomul, be paid by Bhubaneswari as guardian on behalf of the minor.

One of the consolidated appeals allowed : in the other, decree affirmed.

Solicitors for Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for Respondent, Nilcomul Lahiri : Messrs. *Gordon & Dalbiac.*

Solicitor for Respondents, Bhubaneswari Debi and Jotindramohun Lahiri : Mr. *S. G. Stevens.*

C. B.

NOTES.

[The absence of formal order of appointment as guardian may be disregarded where there has been substantial representation :— **(1903) 30 Cal., 1021** ; (1895) 23 Cal., 374 ; (1895) 20 Bom., 534 ; (1891) 20 Cal., 11 ; (1907) 5 C. L. J., 184.

Where the interests as between the adopted son and the widow are not antagonistic, they may join together as plaintiffs :—16 Bom., 119 ; 26 Mad., 647 ; *aliter* when the interests are adverse, 30 All., 95.

Where there has been substantial representation of the estate by the widow, the decree may have operation beyond her personal interests :—(1904) 8 C.W.N., 843 ; *see* also (1907) 34 Cal., 642 (sons).]

[16 Cal. 62]

PRIVY COUNCIL.

The 25th and 26th April, 1888.

PRESENT:

LORD WATSON, LORD HOBHOUSE AND SIR R. COUCH.

Muhammad Yusuf............Plaintiff

versus

Muhammad Husain............Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Evidence—Costs.

One of two co-sharers, by ancestral title in the under-proprietary right in certain villages obtained, in 1870, decrees against the talukdar for sub-settlement, and getting possession had his name entered in the khewat. The other co-sharer remained entitled to claim that this possession was held partly for him.

The present suit was brought upon two agreements, purporting to have been made in 1870, between the two co-sharers, while proceedings to obtain the above decrees were pending, to the effect that, whereas both had claims against the talukdar, one only was to sue him, the other paying half of the costs and being entitled to receive half of what might be decreed.

The Judicial Committee, upon the evidence, concluded that the Appellate Court, attributing too much to certain omissions and acts on the plaintiff's [63] part, which were more or less explained, had erred in reversing the decree of the first Court, which maintained the agreements, depriving the plaintiff of his costs in that Court only.

APPEAL from a decree (18th November 1884) of the Judicial Commissioner, reversing a decree (2nd January 1884) of the Judge of the Lucknow District.

This suit, between parties having the same grandfather, was instituted on the 28th June 1883 by the plaintiff against his cousin Muhammad Husain, who had, by orders (14th November, 1870, and 22nd December 1870) obtained by him in the settlement Courts, been declared to have, "along with his co-sharers if any there be," rights, as under-proprietor, as against Arjan Singh, talukdar, in villages Makunpur, Chandrauli, and Khanpur; also in a four-anna share of another village named Olehipur, forming part of a taluk named Bhilwal in the Bara Banki district.

The joint interest of the family to which the cousins belonged prior to these proceedings was shown in the records of 1858, referred to in their Lordships' judgment.

The talukdari rights in Bhilwal had been purchased in the time of the Nawabi by Arjan Singh, as was decided on 8th July 1868, in a suit brought by Imdad Ashraf, who was a sharer to the extent of twelve annas in zemindari rights in the village of Olehipur.

One of the cousins, Muhammad Husain, as to all four of the villages above named, and Imdad Ashraf as to Olehipur, asserted their zemindari claims, as against Arjan Singh, to a sub-settlement; and, to establish these rights, three suits on the 28th February 1870 were instituted against Arjan Singh by Muhammad Husain in respect of each of the three first named villages, and a fourth suit by him and Imdad Ashraf in respect of their rights in Olehipur.

These resulted in decrees in favour of Muhammad Husain, and "all entitled to share in the sub-settlement of the respective villages."

Whilst those suits were pending, the agreements, according to the plaintiff's case, were executed, which gave rise to the present suit. The first of them, referred to as No. 24, purported to [64] have been written and signed by Muhammad Husain on 2nd May 1870, and related to the three villages first named. The second agreement, referred to as No. 25, was dated 1st September 1870, and purported to relate to the four-anna share of Olehipur. Both agreements were to the effect that, in consideration of Muhammad Yusuf's advancing one-half of the expenses that might be incurred in carrying on the litigation as to the under-proprietary right, Muhammad Husain would give up to him half of whatever he might recover, with the exception of rent-paying and rent-free *sir* land and groves, which were already held by the parties, each holding his own portion. The *khewat* of the villages, which was subsequently prepared under the terms of s. 56 of Act XVII of 1876, was verified by Muhammad Husain, whose name was entered. Notices were issued on 4th August 1871 for any claimants to come forward, but Yusuf did not then make any claim, nor did he at any time, before bringing this suit, attempt to have *dakhil kharij*, as one of the sharers in the villages, made in his name.

In the present suit the plaintiff averred that possession was obtained of the lands sued for in August 1871, and that after such possession the defendant, down to December 1879, acted according to the agreements, and accounted to the plaintiff for his share of the profits of the three first-named villages, and plaintiff received his share of the profits of the fourth village from Imdad Ashraf, who was the sub-settlement holder of that village, and was entitled to the remaining three-fourths of that village, but that in December 1879 the defendant refused to continue to give the plaintiff his share of the profits, which constituted the cause of action.

The defendant, by his written statement, denied the execution of the agreements in question, and his rendering accounts to the plaintiff after he had obtained the decrees against Arjan Singh, and that plaintiff had contributed to the costs of the suits in question. And he pleaded that under the 43rd section of the Code of Civil Procedure (*i.e.*, as to the splitting of claims), the present suit was barred by two suits which the plaintiff had brought, and in which decrees were made in March and August 1871, as to the *sir* lands and *nankar*.

[65] Issues having been fixed as to the above points, the District Judge found that the agreements were proved; also that the subsequent rendering of accounts, by the defendant to the plaintiff, had taken place as alleged; while, as to any bar under s. 43, there had been no splitting of claims, the former suits having related to matters not belonging to the present one. He, however, concluded as follows: "I think the plaintiff's conduct was such that the costs of the suit should not be awarded him."

On an appeal to the Judicial Commissioner by the defendant, that Court was of opinion that the execution of the agreements was not proved. And, as to possession, the Judicial Commissioner rejected the accounts which the first Court had accepted, as the alleged writer, one Hub Lal, whom the plaintiff had examined, had denied his writing: and the Judicial Commissioner further expressed his opinion that the plaintiff's allegation as to his continuing possession till 1879 was discredited by a statement found in a petition of his in 1876, when he was applying for a certificate to enable him to appeal to Her Majesty in Council, against a decree of the Judicial Commissioner of Oudh, made in

November 1875, in a suit relating to other property and brought against another party.

On this appeal—

Mr *R. V. Doyne*, for the appellant, argued that the agreements in question were established by the evidence, entitling the appellant to his half share. He adverted to the two annas share of Olehipur claimed, and the appellant's receipt of the profits of that share, as to which there was no defence.

Mr. *J. Graham*, Q.C., and Mr. *C. W. Arathoon*, for the respondent, contended that the plaintiff had failed to prove that the agreements had been executed; or the arrangement made. They referred to the alleged reasons for the omission to register. The reason avowed by the plaintiff (though registration was not compulsory) discredited him, it being that registration was omitted, and also he did not join in the suit, in order that his and his father's interest in the property might not be known.

Mr. *R. V. Doyne*, for the appellant, was not called upon to reply.

[66] Their Lordships' **Judgment** was delivered by —

Lord Hobhouse.—In this case the suit is founded on two agreements, which are dated respectively 2nd May and 1st September 1870. The two agreements are exactly similar in character. The first, which is called No. 24 in the suit, relates to three villages, and the effect of it is this: that, whereas the plaintiff and the defendant both had claims against the talukdar for an under-proprietary right in these three villages, the claims should be prosecuted in the name of the defendant, the plaintiff paying half the costs and receiving half the profits when the right was established. The second agreement, which was No. 25, was to exactly the same effect with respect to a small portion of a village called Olehipur, which seems to have been of very little value.

Now, though the suit is founded entirely on those agreements, and not on any previous claims, it is not unimportant to consider what was the position of the parties antecedently to the agreements. As the genuineness of the agreements is disputed, it is a material consideration to see whether they contain anything that was at all of an extravagant or monstrous nature. The plaintiff and the defendant are near relatives, and at one time were indisputably co-sharers in some interest in the three villages, which were ancestral property. That is made manifest by the record of proceedings in the Settlement Court in the year 1858, when we find a petition presented by the plaintiff and defendant and two other applicants, stating that settlement had been made with those four, and praying that a fresh settlement should be made to the four, and it is mentioned that three others joined as shikmis. The order which was made on 5th May 1858 was that the settlement be made with the petitioners, and that leases be granted, and so forth. Therefore, there being on record this evidence of joint title in the plaintiff and the defendant, there is no improbability in the plaintiff's account that he intended to sue for his right in the villages, but that the arrangement was made that the defendant should sue, and that the costs should be paid, and the profits shared, in the way he states. What is certain is that the suit was instituted by the defendant against Arjan Singh, who was **[67]** the talukdar against whom the sub-proprietary right was claimed. That suit failed before the Settlement Officer, but on appeal with regard to the village of Olehipur, the Commissioner gave the plaintiff a decree. That decree was made on the 4th July 1870, and it gives an under-proprietary right in mouzah Olehipur to Muhammad Husain the defendant, Imdad Ashraf who claimed for another branch of the family, and other co-sharers if any there be. After that decree was made for Olehipur, the Settlement Officer made a fresh decree for the three villages, following the Commissioner's judgment in the case of Olehipur.

His decree bears date the 22nd December 1870, and is in favour of Muhammad Husain and all entitled to share the sub-settlement of the three villages.

Now under that decree the defendant obtained possession, and it seems that he got his name entered in the *khewat* to which Mr. *Arathoon* has just been drawing their Lordships' attention, and he holds possession up to this moment. The plaintiff being undoubtedly a co-sharer in 1858 is entitled to say that, whoever gets possession under that decree, holds partly for him.

That being the position of the parties, the only point on which the agreement gives to the plaintiff any further right than he might claim independently of the agreement, is this: that the agreement admits, as between himself and the defendant, that the plaintiff is the only party entitled to share in the benefit of the decree. How it was that the other parties named in the decree of 1853 have fallen out their Lordships do not know, but no defence was raised on that ground or on any *jus tertii*. The defendant claims that he is solely entitled, and that no agreement whatever was made with respect to the profits of the estate governed by the decree.

The main question is whether these agreements are proved. The District Judge has held that they are. The Judicial Commissioner thinks that they are not. Taking No. 24, the agreement purports to be witnessed by nine persons. No doubt some of the names were written by others on the speculation that the witnesses would ratify what was done, and other witnesses affixed their names after the agreement was executed and not at the time. That proceeding is very irregular, very improper [68] and if any attempt had been made in this suit to represent that persons named as witnesses were there who really were not there, it would be fraudulent. But no such attempt has been made. Four witnesses have been called, and they all honestly say where they were at the time. It turns out that only one was present at the time, but no attempt has been made to conceal the fact, neither is there any contradiction of what they say upon that point. What do they say? Nawab Ali, who seems to be a perfectly independent man, says: "I signed No. 24 as witness; I cannot say where it was written. I signed in the Commissioner's cutchery." It was not written at the Commissioner's cutchery, or executed there, and he says honestly that was so; but the document was brought to him by Muhammad Husain, and he was told to witness it and he did so. It is irregular, but it is not untruthful. Then Imdad Ashraf says: "I signed No. 24. It is in Muhammad Husain's handwriting; both brought to me to sign at my house fifteen or sixteen days after it was written in Chadigapurwa." That of course is an irregular thing, but it is perfectly honest, and it shows the admission of the agreement by the parties to it. The plaintiff himself positively swears to its having been written from a previously prepared draft by the defendant in his presence, and Beni Parshad, who seems again to be perfectly independent—he is a ryot holding lands under both parties—says the same thing. He was present, and the only witness who was present. In cross-examination none of these witnesses are shaken in the least. No counter-evidence is produced. No facts are shown inconsistent with the story told by any one of the four witnesses who swore to the execution, or to their subsequent signature at the request of the defendant. They were believed by the District Judge, who says they were trustworthy witnesses, and their Lordships cannot hold that there is any contradiction of their testimony merely because other persons are named as witnesses who were shown not to have witnessed the document at all either at the time or otherwise, or because there was one who did sign the document whom the plaintiff did not think fit to call.

But then another objection is made. It is said that the document was not registered. Non-registration is no bar to the [69] validity of the document, but it is said that the plaintiff gives as a reason for non-registration that he was committing a fraud upon the Court. The reason no doubt is very absurd. He says this: the evidence of his father Riasat Ali was of importance in the suit against Arjan Singh, and he and the defendant believed that if the plaintiff's interest was made manifest by the registration of the document, Riasat Ali's evidence would go for nothing in the suit against Arjan Singh. It is a childish mistake to make. It shows a disposition to be a little tricky. But it is not suggested that any false evidence was given in the suit against Arjan Singh ; it is not suggested that by these means Riasat Ali was rendered a competent witness, whereas otherwise he would have been an incompetent witness. Nothing was done by way of fraud upon any human being. All it shows is a disposition to conceal something which happened in order that the parties might reap a benefit in the suit which was pending, and their Lordships think that quite sufficient importance has been given to the matter by the District Judge, who, on account of this little stratagem, has deprived the plaintiff of his costs in the suit.

Now, so far there is nothing in the circumstances to induce their Lordships to entertain any reasonable doubt that the parties who swore to the execution of these documents have sworn to the truth, and if the case rested there they would decide in favour of the genuineness of the documents. But the case does not rest there. There are in the record detailed accounts of the three villages which the plaintiff swears were rendered by the defendant to him, and they are also sworn by the plaintiff and others to be in the writing of one Hub Lal, a putwari of the villages, and to have been sent by the defendant to the plaintiff. One witness goes so far as to say he saw Hub Lal write the accounts. Possibly he may be wrong there. There is no need to decide whether he is right or wrong. Hub Lal denies writing or signing the accounts. But he does not deny their correctness. He does not deny that they were made out or sent, or that the payments were made upon this footing. And what is still more extraordinary is that the defendant does not come forward to say one single word about these accounts. He produces witnesses to say they are not in Hub Lal's handwriting, but he [70] himself does not say one word about them. Now, if the accounts were forged, it would be a forgery of the most portentous kind, consisting as they do of a quantity of items purporting to be holographed by Hub Lal, and setting forth the various payments and expenses for these villages. Nothing would be more easy to expose than such a forgery as that. It is quite certain that a person forging these accounts would fall into a number of mistakes, and on the mistakes being shown the forgery would be made manifest. No evidence of the kind is given. The District Judge on that evidence believed that the accounts were made out and rendered by the defendant to the plaintiff. What the Judicial Commissioner held on the point is not so easy to say. He says they are valueless, and are of no weight, and he mentions that Hub Lal has denied having written them; but whether he held they were really forgeries, or whether he held that, being genuine, and being signed, they were of no value as evidence, cannot be learned from his judgment. It is clear that they are of the greatest value as evidence, because they could not have been sent by the defendant to the plaintiff except on the footing that the plaintiff was entitled to an interest in the villages.

There is one thing more. A series of letters from the defendant to the plaintiff is produced, and the same observations, or very nearly the same

observations, occur upon the letters that have been made upon the accounts, and they need not be repeated. The letters are inexplicable, excepting as referring to these agreements, and as admitting an interest on the part of the plaintiff in the three villages.

The result is that their Lordships think that the District Judge was right in giving the plaintiff a decree, and that the Judicial Commissioner was in error in disturbing that decree. He should have dismissed the defendant's appeal with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Barrow & Rogers.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

---

[71] PRIVY COUNCIL.

The 24th and 26th April, 1888.

PRESENT:

LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. COUCH.

Chandi Churn Barua and others............Plaintiffs

versus

Sidheswari Debi ....Defendant.

[On appeal from the High Court at Calcutta.]

Grant, Construction of—Invalidity of grant, or covenant by grantor, in favour of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.

A Hindu owner cannot make a conditional grant of a future interest in property in favour of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant

The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it

might be regarded as a covenant intended to run with the Raj estate, in favour of non-existing covenantees, to give the villages to them in the event specified. *Held*, that in either view, it was equally ineffectual.

Held, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendant you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance.

APPEAL from a decree (8th July 1884) of the High Court, reversing a decree (21st September 1881) of the Subordinate Judge of the Goalpara District.

The appellants, who were plaintiffs in the suit, were a family named Barua, of the Kayest caste, which for many generations had members in the service of the Rajas of Bijni. The respondent was the widow of the late Raja, who died after the institution of this suit against him, and who represented him on this appeal.

[72] Of the Raj estate, that part, within which the villages now claimed were situate, had been in British territory since 1765, and the villages were settled in the pergunnah named Khutaghat; the rest of the Raj estate having, since the annexation in 1864 of the Eastern Dooars, formed, like that pergunnah part of the Goalpara district. Before 1765, the Baruas were in possession of three other villages under grant from the Rajas. They now claimed further possession of four villages in addition, under an instrument purporting to have been executed on the 15th Pous, of the Pergunnah vear 1185 (December 1778), by the then Raja of Bijni, Mukund Narain Bhup. This purported to be in favour of the undermentioned Baruas, besides others of the family, who had died childless, viz., Dharamsil Barua, grandfather of the plaintiff, Nandkumar Barua, and Kamlakant Barua, grandfather of the plaintiffs Chandi Churn, Jagarnath, and Chunder Madhub, agreeing that the three mouzahs, Kaitpara, Shamraipara, and Mauriagaon, that were at that time in the possession of the ancestors of the plaintiffs, should remain in their possession from generation to generation; that the sons, grandsons, heirs and representatives of the Raja Bahadoor should in future maintain the sons, grandsons and heirs of the persons in whose favour the gift was made; and that in default of this, they should relinquish to them the possession of other four mouzahs, namely, Bhotgaon, Dingaon, Daborgaon, and Salbari; and the heirs of the persons in whose favour the gift was made should be at liberty to take possession of these mouzahs, and to enjoy and possess the same as rent-free properties, by paying annually Rs. 190 as *mangon* to the estate of the Raja. And the plaintiffs alleged that in breach of that undertaking to support them by service from generation to generation, the Raja in April 1876 dismissed the first plaintiff from his service, and did not provide the other plaintiffs with service, though they were fit and proper persons and made application. And on that ground they claimed possession of the four villages.

For the defence, the genuineness of the instrument was denied, as also the plaintiffs' allegation that they were competent for the Raja's service. It was also contended for the defence that, supposing the plaintiffs to have any right to maintenance out **[73]** of the defendant's estate, the profits of the three mouzahs, already in their possession, were sufficient.

Issues were fixed by the Subordinate Judge, who found the instrument to be genuine, and held that the plaintiffs were entitled to have possession, according to the presumable intention of the parties, of the four villages. On the

issue fixed by the Judge as to whether there had been any breach of the terms of the document of 1776, his decision was as follows:—

"In this document, Raja Mukund Narain recites that the grantees have, from the days of his ancestors, been supported (*parwarish*) in various ways (*har shurate*), such as by service in the kingdom, *and* by grants of villages and lands. The various ways in which they have been supported are explained to be by 'service in my kingdom *and* (not *or*) by grants of villages and lands.' The *parwarish* consisted of those two things; not of one or the other, but of both. Mukund then goes on to say that he also supports them (*pratipalan*) in the same manner (*shei mate*), *i.e.*, by service *and* by grants of villages and lands. The word *pratipalan* has clearly the same meaning as the word *parwarish*. The expression *shei mate* places this fact beyond doubt. A pure Bengali word is substituted for a Hindustani word. The Raja then says that in case in his time, or in the time of his descendants, they or their descendants should not be supported (*pratipalan*) in various ways (*har shurate*), he then and there assigns to them these seven villages as a permanent remuneration or allowance. We have already seen what the *pratipalan har shurate* means. After having thus assigned to the grantees these villages, he goes on to revoke the assignment, saying that, as they were at that time being supported (*pratipalan*) by the profits of three of the villages *and* by other means, he will not make over to them the other four villages. That they are to continue to hold the three villages on the terms they were then holding them on. He then goes on to say,—'If ever in the time of my descendants you are not provided with the means of maintenance (*pratipalan na kare*), then let those descendants of yours who may be living at that time (*i.e.*, when there is failure of *pratipalan*) produce this deed and hold all the seven villages at a quit rent of Rs. 100.

[74] "Now, what is this maintenance (*pratipalan-parwarish*), the failure to continue which by his descendants is contemplated by Mukund? It is clearly the *pratipalan*, the *parwarish* by various ways, *i.e.*, by service *and* by grants of land. This maintenance, as I have shown, consisted of two things, and a failure to give service, or a failure to give grants of lands, or both, would each and all constitute a breach of the terms of the document. And as no member of the Barua family is now maintained by service in the raj, although the family still hold the three villages stated by Mukund to be in their possession in 1185 Perganati, there has been a breach of the terms of the document. This breach took place on the 1st Bysack 1283 B. E., when Chandi Churn was dismissed by the defendant. This dismissal is admitted."

The Subordinate Judge, accordingly, decreed in favour of the plaintiffs.

This, however, was reversed by the High Court on appeal. A Division Bench (GARTH, C.J., and BEVERLEY, J.), after expressing doubts as to the genuineness of the instrument, gave judgment on its terms as follows:—

"Assuming that there is a sufficient consideration for the Raja's promise (about which there may be some doubt), in whose favour is the deed made?

"Is it a provision for all the Barua family in perpetuity, however many hundreds or thousands they may number?

"Does the continuance of the grant depend upon the whole Barua family continuing to serve the Raja or to reside within his jurisdiction?

"Would the grant be valid, although all the Barua family, or the large majority of them, deserted the Raja's territories, and those three or four only, or some or one of them, continued in his service?

"Or would the grant be valid if any of the Barua family refused to remain in the Raja's service at all, or proved themselves faithless or incompetent?

"All these points have been raised before us, and they present very serious difficulties, and we much doubt whether in point of law the instrument, if genuine, is enforceable at all. But [75] assuming that it might be so under a different state of circumstances, and that the present plaintiffs were in a position to enforce it, can it now be said that the Raja has committed any breach of the contract, or that he is liable in any way to the present plaintiffs?

"We are clearly of opinion that he is not, and our reason for that opinion seems so unanswerable that we think it needless to deal with the other points in the case, which might perhaps present more difficulty.

"The plaintiffs' case is that one of them, Chandi Churn Barua, has been dismissed from the Raja's service, and that the other have not been employed by the Raja, although they are competent men, and willing to be so employed. This the plaintiffs contend is such a breach of the Raja's contract as entitles them to be placed in possession of the four other villages, Bhotegaon, Kaitpara, Daborgaon, and Salbari.

"The Raja says that as a matter of fact the plaintiff No. 1 was dismissed because he proved a faithless servant, and he also says that the other plaintiffs are incompetent men. But whether he is right or wrong in this, what possible ground is there for the plaintiffs' present claim?

"It is clear that by the terms of the agreement the Raja Mukund Narain does not undertake to keep the whole Barua family in his service, nor any particular member or members of that family. All he undertakes to do is to support them, and it is only in case of the family not being supported that the four additional villages were to be placed at their disposal."

The suit was accordingly dismissed.

On an appeal by the plaintiffs,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the Appellants, argued that the interpretation placed on the terms of the instrument of 1778 A.D. by the Subordinate Judge was a sound one, and that it was a genuine document. That Judge had correctly construed the Bengali words referred to in his judgment, as denoting that the maintenance was to consist of two things, service and grants of land, not merely means of subsistence, from their own or other resources. Moreover no issue had been fixed on the question whether the possession of the villages formerly given to [76] the Baruas was a sufficient maintenance for all the family; and the conclusion of the High Court on this point was disputed by the appellants. Even if the descendants had not been shown to be without any means of support, still, upon the correct construction of the grant, the suit had been rightly decreed by the Subordinate Judge; and the judgment of the High Court should be reversed.

Mr. *R. V. Doyne* for the Respondent was not called upon.

Afterwards, on April 26th, their Lordships' **Judgment** was delivered by

Lord Watson.—This suit was brought by the appellants in the year 1880, before the Court of the Subordinate Judge at Goalpara, for possession of the four mouzahs of Daborgaon, Salbari, Dingaon, and Bhotegaon, which are part of the Bijni Raj estate in Assam. The original defendant was the late Raja Kumud Narain; and since his death the estate has been represented by his widow, the Ranee Sidheswari Debi, who is respondent in this appeal. The foundation of the appellants' claim is a deed alleged to have been executed by the Raja Mukund Narain, the ancestor of the defendant, in 1185 Pergânati (1778 A.D.) in favour of certain members of the Barua family, to which the appellants belong. The document, according to the translation made by

the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms: —

"Let peace and health rest upon your dwelling, O Kasi Nath Barua, dewan, O Ram Nath Barua, O Dharmasil Barua, O Komlakant Barua, O Ram Jibun Barua. Inasmuch as because of my having caused the daughter of Kasi Nath Barua, dewan, to lose caste by taking her away, you and all your connexions having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and forasmuch as from the days of the Maharajas, my deceased ancestors, you have all along been supported in various ways *(such as)* by service in my kingdom and by *(grants of)* villages and lands; and as I too am supporting you in the same manner, and as you have now become dispirited and *(therefore it is proper)* that I should show you even greater [77] kindness, *(I have determined that)* a means of support, that is, a perpetual wage, should be given to you; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways *(by me or by my descendants)*, then, as a means of maintenance, that is to say as wages, I do hereby assign to you seven villages, namely, Shamraipara, Mauriagram, Daborgaon, Salbari, Kaitpara, Dingaon, and Bhotegaon in the nature of a fixed *(perpetual)* remuneration. However, as you are now being supported by *(the profits derived from)* three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants *(you will now hold)* and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance *(by them)*, then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages, and also of the four villages *(now held)* khas *(by me)*, enjoy possession of them rent free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs. 100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed that Kasi Nath and Ram Jibun, two of the four grantees named in the deed, died without issue; and that the appellants are the living representatives of the other two, viz., Dharmasil and Komolkant Barua. They are still in possession of the three mouzahs of Shamraipara, Mauriagram, and Kaitpara, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these mouzahs now yield an annual return of 4,000*l.* sterling. As might be expected in these circumstances, the appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Raja [78] was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grant to descendants became at once operative in their favour, when the late Raja dismissed Chandi Churn from his service in 1876, and declined to employ either him or any other of the appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court: "Is the document filed genuine, and are the plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the res-

pondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law; that at any rate the contingency upon which it depends is the failure of the Raja to provide maintenance, and that no claim can lie so long as the appellants have sufficient means of maintenance derived from her predecessors in the Raj.

The Subordinate Judge gave the appellants a decree in terms of their plaint. He found as matter fact that the deed was genuine, and he held as matter of law that the conditional grant to descendants is valid and effectual, and that it became operative whenever the Raja failed to support them by giving employment as well as land. On appeal the High Court reversed his decree, and dismissed the suit with costs. The learned Judges (GARTH, C.J., and BEVERLEY, J.) held that the onus being upon them, the appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable, they held that the descendants of the four Baruas named in it have, according to the just construction of the instrument, no right to the four mouzahs so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words: "If ever in the time of [79] my descendants you are not provided with the means of maintenance." It attributes to those words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent promise that these Baruas and their descendants shall in future be "supported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the Raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raja, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all or (as in the

present case) for generations to come, or it may be regarded as a contract, not a mere personal contract but a covenant running with the Raj estate, and binding [80] its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of opinion that the judgment of the High Court must be affirmed and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

The appellants must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Watkins and Lattey.*

C. B.

NOTES.

[The '*unborn person*' rule is of general application in Hindu Law; (1901) 24 Mad., 449; (1889) 16 Cal., 549 (existence in contemplation of law); (1897) 21 Bom., 709; (1895) 25 Cal., 405; (1893) 17 Bom., 600; (1891) 16 Bom., 492.

It does not, however, operate to invalidate gifts to a class, merely by reason of some members thereof falling within the scope of that rule.—(1911) 38 Cal., 468;

Nor does it require that the very *character* in which the gift, etc., is claimed should have been present at the time when the document or transaction takes effect; it is sufficient if the donee etc., should have then been in existence:—(1897) 21 Bom., 709; (1910) 15 C.W.N., 66; (1911) 39 Cal., 87; (1905) 28 Mad., 363.

Where the gift is complete, conditions repugnant to the nature of it are invalid and the gift takes effect freed therefrom:—(1894) 18 Mad., 252; 24 Cal., 834; 23 Cal., 446; 31 Cal., 111.

As to perpetuities, *see* also (1906) 33 Cal., 1065.]

[16 Cal. 80]

CRIMINAL MOTION.

The 26th November, 1888.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

Abayeswari Debi............Petitioner

versus

Sidheswari Debi............Opposite Party.*

Superintendence of High Court—Criminal Procedure Code (Act X of 1882, s. 144)—Charter Act, 24 and 25 Vic., c. 104, s. 15—Order to abstain from certain act.

A Deputy Commissioner passed an order, under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or

* Criminal Motion No. 371 of 1888, against the order passed by M. A. Gray, Esq., Deputy Commissioner of Goalpara, dated the 1st of October 1888.

through any of her officers or servants, from the ryots of two specified pergunnahs. And also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *adda* or *kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order :

[81] *Held*, that the High Court had jurisdiction, under s. 15 of the Charter Act, to set it aside if it were made without jurisdiction.

***Held*, further, that the acts which the petitioner was directed to abstain from were not acts which come within the meaning of the words "a certain act" as used in s. 144 of the Code of Criminal Procedure, and that the order should be set aside.**

THIS was an application to set aside an order passed by the Deputy Commissioner of Goalpara, under s. 144 of the Criminal Procedure Code, prohibiting the petitioner from collecting any rents, either herself or through her servants, from the ryots of certain pergunnahs, and doing other specified acts in the Bijni estate.

The order complained of was made on the 1st October 1888 and was as follows :—

"To

RANI ABAYESWARI DEBI,

Goalpara.

"WHEREAS it has been known from various Police Reports, which are received in numbers every day, that many persons are being deputed and sent from your side to collect rents from the ryots of pergunnahs Habraghat and Khutaghat, and also to get possession of and to sell the timbers collected from the forest of the Bijni Estate:

"And whereas, on an inspection of the Register of the Collector of this District, it is seen that Rani Sidheswari Debi, as successor of the late Raja Kumud Narain Bhup, is the sole present proprietor (by the virtue of the registration of her name according to law) of the Bijni zemindari, and you have not yet got your name registered as proprietor of the whole or part of the said zemindari, and you have not yet established your possessory right and interest to the whole or part of the said estate:

"And whereas, on perusing the aforesaid several Police Reports, I have clearly understood that, if there be any collection of rent or attempt for collecting rent in this way, or if your officers, servants, or followers have anything to do with the timbers collected and stocked on your behalf from the Bijni estate, then owing to the rivalry between your people and the people of the legally registered proprietor Rani Sidheswari, which cannot be checked, the breach of peace, riots and bloodshed will unavoidably ensue. I therefore prohibit you by this from collecting any **[82]** rent or attempting to collect rent, either yourself or through any of your officers and servants, from the ryots of pergunnahs Habraghat and Khutaghat, and also from effecting any sale, or put in your hands any transaction with regard to standing trees or collected timbers in the Bijni estate, or erecting any *Adda* or *Kuchari* in the aforesaid two pergunnahs within the period of two months from date, or until the final decision of the case under s. 145 of the Criminal Procedure Code, or until further orders."

The petitioner applied under s. 15 of the Charter Act and s. 439 of the Criminal Procedure Code to have the order set aside. The petition on which the application was made was in the following terms :—

1. That the Deputy Commissioner of Goalpara made an order on the 14th June, 1888, purporting to have been made under s. 144 of the Code of Criminal Procedure, prohibiting your petitioner's *Naib*, Brojo Nath Dass, from making collection of rent on behalf of your petitioner from her extensive zemindari pergunuah Khutaghat in the district of Goalpara.

2. That against the said order your petitioner moved this Honorable Court on the 21st June 1888, and your Lordships were pleased to issue a rule to show cause why the same should not be set aside.

3. That again on the 28th June 1888 the said Deputy Commissioner made a similar order against your petitioner personally, and your petitioner moved this Honorable Court against the said order on the 9th July 1888, when a rule was granted by the Chief Justice and Mr. Justice RAMPINI to show cause why the same should not be set aside.

4. That both the rules, Nos. 201 and 227 of 1888, were eventually heard by Mr. Justice WILSON and Mr. Justice RAMPINI on the 3rd and 10th of August 1888, and the following order was passed: "With regard to the order complained of, we entertain the greatest doubt whether it is a legal order, that is, an order which the Deputy Commissioner had any right to make under s. 144 ; but inasmuch as it expires within a very few days we think it is not necessary for us to make any order on the subject."

[83] 5. That your petitioner has been peacefully collecting rent from such ryots of her extensive zemindari as willingly paid her any, but notwithstanding the aforesaid order of this Honorable Court the Deputy Commissioner of Goalpara has again made an order and issued a notice upon your petitioner on the 1st October instant, a copy whereof is herewith annexed, purporting to have been made under s. 144 of the Criminal Procedure Code, and prohibiting your petitioner from receiving any rent and forest dues which your petitioner can get without the least probability of the breach of peace.

Your petitioner begs to submit that the said order is quite contrary to law and ought to be set aside on the grounds :—

(*a*) That the said section does not empower any Magistrate to prevent any person from collecting rents from the tenants of any estate or issuing passes for selling forest produce.

(*b*) That the effect of such an order is to deprive your petitioner of all possession in the property.

Upon the application being made, a rule was issued calling on the opposite party to show cause why the order complained of should not be set aside.

The rule now came on for hearing.

Mr. *M. Ghose* and Baboo *Umbica Churn Bose* in support of the rule.

Baboo *Iswar Chunder Chuckerbutty* and Baboo *Bassunt ComarBose* for the opposite party.

Mr. *Ghose*.—The order is without jurisdiction. *Firstly*, because it is vague and indefinite in its character; *secondly*, because it interferes with the manifest legal rights of the petitioner to receive rents, which her ryots might willingly pay her; and *thirdly*, because it is practically a repetition of an expired

order and an evasion of the restriction imposed by the last clause of s. 144. The High Court has jurisdiction to set aside under s. 15 of the Charter orders professedly made under s. 144 of the Criminal Procedure Code, but not really coming within its scope. The question of this Court's powers to interfere was fully considered in *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (I. L. R., 5 Cal., 7). Since then **[84]** it has been held that this Court had power to set aside orders made under s. 144, but without jurisdiction. In *Shurut Chunder Bannerjee* v. *Bama Churn Mookherjee* (4 C. L. R., 410), it was contended that this Court could not interfere with orders made under s. 144, but WHITE, J., decided against that contention. In *Bradley* v. *Jameson* (I. L. R., 8 Cal., 580), and *In re Prayag Singh* (I. L. R., 9 Cal., 103), orders made on the corresponding section of the old Code were set aside as being in excess of the Magistrate's power.

[MITTER, J.—I think we can interfere if you satisfy us that the order itself is one which the Magistrate had no power to make. The terms of s. 144 are very wide.]

The section gives power to make a certain order, which must mean a definite and precise order and not a general one, forbidding a man to refrain from doing a series of acts which he has ordinarily a right to do. The section must be very strictly construed. It could scarcely have been intended to invest Magistrates with power to interfere with the legal rights of persons. Could a Magistrate make an order directing a person to refrain from taking his food or from sleeping at night or from living in his own house, on the ground that the Magistrate thought that such an order was needed for the purposes specified in the section? Even if the Magistrate has such a power the order must be *one specified act* which must be complete in itself and of a definite character. Here the order is not to collect rents from the ryots of two pergunnahs. "Collection of rent" is not a definite act in itself, as it involves payment and receipt by several persons. Receipt of rent from different ryots is not a single act, and therefore does not come within the scope of the section.

Baboo *Iswar Chunder Chuckerbutty* contended that s. 144 was very comprehensive in its terms, and that the High Court had no power to interfere with an order made under that section.

The **Judgment** of the High Court (MITTER and MACPHERSON, JJ.,) was as follows :—

The order complained of in this case was passed under s. 144 of the Criminal Procedure Code. The authorities are clear upon this point that, if the Magistrate had no jurisdiction to **[85]** make the order, this Court can interfere under s. 15 of the Charter Act. Therefore the only question that we have to consider is whether the order complained of is one which the Magistrate could make under s. 144 of the Code. The section says that : "In cases where, in the opinion of a District Magistrate, a Sub-Divisional Magistrate, or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order, stating the material facts of the case and served in manner provided by s. 134, direct any person to abstain from a certain act," &c., &c. Now, by the words "a certain act" we understand that it must be a definite act. We have considered the order passed in this case, and we are of opinion that the acts which the petitioner is directed to abstain from are not acts which come within the meaning of the words "a certain act." She is directed not to collect rents from the ryots

of two pergunnahs; no particular ryots are mentioned, but the rent is not to be collected from the ryots of two pergunnahs generally. We do not think that such an order as this comes within the words "certain act." Upon this ground alone we set aside the order and make the rule absolute.

H. T. H. *Rule made absolute and order set aside.*

NOTES.

[As regards interference where there was defect of jurisdiction, *see* also 19 Cal., 127; 26 Cal., 188; 27 Cal., 252; 27 Cal., 892; 33 Cal., 68. *See* also 31 Cal., 990.]

[16 Cal. 85]

APPELLATE CIVIL.

The 19th November, 1888.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR JUSTICE BANERJEE.

Panna Lall............Decree-holder

versus

Kanhaiya Lall............Judgment-Debtor.*

Insolvency—Civil Procedure Code, 1882, ss. 336, 337—Act VI of 1888—Debt not in schedule - Execution of decree obtained against insolvent for such debt—Scheduled debts.

A person, who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is **[86]** in the hands of the Receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VI of 1888).

ONE Kanhaiya Lall Bhaiya, having been declared an insolvent under s. 351 of the Civil Procedure Code, his property and effects became vested in a Receiver. In his application to be declared an insolvent, Kanhaiya Lall referred to the fact that litigation was then pending between himself as a defendant and one Lutchmi Narain Das as a plaintiff, but his schedule did not show any sum as owing to Lutchmi Narain Das.

Lutchmi Narain subsequently obtained a decree against Kanhaiya Lall, and applied under s. 353 of the Civil Procedure Code to have his name inserted as a creditor in the insolvent's schedule. This application was however refused,

* Appeal from Order No. 267 of 1888 against the order of J. F. Stevens, Esq., Judge of Gya, dated the 5th of June 1888.

and he then took out execution of his decree by attachment of certain moneys payable to the Receiver. Subsequently the decree-holder assigned his decree to one Panna Lall, and the attachment referred to was withdrawn.

Panna Lall, on the 4th February 1888, applied in execution to attach the person of his judgment-debtor, and a warrant was issued for his arrest. The judgment-debtor, who had not obtained his discharge under either ss. 351 or 355 of the Code, being brought up before the Court, the District Judge, on the 11th February 1888, released him under s. 336 of the Code on security being found for the decretal amount, giving him liberty to apply within one month's time to be declared an insolvent in respect of the judgment-debt.

On the 5th June 1888 the judgment-debtor applied (during the pendency of the first insolvency) to be declared an insolvent in respect of the judgment-debt; but the District Judge, on reconsideration of the matter, held that no second adjudication in insolvency could be made, and that the original adjudication and declaration being good against all the world, the judgment-debtor could not, pending the insolvency, be arrested.

Mr. *Linton* for the Appellant.—The original judgment-creditor not being a scheduled creditor, his assignee should have been allowed to execute the decree, the more so as the original decree-holder had applied to be inserted as a creditor in the schedule **[87]** and this application had been refused. The applications in the matter were all made before Act VI of 1888 came into force, and no notice was necessary under the old Act.

Baboo *Kali Kissen Sen* for the Respondent.—The order declaring the insolvency is an order *in rem*, and is good against all the public, and that being so, execution cannot issue against the insolvent.

The **Judgment** of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

Petheram, C.J. —This is an appeal from an order of the District Judge of Gya refusing to execute a decree by attachment of the judgment-debtor's person, and the reason which he has given for that is, that the judgment-debtor had filed his petition of insolvency and had given up his property to the Receiver under that petition, and he relies upon the sections of the Code of Civil Procedure relating to insolvency as showing that, after he had done that, he was not liable to arrest at the suit, I suppose, of any creditor whose debt was owing before the time of his petition.

The particular debt in respect of which this applicant had obtained a decree and wished to arrest the judgment-debtor was a debt which the judgment-debtor had not included in his schedule, and we think that the learned Judge was wrong in the view which he took that the judgment-debtor was relieved from the liability to arrest in respect of that debt by the Code of Civil Procedure. The right to arrest or to attach the person of the judgment-debtor in execution of decree is a right which is created by the Code, and was an absolute right, and being created as an absolute right it could only be taken away or qualified by subsequent legislation, and subsequent legislation which was clear in its intention. The only section of the Code which takes away that right is s. 357*, and s. 357 says that, where an insolvent has been

*[Sec. 357 :—An insolvent discharged under section 351 or 355 shall not be arrested or imprisoned on account of any of the scheduled debts. But (subject to the provisions of section 358) his property, whether previously or subsequently acquired (except the particulars specified in the first proviso to section 266 and except the property vested in the Receiver), shall, by order of the Court, be liable to attachment and sale until the debts due to the scheduled creditors are satisfied to the extent of one-third, or until the expiry of twelve years from the date of the order of discharge under section 351 or 355.]

Effect of discharge.

discharged under the preceding sections, he shall not be arrested or imprisoned on account of any of his scheduled debts. But that qualification is expressly limited to the scheduled debts, and in our opinion the liability to arrest under this Code remained the same as it was before in the case of debts which do not appear in the schedule. It is clear that in this case the debt, [88] in respect of which judgment was obtained, did not appear in the schedule, and therefore, in our opinion, the right of the judgment-creditor to attach his debtor by the arrest of his person was not taken away by s. 357, or by any of the insolvency sections, and at that time that right remained the same as it was before; and consequently we think the learned Judge was wrong in the conclusions which he came to that he was prevented from arresting this man under this section. But what escaped the learned Judge's attention, and the attention of both the learned gentlemen who have argued this case here, is the fact that the whole of the law upon this subject has been changed by Act VI of 1888. This Act takes away the right of the judgment-creditor to arrest his debtor and to put him in prison simply for the debt. A right to arrest under certain circumstances is retained, but it is a right to put the man in prison where he has the means of paying and will not pay as a means of compelling him to do that which he could do, and the inference from this provision is, that except for that purpose persons are not to be arrested, and therefore the provisions here have been inserted which provides that the arrest comes in but only under some circumstances.

We think then that the procedure which was adopted in respect of which this order was made is not applicable to the present condition of things, and that if the judgment-creditor wishes to enforce his remedy by proceedings under Act VI of 1888 he must make a new application to the Judge under that Act. At the same time we think that the Judge was wrong in the view which he took of the insolvency sections of the Code of Civil Procedure. Those sections do not afford any answer to an application of that kind in respect of an unscheduled debt; and we think that, if an application of that kind is properly made before him, it ought to be granted, notwithstanding the fact that the debtor has filed his petition, this particular debt not having been inserted in the schedule. With those remarks we decline to interfere, because the law is changed, and under the circumstances we think that there ought to be no costs.

T. A. P. *Appeal dismissed.*

[89] APPELLATE CIVIL.

The 26th June, 1888.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Dinesh Chunder Roy, minor, represented by his next friend Durga Kant Roy Chowdhry, Manager under the Court of Wards............Plaintiff

versus

Golam Mostapha and others............Defendants.*

Dinesh Chunder Roy Chowdhry, minor, represented by his next friend Durga Kant Roy Chowdhry............Plaintiff

versus

Fahamidunnessa Begum and others............Defendants.†

Dinesh Chunder Roy Chowdhry and another, minors, represented by their next friend Durga Kant Roy Chowdhry, Manager under the Court of Wards............Plaintiffs

versus

Nishi Kant Gungopadhya and another............Defendants.‡

Court of Wards Act (Bengal Act IX of 1879), s. 55—Bengal Act III of 1881, s. 7 - Suit on behalf of ward by Manager without sanction of the Court of Wards—Sanction after appeal, Effect of.

In the absence of some order by the Court of Wards authorizing the bringing of a suit, a suit instituted by a manager on behalf of a ward must be dismissed.

A suit was instituted in the Court of the First Subordinate Judge of Dacca on behalf of a ward by his manager without the order or sanction of the Court of Wards, and proceeded to judgment without any such order or sanction. The suit was partially decreed; and the manager appealed to the District Judge for that portion of the claim which had been dismissed by the Court of First Instance. At the hearing of the appeal, an application was filed on behalf of the appellant, accompanied by a letter giving sanction to the institution of the suit the appeal and other proceedings connected therewith, with retrospective effect from the date of its institution. The Judge dismissed the suit. The plaintiff appealed to the High Court.

[90] *Held*, having regard to s. 55 of the Court of Wards Act, 1879, as amended by s. 7 of Bengal Act III of 1881, the Lower Appellate Court was right in dismissing the suit.

Held, also, that the sanction given after appeal did not have a retrospective effect.

---

* Appeal from Appellate Decree No. 1506 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 23rd of May 1887, affirming the decree of Baboo Beni Madhub Mitter, Subordinate Judge of Dacca, dated the 28th of December 1885.

† Appeal from Appellate Decree No. 1519 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 26th of April 1887, affirming the decree of Baboo Chunder Mohun Mukerji, Munsif of Munshigunge, dated the 16th of February 1886.

‡ Appeal from Appellate Decree No. 1507 of 1887, against the decree of W. H. Page, Esq. Judge of Dacca, dated the 27th of April 1887, affirming the decree of Baboo Moti Lal Sirkar Second Subordinate Judge of Dacca, dated the 30th of March 1886.

THESE were appeals from the judgments of the District Judge of Dacca, dismissing three suits instituted by Durga Kant Roy Chowdhry as manager under the Court of Wards without the order or sanction of the Court.

Appeal 1506.

The first suit, which was one for recovery of possession of land and for mesne profits, was filed on the 10th December 1883 in the Court of the First Subordinate Judge of Dacca on behalf of Dinesh Chunder Roy, a ward of Court, and proceeded to judgment without the sanction or order of the Court of Wards. The suit was partially decreed; and both parties appealed to the District Judge, the plaintiff for that portion of the claim which had been dismissed in the Court of First Instance.

At the hearing of this appeal a preliminary objection was taken on behalf of the defendants, respondents, that the suit could not legally be brought without the sanction of the Court of Wards, or the Commissioner to whom the duty of granting sanction in such cases had been delegated. This objection was not taken in the Court of First Instance, nor in the grounds of cross-appeal filed on behalf of the respondents; but it was admitted that notice of the objection had been sent by the pleader for the respondents to the pleader for the appellant. On the same day, the 23rd May 1887, an application was filed on behalf of the appellant, accompanied by a letter No. 385 $\frac{\text{M. R.}}{\text{W}}$ of the 16th May 1887, from the Commissioner of Dacca to the Collector of Mymensingh, giving sanction to the institution of the suit the appeal and all other proceedings connected therewith with retrospective effect from the date of its institution before the Subordinate Judge; and it was suggested that this letter was a sufficient fulfilment of the requirements of the law, and conferred on the Court the power of treating the suit as properly instituted from the beginning.

[91] The District Judge dismissed the suit on the grounds that the terms of s. 55 of the Court of Wards Act, 1879, rendered a suit so coming before him one which he was bound to dismiss, and that the only case in which sanction with retrospective effect, giving validity to proceedings already instituted, could be given was stated in para. 2 of that section.

Appeal 1519.

The second suit, which was for a declaration of right to land, for recovery of possession and for mesne profits, was filed on the 12th January 1885, in the Court of the First Munsif of Munshigunge, by Durga Kant Roy Chowdhry, as manager, without the sanction or order of the Court of Wards, and also proceeded to judgment without such sanction or order.

On the 16th February 1886, the Munsif dismissed the suit on the ground that Government being a necessary party had not been made a party to the suit, although an application had been made at a late stage of the case on behalf of the plaintiff for leave to make Government a party. The plaintiff appealed to the District Judge.

At the hearing of the appeal the same objection—the absence of sanction by the Court of Wards to the institution of the suit—was taken on behalf of the respondents; but as the point had not been raised in the Court of First Instance, the learned Judge gave the appellant an opportunity of showing "whether in fact any order or sanction had been given," when the following documents were filed on behalf of the appellant:—

(1) A letter from the Commissioner to the Legal Remembrancer, dated the 31st January 1886, a short time before the suit, which was instituted on 12th January 1885, was decided in the lower Court, recommending, at the

instance of the Collector of Dacca, that Rs. 39 be allowed for the remuneration of associate pleaders;

(2) The sanction of this payment by the Legal Remembrancer;

(3) A report of the Collector of Mymensingh, dated the 19th March 1886, that he had authorised the filing of an appeal;

(4) The Commissioner's memorandum forwarding copy of the above (3) to the Legal Remembrancer for sanction to the filing of the appeal; and

[92] (5) The Legal Remembrancer's reply to the effect that "as appeal has already been filed, it must be continued."

The Judge held that there was nothing in any of these documents "of the nature of an order of the Court of Wards or of an order of any Government official under the Court of Wards to bring the suit;" and accordingly dismissed the appeal.

Appeal 1507.

The third suit was one for accounts upon an indemnity bond, and was filed on 6th October 1885. At the hearing before the Second Subordinate Judge, the same objection, the want of sanction as in the two other suits, was raised on behalf of the defendants. The Subordinate Judge dismissed the suit on the ground that there was nothing to show that the Board of Revenue as Court of Wards had the authority of the Lieutenant-Governor to delegate to the Commissioner the power to order a suit to be brought by a manager on behalf of a ward of the Court. On appeal the District Judge held that the Subordinate Judge was wrong, but dismissed the suit on the ground of want of sanction, and in doing so said: "There arises, however, a further question on which he (the Subordinate Judge) expressed no opinion. Did the Commissioner in fact order the institution of the suit in question? The only document filed on behalf of the plaintiff with reference to this is the document marked Exhibit I, which is a letter from the Legal Remembrancer, giving *his* sanction, and there is nothing to show that any one else gave any order on the subject. Now whatever delegation there may have been to Commissioners, there was none to the Legal Remembrancer and I am compelled to hold that for want of evidence of any order of the Court of Wards or the Commissioner the lower Court was right in dismissing the suit."

The plaintiff in each suit preferred an appeal to the High Court.

Baboo *Unnoda Prosad Banerjee* for the Appellant in the three appeals.

In Appeal 1506,—

Baboo *Rash Behary Ghose* and Moulive *Seraj-ul-Islam* for the Respondents.

[93] In Appeal 1519,—

Baboo *Rash Behary Ghose* and Baboo *Kashi Kant Sen* for the Respondents.

In appeal 1507,—

Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Roy* for the Respondents.

The arguments sufficiently appear from the **Judgments** of the Court (PIGOT and RAMPINI, JJ.), which were as follows:—

Judgment in Appeal 1506.

This is an appeal from a judgment of the District Judge of Dacca, dismissing a suit instituted by a person appointed as manager under the Court of Wards in respect of certain interests, to which we need not refer, relating to property of which he was appointed manager. The suit was dismissed by the District Judge under s. 55 of the Court of Wards Act (Bengal Act IX of 1879) as modified by Bengal Act III of 1881, which adds three words to the

section It is admitted that the suit was filed in the lower Court without the order of the Board of Revenue, or the Court of Wards, or of the Commisssioner, and proceeded to judgment in the original Court without any such sanction. The District Judge has held that the terms of s. 55 rendered the suit so coming before him one which he was bound to dismiss; and the appeal is against that decree.

We are of opinion that the District Judge was right in dismissing the suit. The terms of the section are: "No suit shall be brought on behalf of any ward unless the same be authorized by some order of the Court." The additional words added by Act III of 1881 are immaterial for the purposes of this case. It was suggested in the Court below, and it was argued here, that s. 55 is intended for the guidance of managers and not for the purpose ot absolutely binding Courts of law in respect of suits by managers on behalf of wards. We have to gather the intention of an enactment from its terms, and though it is quite possible that the effect of this enactment was not sufficiently considered by its framers, we think the words used are such as to leave no alternative but the dismissal of the suit brought [94] without *some order*, to use the words of the section, of the Court of Wards. "No suit shall be brought" are words as strong as could well be suggested. They are similar to the words used in English Acts which have been so interpreted, as, for instance, in an Act of a different character referred to in the case of *Boyce* v. *Higgins* (4 C. B., 1). There the words are: "No proceedings shall be taken by any person other than the party grieved without the sanction in writing of the Attorney-General;" and these were held to constitute in that case an absolute ground for holding that the suit could not be brought.

Then it was suggested that, inasmuch as at the hearing of the appeal by the District Judge an application was filed, accompanied by a letter from the Commissioner of Dacca to the Collector of Mymensingh, giving sanction to the institution of the suit, that conferred, as in terms it was intended to confer, upon the Court, by the use of the word *retrospective*, the power of treating the suit as properly instituted from the beginning. It was contended that that document entitled, and if it entitled, it bound, the Court to entertain the suit. We think not. It would be a strange construction of the section which would give the department which, under the name of the Court of Wards, carries on the suit through its manager the power of rendering valid after decree proceedings which up to that date were invalid, and so empower it, if it pleased, in the interests of those for whom it managed the estate to affirm or to disaffirm a suit, according as it had or had not resulted in success. On that ground alone we think it would be impossible, in the absence of express words, to hold that, when the matter was before the Lower Appellate Court on appeal, a sanction then given should validate the proceedings that had been issued. Further, we think that the view expressed by the learned District Judge, that the second paragraph of s. 55 provides for one case only in which a subsequent sanction is contemplated by the section, is a view entitled to great weight. For these reasons we hold that the learned District Judge was right in dismissing the suit; and we dismiss this appeal with costs.

Appeal dismissed.

[95] *Judgment in Appeal* 1519.

This is also an appeal from a decision of the same District Judge, and in this case also the absence of some order by the Court of Wards was raised in the Court of appeal, and the District Judge, taking the same view, dismissed the suit. In this case the learned Judge had to consider, not merely the effect of the absence of any order authorizing the bringing of the suit, but whether

or not there was in existence any order authorizing the bringing of such suit: for it is an unfortunate characteristic of this section which is drawn with singular absence of regard to the rights of third parties who may be affected in costs, at any rate, by its provisions, that nothing is said in the Act as to the form or nature of the order which, under the terms of the section, is made an essential preliminary to the bringing of the suit. The public, the individuals against whom suits may be brought in contravention of the terms of this section, are not in any manner protected from suits being brought loosely and negligently, and in disregard of the provisions of the section, by the enactment of any procedure, with reference to the making or form of the order, such as ought naturally to have been found in the Act. The District Judge says: "All the papers in connection herewith that the pleader is able to show me are: (1) a letter from the Commissioner to the Legal Remembrancer, dated the 31st January 1886, a short time before the suit, which was instituted on the 12th January 1885, was decided in the lower Court, recommending, at the instance of the Collector of Dacca, that Rs. 39 be allowed for the remuneration of associate pleaders; (2) the sanction of this payment by the Legal Remembrancer; (3) a report of the Collector of Mymensingh, dated the 19th March 1886, that he had authorized the filing of an appeal; (4) the Commissioner's memorandum forwarding copy of the above (3) to the Legal Remembrancer for sanction to the filing of the appeal; and (5) the Legal Remembrancer's reply to the effect that 'as appeal has already been filed, it must be continued.' There is nothing in all these of the nature of an order of the Court of Wards, or of an order of any Government official under the Court of Wards, to bring the suit, and I think that this was a fatal objection." Accordingly, the defendant has, in this case, **[96]** partly in consequence of the slovenly manner in which the Act was framed, partly in consequence of the manner in which the suit has been instituted, been put to costs and trouble, which probably no order of this Court, even though the suit is dismissed, can recoup him. We agree with the District Judge in the view which he has expressed, and we think he was right in dismissing the suit. The appeal is dismissed with costs.

Appeal dismissed.

Judgment in Appeal 1507.

This appeal raises a slightly different question. In this case the original Court dismissed the suit on the ground that there was nothing to show that the Board of Revenue, as the Court of Wards, had the authority of the Lieutenant-Governor to delegate to the Commissioner the power of ordering a suit to be brought by the manager on behalf of a ward of the Court. There, the learned Judge on appeal holds that the Subordinate Judge was wrong, and we agree with the learned Judge in entertaining that opinion. But while expressing that opinion, the learned Judge considers the question whether in fact there was an order authorizing the institution of the suit, and he says: "The only document field on behalf of the plaintiff with reference to this is the document marked Exhibit I, which is a letter from the Legal Remembrancer giving *his* sanction, and there is nothing to show that any one else gave any order on the subject. Now, whatever delegation there may have been to Commissioners, there was none to the Legal Remembrancer, and I am compelled to hold that, for want of evidence of any order of the Court of Wards or the Commissioner, the lower Court was right in dismissing the suit." In the two cases with which we have just dealt, the proceedings had gone as far as judgment and decree before the question was raised. Here the question was raised before judgment in the original Court, and the suit was dismissed on the

ground of the absence of proof of some order. Now, upon that point we referred the learned pleaders to the case of *Mahammad Azmat Ali Khan* v. *Ladli Begum* (I. L. R., 8 Cal., 434) before their Lordships of the Privy Council under the Pensions Act, in which they held that, where it appeared in a suit which [97] had been entertained under that Act that the certificate required by its provisions had not been issued, and where the Court stayed the proceedings and abstained from giving final judgment, but upon the filing of the certificate proceeded to give final judgment, the Court was entitled to do so. That case, however, depended, as we understand it, upon the special terms of that Act, s. 6 of which enacts that a Court, on receiving such a certificate, is *bound* to take cognizance of the claim; and their Lordships held that, upon the certificate being filed, the Court finding a pending suit, although irregularly instituted, was bound to take cognizance of the claim in that suit. It is to be observed that s. 4 of that Act, prohibiting a Court from taking cognizance of a suit without a certificate, commences with the words "save as hereinafter provided," which must be taken of course to refer to s. 6 as well as to the other portions of that division of the Act to which it applies. In the present case, too, it does not appear that any application was made to the second Subordinate Judge to stay proceedings pending the obtaining of a sanction. We think that in this case also the decision of the District Judge was right, and we have only to add that this case again arises in part from the absence from the Act of any attempt at laying down a procedure to be followed with respect to the issue of the order which the Act requires as a preliminary condition to the institution of a suit. We shall bring those cases to the notice of our colleagues in the hope that perhaps some rule may possibly be framed to remedy the consequences, in some measure at least, of the unfortunate drafting of this enactment. We dismiss the appeal with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[As regards wards under the Court of Wards, *see* also (1890) 14 Mad., 289; (1889) 13 Mad., 197; (1891) 18 Cal., 500; (1889) 17 Cal., 688.]

[98] PRIVY COUNCIL.

The 2nd May, 1888.

PRESENT :

LORD WATSON, LORD HOBHOUSE AND SIR R. COUCH.

Chand Kour and another............Defendants

versus

Partab Singh and others...............Plaintiffs.

[On appeal from the Chief Court of the Punjab.]

Res judicata —*Dismissal of suit for default—Difference in causes of action — Civil Procedure Code, ss. 13, 102, 103.*

The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favour of the defendant as *res judicata*. When read with s. 103*, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favour.

Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favour of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1877), Civil Procedure Code.

Held, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen.

APPEAL from a decree (16th May 1884) of the Chief Court, modifying a decree (2nd January 1883) of the Commissioner of the Jullundur division, varying after a remand to the Judicial Assistant Commissioner of the Gurdaspur district, and a return thereto (30th September 1882), a decree (16th May 1882) of the latter Judge.

The suit out of which this appeal arose was brought on the 11th February 1882 by the heirs, brother's sons, of a proprietor deceased in 1848, for a declaration that a gift made in 1879 by his widow, who had succeeded to his estate, would be inoperative as against their rights of inheritance whenever she should die. But the only question on this appeal was as to the application of ss. 102 and 103, Civil Procedure Code.

[99] Mussamut Chand Kour, the donor, was the widow of Sirdar Kahan Singh, who having gone, with his only son by her, to Multan, in 1849, was there killed, and the son also. Kahan Singh was a sharer to the extent of rather more than 200 ghumaos in villages Aliwal and Man Sandwal in the Gurdaspur district, where the widow remained ; and his only other child was

* [Sec. 103 :—When a suit is wholly or partially dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside ; and, if it be proved that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

Decree against plaintiff by default bars fresh suit.

No order shall be made under this section unless the plaintiff has served the defendant with notice in writing of his application.]

a daughter, who in after years had one son, Perak Singh. The widow, on the 29th March 1879, executed the deed of gift, now disputed by the sons of Kahan Singh's brothers, who in this suit claimed a declaration that it should not affect their rights to accrue on the death of the widow. The deed declared: "As I have kept with me my daughter's son, Perak Singh, son of Beja Singh of Majitha, now residing at village Man, from his birth, and have brought him up like a son, therefore I have, without any receipt of money, made a gift in his favour of the following property:" giving a list of Kahan Singh's holdings, according to the *khewat* of the villages above named.

Before this gift was made, on the 1st August 1878, two of the plaintiffs in the present suit, viz., Partab Singh and Golab Singh, sued the widow claiming a declaratory decree, and an injunction forbidding the alienation of Kahan Singh's property. A further petition was filed on 30th August by them, asking that she might be restrained from selling or mortgaging pending the decision of that suit. The plaintiffs failed to appear at the hearing, and the result was that, on the 7th October 1878, the Judicial Assistant Commissioner made the order, which is set forth in their Lordships' judgment, dismissing the suit under s. 102, Civil Procedure Code.

For the defence of the present suit, it was set up that the order, dismissing the former one, barred it. The widow also alleged her right to make the gift to her daughter's son, who had, as she maintained, been adopted by her to Kahan Singh, under a power given to her by him on departing.

The Judicial Assistant Commissioner decreed in favour of the plaintiffs, holding that the present suit was not barred under s. 13, nor was within the provisions of ss. 102, 103; there not having been, in the former suit, any claim to set aside an existing gift. He also found that the alleged power to adopt [100] was not proved; and held that the custom of descent, giving the inheritance to the brother's sons, as being nearer than a daughter's sons, could not be set aside.

The Commissioner, after a remand for further evidence, found the authority to adopt had not been established. He supported the gift only so far as it might relate to the widow's own estate. The decree of the lower Court was accordingly, in the main, upheld.

Both parties appealed to the Chief Court. That Court (BADEN-POWELL and BURNEY, JJ.) held that the suit was not brought upon the same cause of action as the previous one had been; the gift having been a new and subsequent act. The suit might, therefore, be maintained. As to the alleged adoption, the Judges were of opinion that, though something might have been said by the Sirdar, on his going on military service with his son, about the succession in the event of his death, no such proof of definite authority to adopt had been given as would be necessary before the ordinary course of succession could be set aside.

The result was a decree in the plaintiffs' favour, declaring that the deed of gift of 29th March 1879 was void and of no effect in respect of all the lands which it purported to convey to Perak Singh, as against the plaintiffs' reversionary interests.

On this appeal,—

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the appellants, argued that the suit of 1878, having been dismissed under s. 102, the present suit fell within the prohibition of s. 103. The claim then made was more general than the present, having in view any mode of alienation by the widow, which it sought to have prohibited. The widow's making a deed of gift was included in the

general term alienation. If a claim or ground arose out of, and depended upon, the same right as that which was in question in the former suit, it would come under s. 13 as *res judicata*. *Hunter* v. *Stewart* (13 L. J. Ch., 349), *Thakur Shankar Baksh* v. *Daya Shankar* (L. R., 15 I. A., 66; I. L. R., 15 Cal., 422) were referred to.

The respondents did not appear.

[101] Their Lordships' **Judgment** was delivered by

Lord Watson.—In this case the defendants in the original suit, who bring this appeal, are: (1) Mussamut Chand Kour, widow of the late Kahan Singh; and (2) Perak Singh, to whom the first appellant in 1879 made over by deed of gift the fee of her deceased husband's estate. The plaintiffs and respondents are the four nearest agnates of Kahan Singh, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative and cannot affect their reversionary rights. It is admitted that Chand Kour has merely a widow's interest in the estate; and it is also admitted that Parak Singh, in whose favour she executed the deed of gift, is a stranger to the succession. The only point which has been argued on behalf of the appellants is, that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the respondents, Partab Sing and Golab Singh, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased, which was then in the possession of his widow. The plea in bar can only affect these two respondents, and cannot exclude the other respondents from obtaining a declaratory decree in this suit, which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

The proceedings which followed upon the plaint in the suit referred to were these: A defence was lodged for the widow, and on the 7th October 1878 the Judicial Assistant Commissioner pronounced this order, which has become final: "As the plaintiff has not appeared, though waited for up to the rising of the Court, and as the defendant, who is represented by her agent, denies the plaintiff's claim, it is ordered that the case be struck off under s. 102, Civil Procedure Code."

The provisions of ss. 102 and 103 of Act X of 1877 require therefore to be considered. The dismissal of a suit in terms of s. 102 was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however, [102] when read along with s. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The Judge of First Instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two Judges of the Chief Court of the Punjab upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the Statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it,

in whole or in part or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second defendant. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise, and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different. If there had been a deed of gift in 1878 it might have afforded another and separate ground for granting the remedy which was prayed in that suit; but in point of fact it did not exist; and it is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising.

[103] Under these circumstances their Lordships are of opinion that the judgment appealed from ought to be affirmed, and the appeal dismissed, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[As regards the point of dismissal not being res judicata this case was followed in (1909) 14 C.W.N., 298; (1907) 6 C.L.J., 362; *see* also (1893) 15 All., 359; (1898) 22 Mad., 221; (1907) P.R., 121; (1912) 15 I.C., 863.

As regards '*cause of action*' *see* also (1895) 18 All., 131; 432; (1897) 21 Mad., 153; (1901) P.L.R., 139; (1902) 25 Mad., 736; (1907) P.R., 57; 28.

As regards reversioner's suits, *see* also (1904) 27 Mad., 588.]

[16 Cal. 103]

PRIVY COUNCIL

The 3rd May, 1888.

PRESENT:

LORD WATSON, LORD HOBHOUSE AND SIR R. COUCH.

Kamini Debi............Plaintiff

versus

Asutosh Mukerji and others............Defendants.

Asutosh Mukerji and others............Defendants

versus

Kamini Debi............Plaintiff.

[On appeal from the High Court at Calcutta.]

Res judicata— Civil Procedure Code, s. 13— Substantial matters in issue decided in a former suit—Right of shebait-ship of a family deb-sheba under a will.

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain

the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, offerings to the deity."

One or other of the brothers then for some years managed the estate as shebaits, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait.

In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it.

Held, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will, constituting, [104] as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgment of both Courts. As to this no reason had been shown in appeal for a different conclusion.

APPEAL and cross-appeal from a decree (15th September 1883) of the High Court, in part varying, and in part affirming, a decree (3rd September 1881) of the Subordinate Judge of the District of the 24-Pergunnahs.

The main question on these appeals was whether the validity of provisions in a will constituting a family *deb-sheba*, and providing for the maintenance of the members of the testator's family, had been directly and substantially affirmed by a decree in a suit in which the present plaintiff, claiming as the daughter and heiress of the testator, was a party defendant, those who were plaintiffs in the former suit being now defendants.

The object of the present suit, which was instituted on the 6th May 1880 by the only daughter of the testator, the late Ramkomul Mukerji, was to obtain from the Court the proper construction of his will; to have it declared what provisions in it were lawful and valid. and which of them were invalid; to have declared the rights of the several parties entitled to the estate; to obtain possession of such part of the estate as she might be entitled to, and to have an account directed; to have ascertained and declared what was the nature and interest of the religious foundation, or *deb-sheba*; to have partition of that part of the testator's estate in respect of which it should be determined that the members of the family had joint rights, if any. Lastly, Kamini Debi claimed that a proper person should be appointed shebait, whether the plaintiff or any one else.

The will was dated 23rd Magh 1251, or 4th February, 1845, and was registered. It was addressed to the testator's eldest wife, Baroda Sunderi, and to his brothers Ramkumar, Modhu Sudon, and Chunder Mohun.

After reciting that his properties, consisting of lands, houses, money and Government promissory notes, were his own and self-acquired, and directing the payment of his debts and the maintenance of his father, a resident of Benares, and the payment of the expenses of the marriage of this appellant and of the [105] gift of a house and certain lands to her, and of the payment of certain further sums to her and her widowed sister, and to the testator's three wives,

and to the widow and daughters of his deceased brother Dino Nath, and to Kamini Debi, the testator's daughter, the will continued thus:—

"All that remains after the above legacies, etc., are paid, I give unto the Thakur Gopaljiu, consecrated by my mother. You four are hereby appointed as shebaits. The daily worship of Gopaljiu and Sridhur and Banlinga (Siva) having been performed out of the above estate, the family of us, five brothers, shall be supported from the prosad (offerings to the deity), and you will also observe in honour of the deity Iswarjiu (Gopal) the ceremonies of Dole-jatra, Doorga-puja, Ras, Hindola, Nundotsab and all casual and daily ceremonies, etc., that is to say, the marriage ceremonies of your sons and daughters, the investiture of sons with the sacred thread, and the sradhs (offerings of funeral cakes) of father and mother. You are to pay to my *paratpar* (spiritual guide) an allowance of Rs. 5 every month, and Rs. 20 for the expenses of the family at Bakulia. You are authorized under this will to draw out, on giving receipts for, my Government promissory notes, which are deposited in the Collectorate of the 24-Pergunnahs as security for both of you, my second brother Ramkumar Mukerji, and for you, my third brother, Modhu Sudon Mukerji, and to carry out all the provisions aforementioned. You are further empowered to take back those promissory notes on giving receipts for the same, to draw the interest accruing thereon, and to sell them, etc., if necessary. All my ornaments and utensils of gold, silver, brass, pewter, etc., shall be divided equally among my three widows. You shall continue to reside with the family from generation to generation in those apartments of the dwelling house at Kidderpore in which you live at present. To you, my eldest wife, Baroda Sunderi Debi, I have given a separate deed of permission to adopt a son in order to secure for myself the Jal-pinda; and should you die before adopting a son as aforesaid, my second wife, Srimati Doorgamoni Debi, shall have the power to adopt a son and on her death my third wife, Koilasbasini, is authorized to do so. The said adopted son shall when he arrives at majority, be a manager in addition to the four mentioned above, that is to say, he shall make the management in the same way as you four shall do. Of the four persons aforesaid, should you and your heirs, as well as the adopted son when he arrives at majority, act contrary to the true religion of my ancestors, he shall be forthwith removed from the management mentioned in this my will. My three nephews (sisters' sons), namely, the three brothers Gonesh Chunder Banerji, Rango Lal Banerji and Hurri Mohun Banerji, of whom Hurri Mohun is a minor, shall get their food and raiment as they are doing at present; and when they shall build their separate houses, they shall get the house formerly belonging to Jagamohun Shaha, which has been purchased benami in the name of Anund Chunder [106] Banerji. My brothers and the others shall use my horses and carriages, etc., and keep (the latter) in repair in the same manner as they are now doing, and on your death these responsibilities shall similarly devolve on your heirs in the order of seniority, if they adhere to the ancient religion. No one shall have power to alienate the aforesaid properties by sale, gift, *hiba* or otherwise."

The testator died on the 1st of August 1845.

On the 11th September 1846 a certificate under Act XX of 1841 was granted to Ramkumar Mukerji alone, who continued to manage until his death in December 1859, when his brother Modhu Sudon succeeded him, retaining the management till his departure to Benares, about April 1878, at which place he died in October of the following year. His son Asutosh, one of the defendants in the present suit, managed the estate after his father's departure as his agent, and on his death assumed the office of shebait and manager of the estate of the deceased Ramkomul. The defendants in this suit were the heirs and representatives of Modho Sudon, Nos. 1 to 7; 8, Damayanti Debi, the widow and heiress of the youngest brother Chunder Mohun; 9 and 10, the daughters of the fourth brother Dinonath, who died before the testator; 11 to 16 the representatives of the second brother Ramkumar. They all supported the will. Defendants 17 to 22 were the plaintiff's children, and 23 was her sister, a childless widow.

The defendants, besides supporting the will, urged that the suit was barred as *res judicata*, by the decision in a previous suit instituted by Asutosh and his two brothers, defendants 1, 2 and 3 in the present suit in which suit the present plaintiff, was among others a defendant.

Damayanti Debi, No. 8, disclaimed the office of shebait in favour of the respondent Asutosh, who was, as she said, senior to all the other members of the family. He by his statement claimed as senior member of the family to be entitled, in accordance with the terms of the will, to the office.

Munmohini alleged that she, if the office was to go by seniority, was the eldest member of her father's family.

The suit, in which was made the decree on which the present respondents and cross-appellants relied as a conclusive adjudication barring the present suit, was brought on the 15th July 1863. [107] In that suit the plaintiffs were Asutosh Mukerji and his two brothers; and the defendants were the then shebait Modhu Sudon, Kamini Debi (the present appellant), with her husband (to whom she had been married after her father's death) Adhur Chunder Banerji, and also Bissambher Mukerji, with other members of the family. The plaint charged waste against the widow Baroda Sunderi and Modhu Sudon, two of the shebaits named in the will, in that they, in March 1862, had sold to the defendant Adhur Chunder Banerji one of the properties which had passed under the will, and asked to have that sale set aside; complaining also of the defendant Bissambher that he was wrongly obtaining the issue of attachments on the property. No specific relief was claimed against the defendant Kamini. She, however, answered in her written statement that the will was not genuine, and had never been acted on, claiming her father's estate by inheritance. The issues recorded in that suit questioned the genuineness of the will, the right of the plaintiffs to sue, and the validity of the sale. The Court of First Instance, the Principal Sudder Ameen, held that the plaintiffs had a cause of action; that the will was genuine; and that the testator had effectively ordained that all the members of his family, as well as those of his brothers' families, should be maintained out of the *prosad* instead of directing a more general distribution. He referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee* (8 Moore's I. A., 69). His decree declared that the sale to Adhur Chunder Banerji was invalid, and that Bissambher Mukerji had no right to have a judgment, obtained by him against Ramkumar, satisfied out of the testator's estate which had passed under his will.

Kamini Debi and Bissambher appealed to the High Court, and a judgment of a Divisional Bench dismissing their appeals was delivered on 25th May 1865. The conclusion of that judgment was as follows:—

"On the whole, then, we are of opinion that the will is genuine and untainted by fraud; that it has been carried into effect by the devisees; that the endowment is both religious and secular, and that the wishes of the testator have been departed from; that the plaintiff, as having a vested interest in the will, has a right to sue to protect that interest; that the [108] sale to Adhur Chunder, who had every reason to know the circumstances of the family, and who never impugned the will for years, was improper and should be set aside; that the lien attempted to be made out by Bissambher fails on every ground; and that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation."

The first of the issues fixed in the present suit in the Court of the First Subordinate Judge, Baboo Bhuban Chunder Mukerji, was whether the suit was barred under s. 13 of the Civil Procedure Code by the previous adjudication of the subject-matter. Having also fixed issues on other questions, among them, as to the validity of the will, and the construction to be placed on its

provisions, he gave judgment to the effect that the decree in the suit of 1863 was a final determination of the matters in issue in the present suit. He considered that the testator's whole property was absolutely vested in the Thakur, and dismissed the plaintiff's claim by right of inheritance to the estate of her father, as well as her claim to be the sole preferential shebait.

His decree further ordered that the property having been vested in the Thakur, the plaintiff's claim to a partition be dismissed, and that the heirs and descendants of the five brothers, specifying them, "who are by Hindu law entitled to maintenance from the said five persons, shall be entitled to participate in the daily *prosad* of Gopaljiu Thakur as well as to reside in the Kidderpore dwelling-house." The will [*sic*] continued :—

"It is further declared that the expenses of the religious portion only of the ceremonies of sradh of the parents of the aforesaid persons, of the marriages of their sons and daughters and of the jagnapobita ceremonies, shall be defrayed out of the income of the debutter estate, but on no account shall the said income be used in feasting Brahmins, etc., and other secular offices in connection with these ceremonies. It is hereby also declared that the said dwelling-house, along with the other properties of the testator, shall be under the control and management of the shebait for the time being, who shall look to the necessary repairs of the building as next in importance to the daily worship of Gopaljiu Thakur and distribution of *prosad* to the members of the family. The shebait for the time being shall strictly carry out the other provisions of the will concerning Doorga-puja, the celebration of Dole-jatra, Ras, Hindola and Nundotsab. If sufficient funds should not be forthcoming from the estate for their due celebration, then the religious portion of the ceremonies, viz., the Pujas, etc., shall alone be performed. The defendant Damayanti Debi, who has the preferential right to be shebait, having declined to accept the duties of **[109]** shebait, the defendant Asutosh Mukerji, as the next senior member of the family, shall conduct all the duties in terms of the will."

On an appeal preferred by the plaintiff to the High Court a Divisional Bench (Sir R. GARTH, C.J., and W. MACPHERSON, J.) gave judgment on the construction of the will without referring to the issue in regard to the suit of 1863. The judgment referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee* (8 Moore's I. A., 69) and to *Ashutosh Dutt* v. *Doorgachurn Chatterjee* (I. L. R., 5 Cal., 438 ; 5 C. L. R., 266), and did not support the opinion that the property of Ramkomul had absolutely vested in the Thakur, though the worship was a charge on the estate. The judgment proceeded thus :—

"It is clear that nothing was further from the intentions of the testator than that the plaintiff (and her sister) should, subject to the debutter trusts, absorb the whole family property. It would also seem foreign to the wishes of the testator that those members of his family only who were living at his death should take the whole of those proceeds to the exclusion of those who might come into existence after his death. We think his intention evidently was, that his own family and the families of his four brothers should all be maintained in perpetuity out of the *prosad* or surplus proceeds after providing for the festivals and services of the idol, and the specific bequests mentioned in the will. We take it to be clear, however, that according to the doctrine laid down in the *Tagore case* (L. R., I. A., Sup. Vol., 47 ; 9 B. L. R., 377), such a trust as this in perpetuity would be contrary to Hindu law. But we think that, if possible, we are bound to carry out the intentions of the testator in so far as they can be carried out in a legal manner ; and we consider that this may best be done by construing the will as a devise of the surplus proceeds for the benefit of the heirs of the testator himself and of his four brothers in equal shares, so that the heirs of each of the five should be entitled to one-fifth of those proceeds.

"The next question is, whether the plaintiff is entitled under the circumstances to ask for a partition ; and we think she is. A commissioner or commissioners must be appointed to carry out the partition ; and if the parties cannot agree amongst themselves to appoint a commissioner or commissioners, the Court below will make the appointment."

The decree of the High Court was as follows:—

"It is ordered that the decree of the Court below, except in so far as it declares that the defendant Asutosh Mukerji is entitled to carry on the worship, be set aside, and this Court doth direct that an ample portion of the family property be set apart for the worship, festivals, etc., as [110] provided in the will, and that the residue be partitioned into five shares to the heirs of the five brothers respectively, each section of the family holding their one-fifth share jointly, but subject to partition *inter se* if any of them should take proceedings for that purpose. And it is decreed that the Court below do appoint a commissioner or commissioners with a view to carry out the directions given above. And it is further ordered and decreed, in accordance with the finding of the Court below, that the defendant Asutosh Mukerji do continue to be shebait, and as shebait hold such portion of the family property as will be set apart for the worship, festivals, etc."

The present appeal having been filed by Kamini Debi, the defendants Asutosh and the others obtained leave to cross-appeal with reference to the effect of the decision in the suit of 1863, which the judgment of the High Court omitted to notice.

Mr. *R. V. Doyne*, for the Appellant.—The plaintiff did not seek to bring into question the genuineness of the will, or to dispute that the maintenance of the *deb-sheba* was a charge on the testator's estate, in whatever form the charge might be expressed; and she was not precluded by the decree of 1865, establishing those matters, from contending that there was no valid disposition in the will of the surplus proceeds of the estate. The High Court had rightly held that the testator's real object was to provide for the members of his family in perpetuity, and to prevent alienation; but the result should have been, not that at which the High Court had arrived, but that this object failed, as tending to a perpetuity, in a manner contrary to the principle of Hindu law on this subject. The true conclusion was, that the provisions of the will could not be carried out, except as to the maintenance of the *deb-sheba*; and that the plaintiff, subject to the latter provision, was entitled to the surplus and residue of the estate by her hereditary title. There had been no such effective devise, as had been supposed by the High Court, of the surplus proceeds for the benefit of the heirs of the testator and of his four brothers in equal shares; and if attempted it would have been too remote and ineffectual for the reasons explained in the *Tagore case* (L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377). Supposing that Asutosh came in as shebait, giving maintenance to all the members of the families respectively, how long was that state of things to last? And, as addressed only to the point of *res judicata*, these [111] questions were not such as had arisen when the suit of 1863 was before the Courts. Circumstances had varied the position of the parties since the judgment of 1865. That decision it was not sought to dispute. But the estate with the accumulations of after-years could not have vested in its entirety. The judgment in *Sonatun Bysack* v. *Juggut Soonderee Dossee* (8 Moore's I. A., 69) did not completely decide the question. If it were contended that this should have been brought forward by the present plaintiff when defendant in the suit of 1863, the answer was that the state of things now existing had not then arisen. He referred to the judgment in *Soorjeemoney Dassee* v. *Denobundo Mullick* (6 Moore's I. A., 526).

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the Respondents and cross-appellants, were not called upon.

Their Lordships' **Judgment** was delivered by

Lord Hobhouse.—Their Lordships do not think it necessary to call upon counsel for the respondents; but they are of opinion, after hearing the very elaborate and careful argument of Mr. *Doyne*, that they are bound to

decide that the greater portion of the matter comprised in these appeals has been decided in a former suit.

The question arises under the will of the testator Ramkomul, which contains a gift of the residue of his estate to a family idol. Then he appoints four persons, his three brothers and one of his wives, to be shebaits of the idol, and he directs them to perform certain matters of ceremony and worship, and after that he says, "the family of us five brothers shall be supported from the *prosad*," which is translated "the offerings to the deity." That is the whole of the will that contains any gift, excepting specific and pecuniary legacies, to the members of his family.

The testator died in the year 1845, and the property was managed apparently in accordance with the will by one or other of his brothers, who were shebaits until October 1879. The survivor of the brothers was named Modhu Sudon, and he remained in the management for a great number of years. He died in 1879, and then his son Asutosh, the defendant in the present suit, took the office of shebaitship and the management [112] of the estate, and has managed it ever since. There seems to have been no quarrel or litigation in the family until the year 1863, when the plaintiff's mother, who was one of the shebaits, died, and the plaintiff became the heir-at-law of the testator. Immediately after that event she applied for a certificate of the usual kind authorising her to collect the assets of the testator, on the ground that she was entitled to the property; that is to say she challenged the validity of the will. This and other causes seem to have led to the suit of 1863, which is the suit that bears on the present case.

Now the construction of that suit was in this fashion. The then shebait was Modhu Sudon. The sons of Modhu Sudon, of whom the principal appears to have been the present principal defendant Asutosh, complained that he had made improperly a sale of part of the testator's property to one Adhur Chunder Banerji. They also complained that a person of the name of Bissambher, who was an execution-creditor of Ramkomul, was improperly attaching his assets, and they made Modhu Sudon, Adhur Chunder, and Bissambher defendants to the suit, attacking the purchase of Adhur Chunder and the execution proceedings of Bissambher. But they also made the present plaintiff, the heir-at-law, and the other members of the family, parties to the suit, and the suit was in effect one for establishing the will against everybody concerned. The prayer was, "that the Court on giving effect to the above will may be pleased to set aside the purchase by the defendant Adhur," release the items attached by the decree-holder, and prohibit the defendant Modhu Sudon "from infringing the terms of the will hereafter."

The present plaintiff appeared to defend that suit, and in her defence she raised the question of the genuineness of the will. She prayed the Court "to dismiss this unjust claim and uphold rights which I have to the properties left by my deceased father." She claimed as heir-at-law, and on the face of her written statement there does not appear to be any ground stated excepting the charge as to the genuineness of the will. But when the issues came to be stated a wider question was propounded. There was not only an issue as to the genuineness of the will, but a further issue whether or no the plaintiffs had any [113] right to have instituted the suit. That is a very vague issue, and might mean much or little, but what it did mean is plain from the judgment delivered in the suit. In dealing with that particular issue the Principal Sudder Ameen says this: "The Court is decidedly of opinion that the plaintiffs have a right of action, inasmuch as their vested right has been infringed upon by the acts of the trustees," that is, of the shebaits; and, again, "that the plaintiffs have

as well a vested right of maintenance from the *prosad* of the idol, as a contingent one of superintendence and management of the endowed property cannot, if the will is genuine, be doubted for a moment." That is to say, he held that the plaintiffs had a right of action, not because anything was given directly to them, but because they had a right of maintenance through the *prosad* of the idol. If they had not that right they could not have sued, but he maintains the gift to the family which is made through the sides of the idol from the offerings given to the idol. To support his finding upon that issue he has to examine the will very elaborately. He does so, and examines the authorities which are applicable to the case, and the conclusion he arrives at is this. It is stated several times over in the judgment, but it is only necessary to quote one passage from the record. "The gravamen of the defendant's contention now is, that the endowment was illegal, as far as the Hindu law was concerned, and it was only nominal, it being got up by the brothers of the testator, who were chiefly interested in giving effect to the will. On carefully weighing these objections, and considering all the surrounding circumstances of the case, I am of opinion that the provisions of the will are no more repugnant to the principles of the Hindu law than was the endowment created by it nominal." Then he refers to a decision of this Board, and in applying it to the present case goes on: "The will under review, after providing for legacies, created an endowment on behalf of the family idol, and directed to appropriate the surplusage, if any, for the benefit of the children of the trustees. Viewing then the will in its true light, and analysing its provisions with reference to the principle recognized in the above authoritative ruling, I am of opinion that the will is perfectly legal," and he decrees accordingly: "That the suit be decreed; that the will be declared genuine," and so [114] forth, and he gave costs against the present plaintiff. He could not have decreed that suit unless he had held that there was, first, a valid gift to the idol, and, secondly, that the plaintiffs in that suit, who were not heirs of the testator and had nothing given to them excepting through the idol, had a valid gift made to them.

The present plaintiff was not satisfied with that decree, and she appealed to the High Court, and one of the grounds of appeal was thus stated: "The alleged will of Ramkomul Mukerji, even if genuine, was revoked by his conduct, and is invalid under the Hindu law, and indefinite and incapable of being carried out with reference to the different provisions of it, the trust being nominal," that is, illusory. Another ground was, "that the rights of all parties under the will, if genuine, have not been properly interpreted." Upon that the High Court again examined the question of the validity of the will. It appears to have been argued on behalf of the defendant Bissambher more than on behalf of the defendant Kamini, the present plaintiff, but it was argued before them "that, while holding the will to have been really signed and registered by Ramkomul, we should consider it as a scheme for retaining property which was in reality joint in the hands of all the members, and for holding the creditors of the estate or of any member of the family at defiance." They examine the arguments against the validity as distinguished from the genuineness of the will, and hold that it is valid, and they sum up thus: "On the whole then we think that the arguments both for Kamini and for Bissambher, that the will is either a nullity or a disguise to throw dust in the eyes of creditors, fail when weighed against" the considerations that they mention; and they conclude "that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation." They therefore dismiss the appeal with costs.

Their Lordships take that to be a decision that the will contains a gift of the entire property to the idol; that the members of the family take only

maintenance from the offerings made to the idol; and that it is a legal and valid gift in every respect.

Now what is the present suit? The present suit appears to their Lordships to be founded upon the total, or at least the partial, invalidity of the will. The first prayer of the plaint is "That upon a proper interpretation of the will of the said [115] Ramkomul Mukerji the Court will be pleased to determine and settle those provisions which are valid and lawful, and those which are illegal and invalid." Unless something in the will is illegal and invalid the plaintiff has no title whatever to get accounts or possession, or to do anything but to make a claim to the shebaitship. That she may do on the supposition of the entire validity of the will. It is not alleged that she has not received proper maintenance out of the offerings to the idol. She sues on the ground that there is some invalidity somewhere in the will, and that she, as heir-at-law, is entitled to take advantage of it.

Upon that view of the suit the Subordinate Judge held that the matter must be taken to be *res judicata*, having regard to the issues decided in the suit of 1863, and he ordered that the plaintiff's claim to get the estate of her deceased father by right of inheritance be dismissed. He also dismissed the plaintiff's claim for a partition, and he declared that the heirs and descendants of the five brothers, "who are by Hindu law entitled to maintenance from them, shall be entitled to participate in the daily *prosad* of" the idol, and to reside in a certain dwelling-house which was another matter in dispute. Her claim to be the preferential shebait of the idol was dismissed, not as *res judicata*, but as not warranted by the will.

An appeal was preferred from that decree to the High Court which differed in opinion from the Subordinate Judge. On reading the judgment of the High Court it does not appear that they noticed the suit of 1863 at all. They do notice the plaintiff's application for a certificate in 1863, but the suit they leave entirely unnoticed. Why that happened is not explained, but it is a matter complained of in the cross-appeal presented by Asutosh. Their Lordships are left without any means of understanding how it was that the judgment came to be delivered without any observation upon the suit of 1863. However, the matter has been fully argued now, and their Lordships are of opinion that the view of the Subordinate Judge was right.

The case is governed by s. 13 of Act X of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863, in a suit in which the present plaintiff was defendant, and the present defendants were plaintiffs. Their Lordships' reasons have been assigned for thinking that the [116] question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid, and passed the entire estate to the idol; and that the same question cannot now be raised.

Their Lordships express no opinion whatever whether they agree or disagree with the High Court on the construction of the will of Ramkomul. It may be that the opinion of the High Court now expressed is preferable to the opinion of the High Court expressed in the suit of 1863, but they consider that that question is not open to them. The matter was decided between the parties and never can be re-opened.

Then there remains only one question to be decided in the suit, and that is whether the plaintiff has a preferential title to be shebait. That depends upon one sentence in the will, which was written in Bengali, and their Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the Bengali grammar,

and he delivered as his opinion that the effect of the will was to constitute a shebait the senior in age of the heirs of the original shebaits. The actual senior has disclaimed. The defendant Asutosh is the next senior in age, and therefore the Subordinate Judge held that Asutosh is the proper shebait. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

The result is that the appeal of the plaintiff wholly fails and the cross-appeal wholly succeeds. The High Court, in their Lordships' opinion, ought to have dismissed the appeal to them with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect, and the usual consequences will follow. The appellant Kamini must pay the costs of the appeal and the cross-appeal.

Appeal dismissed; cross-appeal allowed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers.*

Solicitors for the Respondents and Cross-appellants: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[*See* also (1889) 14 Bom., 206.]

[117] APPELLATE CIVIL.

The 7th December, 1888.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANNERJEE.

Kalup Nath Singh............Plaintiff

versus

Lala Ramdein Lal and others............Defendants.*

Partition—Suit to stay partition by Collector—Bengal Act VIII of 1876, ss. 267, 105—Specific Relief Act (I of 1877), s. 42—Declaration of specific rights—Limitation.

A person bringing a suit under s. 42 † of the Specific Relief Act to stay a partition directed by the Collector under Bengal Act VIII of 1876, on the ground that a private partition has

* Appeal from Appellate Decree No. 554 of 1888, against the decree of H. F. Mathews, Esq., Judge of Shahabad, dated the 15th of December 1887, reversing the decree of Baboo Koilash Chunder Mukerjee, Subordinate Judge of that district, dated the 7th June 1887.

† [Sec. 42 :—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Discretion of Court as to declarations of status or right.

Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

Bar to such declaration.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.]

already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of, in severalty some specific portion of the property again sought to be partitioned by the Collector ; and such person is entitled to no declaration affecting the rights of other sharers in the parent estate. *Khoobun* v. *Wooma Churn Singh* (3 C. L.R., 453) distinguished.

Semble.—Section 26 of Beng. Act VIII of 1876 does not bar the right to bring an action, but merely limits the effect of the decree unless the action is brought within a certain time.

THIS was a suit under s. 42 of the Specific Relief Act, brought on the 25th September 1886, for the purpose of staying certain *butwara* proceedings directed to be effected by an order, of the Board of Revenue, dated the 8th April 1886, which order confirming the order of the Collector, decided that there was no sufficient evidence of a private partition having taken place regarding the land in suit. The plaintiff alleged that he was one of the proprietors of Mehal Soa, which consisted of eight villages, entered as an entire estate in the Collector's *towzi*; that the whole of this mehal had been privately partitioned between the several co-sharers, and that therefore no further partition proceeding could be had under Beng. Act VIII of 1876.

The defendants contended that the mehal had not been privately partitioned, and that the question was *res judicata*.

[118] The Subordinate Judge found that there had been a private partition, and that a certain portion of the mehal, which was in jungle, was joint ; he therefore held that the *butwara* proceeding under the Act should be stayed, save as regards a portion of the estate which was under jungle.

The defendants appealed to the District Judge, contending for the first time that the suit was barred by limitation under s. 26 of Bengal Act VIII of 1876 ; the District Judge held that the suit was so barred, the plaint not having been filed till more than five months after the Board's order for *butwara*, and the decree of the lower Court being of such a nature as to affect the progress of the proceedings taken under the Act ; he therefore reversed the decision of the Subordinate Judge.

The plaintiff appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the Appellant, contended that s. 26 of Beng. Act VIII of 1876 did not apply, and that private partition had been sufficiently proved, citing *Khoobun* v. *Wooma Churn Singh* (3 C. L. R., 453).

Baboo *Mohesh Chunder Chowdhry* for the Respondents.

The **Judgment** of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

Petheram, C.J.—This is a suit brought by the plaintiff against the defendants to obtain certain declarations, and the facts of the case are, that the plaintiff and the defendants are co-sharers in a mehal called Mehal Soa, and that the defendants had taken proceedings before the Collector for the purpose of having that mehal partitioned amongst the co-sharers. The plaintiff objects to these proceedings on the ground that the mehal in question has already been partitioned, and he has accordingly brought this suit.

There are six prayers to the plaint. They are : (*a*) that it be declared that the lands of Mehal Soa have, from before, been separately in possession

of the puttidars according to private partition ; (*b*) that it be declared that the defendants, the applicants for the *butwara*, have no right to get it partitioned by the Collectorate ; (*c*) that the orders of the Revenue Court, [119] the last of which was passed by the Board of Revenue on the 8th April 1886, be set aside ; (*d*) that a rubocar be sent to the Collectorate of this district for stopping the *butwara* proceedings till the disposal of this case by the Court ; (*e*) that such other relief be granted by the Court as the plaintiff may be entitled to ; and (*f*) that costs be awarded against the contending defendants.

The Subordinate Judge who tried the case has practically granted all the prayers of the plaint, and the District Judge before whom the matter came on appeal has reversed his decree and has dismissed the suit, on the ground that the whole claim is barred by s. 26 of Beng. Act VIII of 1876.

It is not necessary for us to say anything in this case with reference to any of the prayers in the plaint, except prayer (*a*), because they are practically abandoned, and with reference to (*a*) the judgment of the Subordinate Judge is a short one. With reference to that prayer, he declares that there is a private partition in the mehal.

As I said just now the District Judge has dismissed the suit on the ground that it is barred by limitation by s. 26. As to that I think it is enough for us to say that we do not agree with the Judge in his view of the section. That section does not, in my opinion, bar the right to bring an action ; it only limits the effect of the decree, unless the action is brought within a certain time. But, although we do not agree with the Judge in the reasons for which he dismissed the suit, we think he was right in dismissing it.

As I said just now, the only prayer of the plaint which is pressed upon us is the part which declares that there has been a private partition among the co-sharers in the mehal. That being so, it follows that this is a suit brought under the provisions of s. 42 of the Specific Relief Act. That section states : "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief."

In this case the plaintiff has brought this suit for the purpose of having it declared that there has been this [120] partition, and that by this partition he is entitled to some portion of the property in severalty ; and if what he had done had been to bring a suit to declare that he was entitled in severalty to some specific portion of property, then no doubt he would have been entitled to that relief if he proved it. But then he would have had to prove much more than he has proved in this case. He would have had to prove that there had been a private partition, and he would have had to prove that under that partition he was entitled to, and was in possession of, some specific area within this mehal. But he is not entitled, I apprehend, to any declaration unless it affects his right to some specific property. In this case, the decree falls short of that ; because it only declares that there has been a private partition which does not carry the matter far enough, and in addition to that it professes to affect the rights of other parties who were not litigating those rights. The only thing the plaintiff was entitled to was a declaration with reference to his

own property, and his own property according to his own case is some specific area within this mehal, not indicated by this decree.

The question then arises whether we can remand this case so as to enable the parties to get their rights tried. If we remanded the case we should have to remand it for fresh evidence to be taken, and for the case to be tried on different lines, and for a finding to be come to as to what specific pieces of land the plaintiff is entitled to under the alleged partition. That would not only involve the taking of fresh evidence and a fresh trial but also an amendment of the plaint. We do not think that any good purpose would be served by our adopting such a course, because all the costs which have been already incurred would be thrown away, and in fact it would be the same as if a fresh suit had been brought. Under these circumstances we think that the judgment of the District Judge dismissing the suit was right.

Our attention has been called to the case of *Khoobun* v. *Wooma Churn Singh* (3 C. L. R., 453) as showing that such a suit as this can be maintained, although the specific land to which the plaintiff claimed to be entitled is not declared. But in that particular case the specific land does not seem to have been in dispute. [121] The fact there was that all the co-sharers in the village were admittedly in possession of specific pieces of land, and the only question between the parties was whether the partition had given them the title to the partitioned land. This distinguishes that case from the present one, and therefore in our opinion that case does not conflict with our decision in the present case.

For the reasons then which I have given we think that the judgment dismissing the suit was right, although we do not agree with the reasons which the District Judge has given for dismissing it. In the result this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

[16 Cal. 121]

CRIMINAL REVISION.

The 10th November, 1888.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE TREVELYAN.

In the matter of Madhub Chunder Mozumdar.............Petitioner

versus

Novodeep Chunder Pundit............Opposite Party.*

Criminal Procedure Code (Act X of 1882), s. 487—Judicial proceeding—Sanction to prosecute—Criminal Appeal, Hearing of by District Judge who has granted sanction to prosecute—Penal Code, s. 210.

A complainant applied to a Munsif for sanction to prosecute a decree-holder for an offence under s. 210 † of the Penal Code, and upon the Munsif's refusing such application preferred an appeal to the District Judge, who granted the sanction asked for. The decree-holder, having been prosecuted and convicted before a Deputy Magistrate, preferred an appeal, which came on for hearing before, and was disposed of by, the same District Judge who had granted the sanction.

Held, that the words "shall try any person" as used in s. 487 ‡ of the Code of Criminal Procedure, include the hearing of an appeal, and that the hearing of the appeal from the order of the Munsif refusing sanction was a judicial proceeding within the meaning of the Code, and consequently that, under the provisions of s. 487, the District Judge had no jurisdiction to entertain the appeal against the judgment and sentence passed by the Deputy Magistrate.

THE facts which gave rise to this application were as follow: On the 15th September 1885 the petitioner, Madhub Chunder Mozumdar, obtained a decree for Rs. 44-7-6 against Novodeep Chunder Pundit and his brother in the Chandpur Munsif's Court. [122] On the 12th December 1887 the petitioner took out execution of the decree against his judgment-debtors; and, although they declared that the decree had been already satisfied, they were compelled to pay the amount decreed into Court, as satisfaction of the decree had never been certified to the Court.

---

* Criminal Revision No. 351 of 1888.

† [Sec. 210 :—Whoever fraudulently obtains a decree or order against any person for a sum not due or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied, or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.]

Fraudulently obtaining a decree for a sum not due.

‡ [Sec. 487 :—Except as provided in sections 477, 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such judge or Magistrate in the course of a judicial proceeding.

Certain Judges and Magistrates not to try offences referred to in section 195 when committed before themselves.

Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court, or shall prevent a Presidency Magistrate from himself disposing of any case instead of sending it for inquiry to another Magistrate.]

On the 9th January 1888 Novodeep and his brother preferred a complaint before the Magistrate against the petitioner charging him with offences under ss. 210 and 417 of the Indian Penal Code in respect of the execution of the decree, and were ordered by the Magistrate to procure the Munsif's sanction to prosecute within seven days. On the 20th January the complainants applied for permission to withdraw the charge, on the ground that they were about to take proceedings against the petitioner in the Civil Court. They at the same time stated in their application that they would come forward at a future time with the Munsif's sanction for the prosecution of the petitioner. The Magistrate thereupon dismissed the complaint under s. 203 of the Criminal Procedure Code. Some time afterwards the judgment-debtors obtained a decree for the refund of their money against the decree-holder (the petitioner), and applied to the Munsif for sanction to prosecute him. Sanction was refused by the Munsif, but was granted by the District Judge upon an application being made to him.

Thereupon the present prosecution was instituted, and resulted in the conviction of the petitioner under s. 210 of the Indian Penal Code by the Magistrate, who sentenced him to six months' rigorous imprisonment and a fine of Rs. 100, or in default of payment of such fine to a further period of 1½ months' rigorous imprisonment.

Against that conviction and sentence the petitioner appealed to the District Judge, who dismissed the appeal.

The following is the material portion of the judgment of the District Judge :—

"It is contended in appeal that the Magistrate, having once dismissed the case under s. 203 of the Criminal Procedure Code, had no power to take it up again of his own motion. I have carefully considered the arguments on this point advanced by the learned pleader for the defence, but I am unable to accept them. It is not at [123] all clear from the terms of s. 437 of the Criminal Procedure Code that it is only the District Magistrate who can of his own motion take up again a complaint already dismissed under s. 203 of the Criminal Procedure Code, and I do not think it can have been the intention of the Legislature to tie the hands of Subordinate Magistrates, and especially Sub-Divisional Magistrates, in the manner contemplated by such a very strict interpretation of the section. Even allowing, however, that the proceedings of the Magistrate in the present case were irregular, I think the irregularity is cured by s. 537 of the Criminal Procedure Code, as the accused does not appear to have been in any way prejudiced in his defence by the action of the Magistrate. On the legal ground, therefore, this appeal must fail.

"The other ground taken by the appellant is that the evidence for the prosecution is untrustworthy. I am unable to agree in this view. The evidence of the prosecutor and of his nephew, Rukini, as to the voluntary payment in Falgoon 1292 B. S., of the decretal amount by the judgment-debtors to the decree-holder (appellant) is corroborated by the certified copy of the decree, which bears an endorsement in what clearly appears to be the appellant's handwriting, to the effect that the decree has been satisfied. The appellant fails to show that this document came into the hands of the prosecutor in any other way than that alleged by the prosecutor, viz., that he received it from the appellant; and, this being so, and considering that the handwriting of the endorsement so closely resembles the admitted handwriting of the appellant, I believe that the prosecutor is speaking the truth in saying that he had already paid the money when the appellant took out execution against him.

"On the whole, after careful consideration of the case, I have no doubt that the appellant has been rightly convicted. The sentence is severe, but I am not prepared to say it is excessive. The appeal is dismissed."

The petitioner thereupon applied to the High Court under its revisional powers to send for the record and to set aside the conviction and sentence upon, amongst others, the following grounds:—

(1) That as the complaint of the complainant had been once dismissed under s. 203 of the Criminal Procedure Code, the **[124]** Deputy Magistrate had no jurisdiction to entertain the complaint unless empowered by the High Court or Court of Sessions, or District Magistrate, in accordance with the provisons of s. 437 of that Code.

(2) That the Court of appeal had erred in law in holding that the said defect of jurisdiction was cured by s. 537 of the Criminal Procedure Code.

(3) That as the question raised on the merits related to the discharge or satisfaction of a decree, and as the complainant, the judgment-debtor, did not admittedly raise this objection in the execution department, the Courts below had erred in law in having recognized such alleged private adjustment, and in having allowed him to adduce oral evidence on that point.

(4) That the learned Judge having granted sanction ought not to have heard the appeal under s. 487 of the Criminal Procedure Code.

Upon that application a rule was issued which now came on to be heard,

Mr. M. *Ghose* and Baboo *Kashi Kant Seal* for the Petitioner.

Baboo *Surendro Nath Mutty Lall* for the Opposite Party.

The **Judgment** of the High Court (MACPHERSON and TREVELYAN, JJ.) was delivered by

Trevelyan, J.—Two main questions have been argued before us. In the first place it is contended that the Judge had no jurisdiction to entertain the appeal, and secondly that no offence had been committed.

The first question turns upon the construction of s. 487 of the Code of Criminal Procedure. The Sessions Judge who tried the case, Mr. Cameron, had given sanction for the institution of the charge. The charge was one under s. 210 of the Indian Penal Code for causing a decree to be executed against the complainant after it had been satisfied. The Munsif had refused sanction; the Judge had given it. A prosecution was accordingly instituted, and the case was heard by a Deputy Magistrate, and then came up on appeal before the Judge who had given sanction.

Section 487 provides that, except as provided in certain of the preceding sections, no Judge of a Criminal Court or Magistrate **[125]** other than a Judge of the High Court shall try any person for any offence referred to in s. 195, when such offence is committed before himself or is brought under the notice of such Judge or Magistrate in the course of a judicial proceeding.

In the first place there can be no doubt, we think, that the trial of an appeal is included in the expression "shall try any person." The offence which is charged was undoubtedly an offence referred to in s. 195, and the offence charged here is one of the offences mentioned in that section. The only real question as to the applicability of s. 487 is, whether the offence was brought under the notice of this Judge in the course of a judicial proceeding.

With regard to that there can be no doubt that the hearing of the appeal from the order refusing the sanction was a judicial proceeding within the meaning of the Code of Criminal Procedure. That Code defines "judicial proceeding" as any proceeding in the course of which evidence is or may be

legally taken. On the appeal from the order of the Munsif refusing sanction, the Judge undoubtedly had power to take evidence, and therefore it was a judicial proceeding, and it was in the course of that proceeding that the offence was brought under his notice, because the appeal was with reference to the refusal to sanction the prosecution. When that offence is established, s. 487 applies, and the Judge had no jurisdiction to entertain the appeal.

With regard to the second objection, inasmuch as there will be a fresh trial, we think it undesirable to prejudge the question now. It will be open to the defendant to argue it when the appeal is heard and all the facts have been gone into (see next case). Under the circumstances we think it would be better that the appeal should be heard in this Court, and we direct that it be so heard, and that notice thereof be given to both parties and to the Magistrate. The prisoner to be released on bail to the satisfaction of the Magistrate pending the hearing of the appeal.

H. T. H. *Rule made absolute.*

NOTES.

[As regards the point of capacity to try, this case was overruled in **16 Cal., 766 F.B.** *See* also 18 Bom., 380; 7 C.W.N., 708.

As regards the meaning of '*trial*' *see* also 12 Mad., 451; 23 Cal., 44; (1895) A.W.N., 225; 12 C.W.N., 438; 14 Bom., 160.]

---

[126] CRIMINAL APPEAL.

The 18th December, 1888.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

Madhub Chunder Mozumdar
versus
Novodeep Chunder Pundit.*

Penal Code (Act XLV of 1860), s. 210—Civil Procedure Code (Act XIV of 1882), s. 258—Satisfaction of decree—Execution of decree—Fraudulently executing decree after it has been satisfied when satisfaction has not been certified to Court.

A decree-holder having proceeded to execute his decree against his judgment-debtor, the latter objected, stating that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by s. 258 of the Code of Civil Procedure. The judgment-debtor, being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under s. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognised by the Court executing the decree, and that consequently no offence had been committed.

Held, that the words "after it has been satisfied," used in s. 210 of the Penal Code, indicate only the *fact* of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognise it, does not prevent the decree-holder from being properly convicted of an offence under that section.

* Criminal Appeal No. 852 of 1888, against the order passed by D. Cameron, Esq., Sessions Judge of Tipperah, dated the 31st of August 1888, affirming the order passed by Baboo Bugola P. Muzumdar, Deputy Magistrate of Chundpore, dated the 8th of August 1888.

THIS was an appeal from the order of a Deputy Magistrate convicting the appellant and sentencing him to rigorous imprisonment and a fine, which came on to be heard by the High Court under the circumstances stated in the preceding case—[*In the matter of Madhub Chunder Mozumdar*, petitioner (*Ante* p. 121)].

The facts of the case are fully stated in the report of that case.

Mr. *M. Ghose* and Baboo *Kashi Kant Sen* for the Appellant.

Mr. *Kilby* for the Crown, appeared in support of the conviction.

[127] The **Judgment** of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The evidence has been placed before us, and we think that the conclusion to which the lower Court has come on that evidence is right. As regards the question of law which has been argued, viz., that the present case does not come within the purview of s. 210 of the Indian Penal Code, because the satisfaction of the decree was of such a nature as could not be recognized by the Court executing the decree, we do not think that that contention is valid. The words of the section are: "Whoever fraudulently causes a decree to be executed against any person after it has been satisfied, etc." The words "after it has been satisfied" indicate, in our opinion, the fact of its satisfaction. Merely because the satisfaction is of such a nature that the Court executing the decree could not recognise it would not take the case out of the purview of the section. We therefore dismiss this appeal.

H. T. H. *Appeal dismissed.*

[16 Cal. 127]

APPELLATE CIVIL.

The 20th December, 1888.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE BEVERLEY.

Gur Buksh Roy *alias* Gur Buksh Singh............Plaintiff

versus

Jeolal Roy and others............Defendants.*

Right of occupancy —Purchase by tenant of fractional share of proprietary interest, Effect of, on acquisition of right of occupancy— Beng. Act VIII of 1869, s. 6.

A tenant, who had commenced to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietary interest, and continued to

* Appeal from Appellate Decree No. 1062 of 1888, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Bhagulpore, dated the 24th of March 1888, affirming the decree of Baboo Bemola Churn Mozumdar, Munsif of Beguserai, dated the 22nd of December 1886.

occupy the holding as ryot till the 13th May 1885, when he was dispossessed. On the 30th March 1886 he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that owing to the purchase ot the share of the proprietary interest he could not have acquired such right.

***Held*, that under Bengal Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued [128] to hold the land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding.**

IN this suit the plaintiff sought to recover possession of some 4½ bighas of land, alleging that he held the same as tenant and had acquired a right of occupancy therein, and that the defendants had illegally dispossessed him therefrom.

He alleged that 7 bighas—made up of the 4½, the subject of this suit, and 2½ bighas, the subject of an analogous suit against other defendants,—appertained to mouzah Madhurapur and lay in a four-anna *putti* which had been divided by metes and bounds from the other *putti*, and were held by him under a settlement from the former malik, which took place in 1277, taking effect from the 1st Bysack 1278 (13th April 1871). The only question decided in the suit by the lower Courts amongst those in issue on the pleadings was whether the plaintiff had acquired a right of occupancy or not as claimed by him, and the only witness examined by the Munsif in the case was the plaintiff himself. Upon his evidence the Munsif dismissed the suit, holding that the plaintiff had not acquired a right of occupancy and could not therefore succeed.

It appeared that in 1285 (1878) the plaintiff purchased a half share in the proprietary interest of the mouzah in the name of his son, and that he had been paying the rent of the entire *jumma* to the several maliks, the collections being made by the putwaris of Raghu Nath, the former proprietor, prior to the purchase of the 8-anna share by the plaintiff, and since such purchase to the putwaris of the purchaser of the other half share and himself, there being only one collection. The suit was instituted on the 30th March 1886, the dispossession complained of being stated to have taken place on the 1st Jeyt 1292 (13th May 1885). Upon the above facts the Munsif, without going further into the case, held that, as the plaintiff had not acquired a right of occupancy at the date of his purchase of the half share in 1878, he could not be held to have acquired such right at all, as he could not acquire such right as against himself. He accordingly dismissed the suit.

The Lower Appellate Court affirmed that decree, and the material portion of the judgment of the Subordinate Judge was as follows: **[129]** "There is no doubt that plaintiff could not acquire a right of occupancy from 1278 to 1285, viz., within a period of about seven years, so that at the time of the purchase of the half share of the malik the plaintiff had no right of occupancy. The question next to be seen is whether after the purchase of the proprietary interest (8 annas) of the malik the plaintiff could reckon the subsequent portion of his occupancy for the purpose of creating such right. I think, regard being had to the clear provision of s. 22 of the Tenancy Act, the plaintiff could not tack the period for the purpose of a right of occupancy. A ryoti holding merges in the proprietary interest after the purchase of the latter. A man cannot occupy the double character of landlord and ryot, or make a pretence of paying rent to himself for the purpose of acquiring a right of occupancy—*Lal Bahadoor Singh* v. *Solano* (I. L. R., 10 Cal., 45). The same principle applies if the holder of the landlord's fractional interest acquires an occupancy right. It is to be determined now whether the plaintiff, having no right of occupancy, is entitled to succeed. I think not. The present suit is not of a possessory character

brought within six months, as provided in the Specific Relief Act; he has undoubtedly brought this suit upon title, and failing which he is not entitled to recover—*Debi Churn Boido* v. *Issur Chunder Manjee* (I. L. R., 9 Cal., 39); see also s. 87, cl. 3, Act VIII of 1885. It is true that under s. 89 of the Act no tenant shall be ejected from his tenure except in execution of a decree; but if the tenant has been out of possession, either legally or illegally, by the admitted landlord, the former must make out a title or right to recover lands from the owner thereof, and in this case the plaintiff has failed."

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* for the Appellant.

Mr. *C. Gregory* and Baboo *Mahabeer Sahai* for the Respondents.

The **Judgment** of the High Court (MITTER and BEVERLEY, JJ.) was as follows:—

The question that we have to decide in this case is whether, upon the facts found by the lower Courts, the plaintiff has acquired a right of occupancy in respect of the land in dispute.

[130] The facts of the case are these: The land in dispute lies within a four-anna divided *putti*. It lies wholly within that *putti*, that *putti* being divided by metes and bounds from the other *putti*. It is not stated in the plaint, but it appears from the deposition of the plaintiff, who was the only witness examined by the Munsif, that the land in dispute was let out to him from the beginning of the year 1278 or 1871. It further appears from that deposition that in the year 1878 he acquired by purchase a fractional share in the proprietary right of the *putti* itself. The present suit was brought on the 30th of March 1886, the plaintiff alleging dispossession by the defendants on the 1st Jeyt 1292, that is, some time in May 1885. Upon these facts the Munsif, accepting them as established for the purpose of raising this question of law, decided that the plaintiff, after his purchase of a fractional share in 1878, could not acquire a right of occupancy. It is clear that if the Munsif's view is not right the right of occupancy would be deemed to have been acquired by the plaintiff on the completion of twelve years possession, that is to say, some time in the year 1883.

The Lower Appellate Court has referred to the provisions of s. 22 of the Bengal Tenancy Act; but, as shown above, if the Munsif's view was not right, the right must have been acquired by the plaintiff under the old Act, namely, Bengal Act VIII of 1869. If after the Bengal Tenancy Act came into operation there was no such dealing with the property as would bring the present case within any of the clauses of s. 22, the provisions of that section would not be applicable; and there is no such case established by either party. Therefore we may put aside s. 22 altogether from our consideration. The question therefore is, whether under s. 6 of the old Act, namely, Bengal Act VIII of 1869, after the purchase by the plaintiff of a share in the zemindari, he could acquire a right of occupancy in the land in dispute if he continued to hold it after his purchase for twelve years from the date of the commencement of his holding. If after his purchase he was legally in possession of the whole of the disputed land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, we see **[131]** no reason why, in the express words of s. 6, he should not be considered to have acquired a right of occupancy after completing his occupancy as a ryot for twelve years. The question of merger does not arise at all in this case. If he had been the proprietor of the entire zemindari, no doubt then in that case the question of merger would have arisen. But here

the only right under which he held that share of the disputed land, which is not covered by the share of the zemindari interest which he purchased, was his ryoti title in respect of it. And therefore it must be considered that, unless that title was extinguished by operation of law, he continued to be a ryot in respect of the whole disputed land. We are not aware of any provision of law according to which his ryoti interest in respect of the whole of the disputed land would be extinguished by his purchase of a fractional share of the zemindari. In the case of *Jardine, Skinner & Co.* v. *Sarut Soondari Debi* (L. R., 5 I. A., 164 ; 3 C. L. R., 140) this question was considered both by the High Court (25 W. R., 347) and their Lordships of the Judicial Committee. That was a suit brought by Rani Sarut Soondari to recover possession of a two annas eleven gundas share of upwards of 20,000 bighas of chur land. She was the owner of that fractional share of the zemindari in which the land in dispute in that case was situated. The claim in the suit was resisted upon two grounds : *First*, that under an ijara lease the defendants were entitled to retain possession of the land ; and, *secondly*, that they had acquired a right of occupancy in the land because they held it as jotedars before the ijara was granted to them. The High Court was of opinion that the defendants' possession of the land in suit was not that of jotedars, but that they were in possession of it as ijaradars ; and that Court further held that as ijaradars they could not create in themselves a right of occupancy. But the Court added that, "even if that were not so, it is impossible to say how the defendants could have acquired either a right of occupancy or a jotedari right in respect of an undivided share of an estate," that is to say, the Court was of opinion that, as the defendants were the ijaradars of a fractional share, and thus represented the zemindar as regards that share, **[132]** their possession as jotedars, even if it be accepted as true as against the owners of an undivided fractional share, could not confer upon them a right of occupancy. But the Judicial Committee on appeal were of opinion that this view was not correct. They said : "Their Lordships do not concur in the view thus expressed by the High Court to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate."

We are, therefore, of opinion that, if the plaintiff's case was stated in the plaint and supplemented by his deposition be established, he would be entitled to a decree on the ground that he has a right of occupancy in the land in suit. But the Munsif did not take the other evidence of the plaintiff or any evidence on behalf of the defendants. We, therefore, set aside the decrees of the lower Courts and remand this case to the Court of First Instance for completion of the trial.

Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

NOTES.

[*See* also (1890) 18 Cal., 121 ; (1896) 1 C.W.N., 521.]

[16 Cal. 132]

APPELLATE CIVIL.

The 19th December, 1888.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Sheonath Doss...........(Decree-holder),

versus

Janki Prosad Singh and others...........(Judgment-debtors).*

Sale in execution of decree--Civil Procedure Code, 1882, s. 294-- Decree-holder, Purchase by—Satisfaction pro tanto— *Mortgagee not trustee for mortgagor in sale proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy—Practice.*

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart* v. *Tara Prasanna Mukherji* (I.L.R., 11 Cal., 718) distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold and is not bound to credit the judgment debtor with the real value of the property to be ascertained by the Court.

[133] The permission to a mortgagee to bid should be very cautiously granted, and only when it is found after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale proclamation has been duly published.

IN execution of a mortgage decree for Rs. 5,088, obtained by one Sheonath Doss against Janki Prosad and others, four bonds (the subject of the mortgage), which had been executed in favour of the mortgagors by third persons, were put up for sale and purchased for Rs. 685 by the decree-holder, who had obtained permission to buy at such sale. On the 27th January 1888 the third persons above referred to paid into Court Rs. 5,812 to the credit of the person or persons (whoever they might be) then entitled to the money under such bonds. The exact amount payable as principal and interest on such bonds on the 7th January [?] 1887 amounted to Rs. 5,719. The decree-holder, subsequently to the sale in execution, assigned one of such bonds, of the value of Rs. 1,000, to a stranger for Rs. 300; and subsequently applied for further issue of execution against other properties of his judgment-debtors for the unsatisfied balance of his decree, contending that he had become by his purchase in execution the absolute owner of these bonds, and was still entitled to satisfaction of the remainder of the judgment-debt from his judgment-debtors. The judgment-debtors objected to the issue of further execution.

The Subordinate Judge of Shahabad held, on the authority of *Hart* v. *Tara Prasanna Mukherji* (I. L. R., 11 Cal., 718) that the decree-holder having become himself the purchaser of the bonds at the sale in execution of his own decree, was bound to prove that the property purchased by him had realized a fair amount; and that this question was one which the Court was bound strictly

* Appeal from Order No. 360 of 1888, against the order of J. Tweedie, Esq., Judge of Shahabad, dated the 22nd of June 1888, modifying the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 24th of January 1888.

to enquire into before the decree-holder could be allowed to take out further execution ; and under the circumstances of the case he eventually directed that execution should be stayed, and that the decree-holder would be at liberty, on application made for that purpose, to take out from the Court the sum of Rs. 5,812 deposited by the third parties above referred to, after giving notice to the person to whom he had assigned one of the bonds, part of the subject of his mortgage.

[134] The decree-holder appealed to the District Judge, who held that in common honesty all the decree-holder was entitled to was the amount due on the bonds on the 7th February 1887, viz., Rs. 5,719 ; but that as he had assigned to a stranger one of such bonds of the value of Rs. 1,000, that sum should be deducted from the Rs. 5,719, and the price for which it was so assigned, viz., Rs. 300, should be added thereto after such deduction, making the value of the bonds on the 7th February to have been Rs. 5,019 ; and that as the judgment-debt amounted to Rs. 5,088, there remained only a sum of Rs. 69 due by the judgment-debtors. He therefore varied the order of the lower Court and found that there was due to the decree-holder Rs. 69 plus costs and interest up to realization.

The decree-holder appealed to the High Court.

Mr. *R. E. Twidale* for the Appellant.—The judgment-debtors are only entitled to be credited with Rs. 685, and for the balance of the judgment-debt the decree-holder is entitled to issue out further execution. The lower Courts have not kept in view s. 294 of the Code of Civil Procedure, which lays down that the purchase-money is to be set off against the amount due under the decree and satisfaction entered up to that extent ; and also were in error in holding that the money paid into Court by third persons should be taken in satisfaction of the appellant's decree.

The case of *Hart* v. *Tara Prasanna Mukherji* (I. L. R., 11 Cal., 718) has no application to a case of this kind.

Moulvie *Mahomed Yusuf* for the Respondents.—The decree-holder, after purchasing at the execution sale, became trustee for the mortgagors, and held the bonds only subject to satisfaction of his decree. I rely on *Hart* v. *Tara Prasanna Mukherji* (I. L. R., 11 Cal., 718).

The **Judgment** of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

Banerjee, J.—The only question raised in this appeal, and the only question tried in the Courts below, is, whether the mortgagee, who has bought the mortgaged property at a sale in execution of a decree upon the mortgage bond, is at liberty to take out further execution for the balance of the amount decreed left after deducting **[135]** the price for which the property was sold ; or whether he is bound to give the mortgagor judgment-debtor, credit, not only for such price, but for the real value of the property sold to be ascertained by the Court ; in other words, whether the mortgagee, by his purchase, became the absolute owner of the property, or took it in trust for the mortgagor. Both the Courts below have answered this question in favour of the mortgagor, and the Lower Appellate Court has ordered execution to issue only for the balance left after deducting from the amount of the decree what it found to be the real value of the property sold. We think the decision of the Courts below is not right.

The rule deducible from *Downes* v. *Grazebrook* (3 Mer., 200) ; *In re Bloye's Trust* (1 Mac. & G., 488) ; *Tenant* v. *Trenchard* (L. R., 4 Ch. Ap., 537) ; *Martinson* v. *Clowes* (L. R., 21 Ch. D., 857) ; and other cases bearing on the question which are referred to in White and Tudor's Notes to *Fox* v. *Mackreth*,

is thus stated in Fisher on Mortgage, and other well-known text books, that neither the mortgagee, whether he claims under an ordinary power or under a trust for sale, nor his trustee, can buy the mortgaged property, unless, when the sale is made by the Court, he has obtained leave to bid, and if the mortgagee be a trustee he will not have leave to bid where the *cestui que trust* objects, unless attempts to sell to others have failed, and that the same rule applies to a pledgee. See Fisher on Mortgage, 4th Edition, p. 458; Coote on Mortgage, 4th Edition, p. 257; Dart on Vendors and Purchasers, 6th Edition, pages 35 and 41.

In the second of the above cases Lord COTTENHAM explains the reason of the prohibitory rule to be this, that it would be improper to place a person in a situation in which his interest, as intending purchaser, might conflict with his duty to secure the highest price for the property to be sold; and in *Tenant* v. *Trenchard* (L. R., 4 Ch Ap., 537) Lord HATHERLEY points out that, if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the trustee might be allowed to make proposals and to become the purchaser.

[136] The above rule is in perfect accord with reason and common sense. While it prevents the mortgagee from taking any unfair advantage of his position by prohibiting him to buy, it removes the prohibition, to prevent the very result it was meant to guard against, when that becomes necessary. But a hard and fast rule that the mortgagee can never become the purchaser is not only unnecessary but would be inexpedient, even in the interests of the mortgagor. In the case of *Warner* v. *Jacob* (L. R., 20 Ch. D., 220) it was held that the mortgagee selling was not in a fiduciary position towards the mortgagor, and in *Coaks* v. *Boswell* (L. R., 11 Ap. Cases, 232) under somewhat similar circumstances it was held that the leave to bid put an end to the disability to purchase under which the party may have laboured.

The decree-holder, under our Code of Civil Procedure, can only buy with leave of the Court, and when the mortgagee decree-holder has bought the mortgaged property with such leave, we do not find any reason or authority for holding that he takes the property in trust for the mortgagor.

The only authority referred to by the Court below and relied upon by the respondent in this case is the case of *Hart* v. *Tara Prasanna Mukherji* (I. L. R., 11 Cal., 718); but that case is clearly distinguishable from the present. There the question was not one between the decree-holder mortgagee and the judgment-debtor mortgagor, but was one between the decree-holder and other creditors of the judgment-debtor; and though in one place the rule laid down by the learned Judges is stated somewhat too broadly, the distinction pointed out above is clear from another part of the judgment where the reason of the rule is stated. "It would manifestly be inequitable," say the learned Judges, "to allow a mortgagee to buy in the mortgaged property at an auction for a sum far below its real value, and then to go on against other property of the mortgagor to the injury of the other creditors." This makes the distinction between that case and the present one perfectly clear.

Whilst we attach so much importance to the leave of the Court to the decree-holder to bid, and consider that it removes all [137] disability in him to bid we deem it our duty to observe that such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given only after some enquiry, that the sale proclamation has been duly published. And if, after all, the mortgagor, judgment-debtor, is in any way injured, he has ample remedy provided for him in the Code.

He can, under s. 294*, question the propriety of the leave to bid, by showing, either that it was obtained by misrepresentation, or that it was granted through inadvertence and without the exercise of judicial discretion by the Court, and he can have the sale set aside under s. 311†, or obtain compensation under s. 298‡ of the Code, according to the nature of the property sold.

The present may be a hard case; but if there was any real hardship, the respondent was not without remedy; and for aught we know he may still have his remedy. All we say at present is, that the decision of the Court below, so far as it goes, is incorrect, and that the application of the decree-holder for further execution should be granted, subject, of course, to any objections or proceedings that it may still be open to the judgment-debtor to take. The appeal must be decreed with costs.

T. A. P. *Appeal decreed.*

NOTES.

[The decree-holder buying with the leave of Court to bid is not in the position of a trustee, and is like any other bidder :—(1889) 16 Cal., 682 ; (1891) 19 Cal., 4 ; (1893) 18 Mad., 153 ; (1895) 18 All., 31.: (1900) 24 Mad., 96 ; (1905) 10 C.W.N., 209 ; (1906) 4 C.L.J., 246.

In (1899) 23 Mad., 227 the Privy Council remarked with reference to this case that analogies derived from English Practice are inapplicable to cases in India where the conduct of the sale is not in the hands of the mortgagee.]

Decree-holder not to bid for or buy property without permission.

* [Sec. 294 :—No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

If decree-holder purchase, amount of decree may be taken as payment.

When a decree-holder purchases with such permission the purchase-money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the resale, and all expenses attending it, shall be paid by the decree-holder.]

Application to set aside sale of land on ground of irregularity.

† [Sec. 311 :—The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.]

Irregularity not to vitiate sale of moveable property, but any person injured may sue.

‡ [Sec. 298 :—No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property and for compensation in default of such recovery.]

[16 Cal. 137]

APPELLATE CIVIL.

The 15th June, 1888.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE MACPHERSON.

Chunder Coomar............One of the Defendants

versus

Hurbuns Sahai (Plaintiff) and another.........Defendants.*

Benami transaction—Estoppel—Misrepresentation—Heir, when bound by the acts of ancestor—Mitakshara Law—Sale by a coparcener, Effect of.

B purchased some property from *D* (a member of a joint Mitakshara family) in the name of his wife *K* with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in [138] fact continued to treat the property as her own. During *S's* minority, *C* the nephew of *D*, who was now of age, brought a suit for pre-emption against *K* in respect of this property, and obtained a consent decree under which he took possession. *S*, then, on attaining majority, instituted a suit against *C* for the recovery of the property, as the heir and representative of his father, on the ground that *K* was a mere benamidar. The defence taken by *C*, amongst others, was that *K* was the real owner he believed her to be.

Held, that on the authority of *Luchman Chunder Geer Gossein* v. *Kally Churn Singh* (19 W. R., 292) it was a good defence, for, even on the assumption that the purchase was *benami*, *S* as heir of *B* was bound by the misrepresentation of the latter.

Held, also, that the sale by *D* as against *C* was bad under the Mitakshara law, inasmuch as it was an appropriation by him, without any partition, of part of joint family property.

THIS was an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. Hurbuns Sahai, the plaintiff, brought this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276 (15th October 1868), leaving the plaintiff, then an infant, and Ruttonjote Koer (defendant No. 2), his widow and mother of the plaintiff. The plaintiff alleged that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant Chunder Coomar's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote Koer, Lala Bhugwandut was the real owner. He further alleged that after his father's death, and while he was an infant, in 1875, the defendant Chunder Coomar brought an unfounded suit of pre-emption against Ruttonjote; and by compromise with her obtained a decree for the property on the 15th June 1875, and took possession of it. The plaintiff also alleged that he was the real owner; that his mother Ruttonjote Koer had no right to compromise the suit; that undue influence, threats and coercion had been used to induce her to enter into the compromise; and that the decree was obtained fraudulently and illegally. He prayed for a declaration to that effect; that the deed of compromise of 12th May 1875, and the decree of 15th June 1875, be set aside; that he be put in possession of the property; and for mesne profits. He offered to re-[pa]y to Chunder Coomar the sum of Rs. 7,080-2-0, the amount alleged to have [139] been paid by him to Ruttonjote Koer under the consent decree in the

* Appeal from Original Decree No. 247 of 1886, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Shahabad, dated the 11th of September 1886.

pre-emption suit. The defendant Ruttonjote Koer did not put in an appearance although duly summoned. Chunder Coomar alleged that he and his paternal uncle Juneswar Das were members of a joint undivided Hindu family governed by the Mitakshara law; that no division of any description had ever taken place between them; and that the property in dispute covered by the sale of 28th September 1866 was part of property acquired with joint family funds. He denied coercion, undue influence and fraud. His defence shortly was, that Ruttonjote Koer was the real owner whom he believed her to be, under the deed of 28th September 1866; that the decree of the 15th June 1875, as between the plaintiff and the defendant, was binding on the plaintiff; that, even if Ruttonjote Koer was no more than a mere manager for the plaintiff, her compromise was the act of a prudent manager and therefore binding on the plaintiff; that under no circumstances could the plaintiff recover inasmuch as the deed of sale of 28th September 1866 from Juneswar Das was a conveyance of part of the property of a joint Mitakshara family by one member of the family asserting it to be his own separate and distinct property; and that the sale was void as against him.

The Subordinate Judge found that neither undue influence nor coercion had been used, and that the case of fraud was false; that when Ruttonjote Koer applied for a certificate of guardianship to her son, the plaintiff, under Act XL cf 1858, she excluded the property in suit from the list of properties which she had filed; that Lala Bhugwandut purchased the property in dispute in the name of his wife Ruttonjote Koer with the object of concealing the fact that he was the purchaser from the Maharajah of Dumraon, in whose service the Lala was, and whose relatives were the former owners, and further lest, in the event of any dispute arising out of this property, his exclusive property might be prejudiced and attached with debt. The Judge also found that Chunder Coomar, Purbhu Das, his father, and Juneswar Das were members of a joint Mitakshara family; and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family and managed the business of the house. He held that [140] the sale of 28th September 1866 by Juneswar was valid; that Ruttonjote was a mere benamidar; and that everything that passed under the sale passed to Bhugwandut. He also found that the compromise of 12th May 1875 was, so far as Ruttonjote was concerned, *bonâ fide*, for the benefit of her son, but held that the compromise could not bind the plaintiff.

The Judge partially decreed the suit. He set aside the compromise and consent decree, and gave the plaintiff possession, but disallowed mesne profits.

Against this decree Chunder Coomar appealed to the High Court.

The Advocate-General (*Sir G. C. Paul*) and Baboos *Unnoda Prosad Banerji*, *Mohesh Chunder Chowdhry*, and *Tarapodo Chowdhry* for the Appellant.

Mr. *C. Gregory* and Baboos *Guru Das Banerjee* and *Oukhil Chunder Sen* for the Respondents.

The **Judgment** of the Court (PIGOT and MACPHERSON, JJ.) was as follows:—

This is an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. The plaintiff brings this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276, leaving the plaintiff, then an infant, and Ruttonjote, his widow, and mother of the plaintiff. The plaintiff says that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant's uncle, of which property, though

by the deed of sale it was conveyed to Ruttonjote, Lala Bhugwandut was the real owner in the name of Ruttonjote. The plaintiff says that after his father's death, and while he was an infant, the defendant brought an unfounded suit of pre-emption against Ruttonjote in respect of this property, and by compromise with her obtained a decree for the property and took possession of it. He says that he was the real owner, that Ruttonjote had no right to compromise the suit, that the decree was obtained fraudulently and illegally; and he asks for a declaration to that effect, that he be put into possession of the property and for mesne profits; offering, if this Court thinks fit, to repay to defendant the sum of Rs. 7,080-2-0, being the amount said to have been paid [141] by defendant to Ruttonjote under the consent decree in the pre-emption suit. The defence is shortly this: (a) Ruttonjote was the real owner defendant believed her to be. (b) The decree is as between plaintiff and defendant binding on plaintiff. (c) Even if Ruttonjote was no more than a manager for the plaintiff, her compromise was the act of a prudent manager and was binding on the plaintiff. (d) Under no circumstances can the plaintiff recover, inasmuch as the deed of the sale from Juneswar was a conveyance of part of the property of a Mitakshara family, by one member of the family, under pretence that it was his own, and that the sale was void as against the defendant. These are the substantial points made by defendant in his written statement, though stated in a different order. He of course denies fraud, etc., in the decree. A description of the property claimed in this suit and of the manner and the dates of its acquisition is given in the plaint as follows:

1. That Baboo Dyal Singh, deceased, was the proprietor of the entire 16 annas of mehal Athur, pergunnah Bhojepur, to which the undermentioned mouzahs appertain.

2. That in accordance with the conditions specified in the taksimnamah executed by Baboo Dyal Singh, in the mehal aforesaid, 6 annas came into the possession of Baboo Rip Bhunjun Singh, 5 annas into that of Baboo Goman Bhunjun Singh, and 5 annas into that of Baboo Ari Bhunjun Singh, sons of Baboo Dyal Singh.

3. That the entire 16 annas of the aforesaid mehal was mortgaged on behalf of Baboo Rip Bhunjun and Baboo Goman Bhunjun Singh for selves and as guardians of Baboo Rip Bhunjun Singh, minor, to Juneswar Das for self and as guardian of Baboo Chunder Coomar, and out of the mouzahs aforesaid appertaining to the mehal aforementioned, mouzah Athur, mouzah Kunhuan and mouzah Runbirpore were under two *zurpeshgi* leases, severally dated 17th February 1862 and 21st September 1860, in the possession of Baboo Juneswar Das for self and as guardian of Baboo Chunder Coomar.

4. That Juneswar Das, for self and as guardian of Chunder Coomar, obtained a decree on the basis of his mortgage bond, and caused the shares of Baboo Rip Bhunjun Singh and Baboo Goman [142] Bhunjun Singh in mehal Athur aforesaid to be sold at auction, and purchased them himself on the 4th March 1865.

5. That after the purchase made at auction, Juneswar Das, for self and as guardian for Chunder Coomar, held the entire 16 annas of mouzah Athur, mouzah Kunhuan and mouzah Runbirpore in possession under zurpeshgi lease, and entered into possession of 11 annas of the entire mehal by virtue of purchase at auction, and out of this one-half was the share of Juneswar Das, and the other half that of Chunder Coomar.

6. That out of half of the share which belonged to Juneswar Das under the *zurpeshgi* deed and the auction purchase one-fourth was sold by Juneswar Das to Lala Bhugwandut, father of the plaintiff, under the deed of sale dated

28th September 1866, and possession made over, and that Lala Bhugwandut got that deed of sale executed in the fictitious name of Mussummat Ruttonjote Koer, his wife.

7. That under the deed of sale above adverted to, Lala Bhugwandut became proprietor and holder of 1 anna 4 pie 10 krants in the entire mehal Athur as auction-purchaser, and in that mehal in mouzah Athur, mouzah Kunhuan and mouzah Runbirpore he came to hold possession of 2 annas share under a *zurpeshgi* lease.

The Judge in the Court below held that the case of fraud (which consisted of a charge of intimidating Ruttonjote by threatening her to kill her son by sorcery) was false. He held that the purchase in Ruttonjote's name was a benami purchase, and that everything that passed under the deed of sale passed to Lala Bhugwandut. He found that Purbhu Das, defendant's father, Juneswar Das, his uncle, and the defendant were members of a joint Mitakshara family, and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family.

We accept these findings as correct.

The Judge further held: (*a*) that the compromise and consent decree could not bind the plaintiff; (*b*) that, although the defendant's family were joint, Juneswar was, as to the property of which that in dispute was one-fourth, separate owner, and capable of giving a good title to it by sale; and (*c*) that even if he were not, defendant could not now insist on the defect of title, as he had **[143]** not made it a ground of claim when he instituted the pre-emption suit.

As to the first point, the Judge expresses no opinion upon the question whether defendant had, at the time he entered into the compromise, notice that Ruttonjote was a benamidar. The defendant wholly denies that he had; and we find, upon the evidence, that there is no ground for finding that he had, and that the facts of the case are not such as to justify a Court in fixing him with constructive notice of the plaintiff's rights such as they were. Not merely was the purchase made in Ruttonjote's name, but the reasons for the use of her name by Lala Bhugwandut are given by the Judge. It was desired to conceal from the Maharajah of Dumraon, in whose service Lala was, that he had purchased property of persons who were the Maharaja's relatives: and there was the further very substantial reason that the disputed properties were heavily encumbered, as Sheo Gholam, witness No. 7, says: "He made the purchase in the name of Ruttonjote with a view that in case of dispute arising his exclusive property might not be prejudiced, and no liability in consequence of debt might attach to it," and then mentions also the consideration about the Maharajah.

It is plain that the concealment (assuming the purchase to have been a benami one) was intended to be effectual. There seems no reason to doubt that it was effectual. It is plain that after Lala's death the property continued to be treated as Ruttonjote's. She obtained a certificate of guardianship of her son under Act XL of 1858, but this property was not included in it. A number of exhibits have been put in showing that for years, and down to near the time of the pre-emption suit, the property was managed and proceedings relating to it conducted in her name. There is not a fact in evidence such as could be calculated to put a purchaser from her (supposing for the moment that the defendant was such) upon enquiry, save the fact that plaintiff was her son; and the fact that she had excluded the properties from the certificate of guardianship is probably a sufficient indication of the answer that might have been expected from her to an enquiry as to the ownership of the property.

Further, had the defendant known or suspected the ownership **[144]** of the plaintiff, there seems no reason why he should not have made him a party to the suit. His mother was his guardian. She might have been enabled to defend the suit in respect of this property as his guardian. The Judge finds that the compromise was, so far as Ruttonjote was concerned, a *bonâ fide* compromise for the benefit of her son in respect of property which was then heavily encumbered; and this would have justified her as his guardian in what she did. On the whole, we see no reason to doubt that were the defendant in this case simply a purchaser for valuable consideration, he would be entitled to whatever defence *bona fides*, and absence of notice of plaintiff's claim, would entitle him to. That such a defence would be, in such a case as this, complete is decided by the case in the Privy Council of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (19 W. R., 292), where it was held, overruling the decision of this Court, that such a defence is good against an heir of the person who created the benami, even although an infant at the time, when, after the death of the ancestor, a sale is made by the benamidar, in breach of his trust, to a *bonâ fide* purchaser without notice, there being a continuing misrepresentation by the ancestor by which the heir is bound.

We can see no distinction in favour of the plaintiff between the present case and the case of a purchaser. If Ruttonjote was by the act of Lala Bhugwandut held out as the real owner, and so competent to make a good title on sale, she was at least as much so held out as such, as being competent to defend the title obtained by the sale—at any rate, as against a member of the vendor's family claiming that the sale was in derogation of that member's rights, and so was capable of entering into a compromise with him should she honestly think the title defective. No doubt the compromise may very possibly have been arranged before the suit was filed. There is nothing to suggest that this was the case with the preliminary *mowasibut* and *istashad* which long preceded the actual filing of the pre-emption suit. Nor should it be omitted from consideration that pre-emption is in fact a sale enforced by law, and that the price paid by Lala Bhugwandut was actually paid back to Ruttonjote.

[145] The Subordinate Judge has said that the performance by Chunder Coomar of the preliminaries required by the Mahomedan law in a case of pre-emption do not appear to have been properly performed. That question was not before him save so far as it might bear on the question of fraud , which he has negatived; for he has found that the compromise was *bonâ fide* made by Ruttonjote so far as she was concerned, for the benefit of her son. If she had power to defend the suit, the decree is binding; if not, it is quite immaterial whether the preliminaries were performed or not in compliance with the strict Mahomedan law of pre-emption or whatever modification of it, if any, may apply amongst Hindus in this part of the country, where, by custom, the right of pre-emption exists amongst them. For these reasons we are of opinion that upon this point the Judge was in error, that the plaintiff is bound by the compromise and the decree in pursuance of it, and that on this ground alone the suit ought to have been dismissed.

We may observe that the case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (19 W. R., 292) was not cited before us, nor is it referred to in Mr. Mayne's chapter on benami, nor in Mr. Woodman's Digest under that title*; nor, so far as the reports show, does it appear to have been cited in any case in this Court. It is a decision of great importance, as showing that, in some cases, the heir of one who purchases benami may be bound as between him and a purchaser from the benamidar by that act of his ancestor,

* It appears under title Estoppel—Estoppel by Conduct, case 168.—Ed.

irrespective of any act or omission of his own whatever, and even although a minor when his ancestor's conduct was acted on by such purchaser.

Although our decision upon this point is decisive on the appeal, we think we should also decide the other question argued before us. Purbhu Das, Juneswar Das, and the defendant, who is the son of Purbhu Das, were members of a joint family living under the Mitakshara law. Juneswar Das died in October 1874. The date of the death of Purbhu Das does not appear, but from a deposition of Juneswar Das, made on the 19th August 1872 before the Subordinate Judge of Shahabad, put in in this case and marked **[146]** Exhibit 22, it does appear that at that date Purbhu Das was alive—a fact which appears to have escaped the attention of the lower Court and of learned counsel in this. Purbhu Das had nominally renounced the world. The lower Court finds that, though it was given out that he had done so, he had not really done so, but managed the business of his house. The brothers appear to have become possessed of considerable means, to have bought a good deal of zemindari property, and to have been much engaged in law suits, which latter pursuit is referred to in the deposition above mentioned as though it were part of their business, as it possibly was.

But, while holding that the status of the family was joint, the Subordinate Judge holds that the kobala of September 1866 was valid under the Mitakshara law. He does so chiefly on the ground that Juneswar in that kobala recites that the original purchase at auction was made half for himself and half for Chunder Coomar, and in reliance on certain expressions used by Chunder Coomar in his evidence in this case, in his plaint in the pre-emption case, and in an objection filed by him on December 13, 1877, all of which, he appears to think, bar Chunder Coomar from now disputing that the property was joint. We think the construction put upon these expressions by the Subordinate Judge is erroneous, but, were it otherwise, they could not have the effect he attributes to them. Chunder Coomar's evidence in this case, in which he explicitly sets up the joint character of the property, cannot on the face of it be taken as an admission of a fact which he comes into Court to deny, while the language used by him in proceedings to which plaintiff was not a party could not bind him towards the plaintiff, even if it contained, as we do not think it does, admissions on his part that the property was not joint; nor can the language of the kobala have the effect attributed to it, for Juneswar, if he was selling property which he had no right to sell, could not confer that right upon himself by asserting that he had it. It is not suggested that the money advanced on the *zurpeshgi* leases, or the money which was the consideration for the auction sale, were not joint family funds: and the property which passed under those transactions became clearly joint family property.

[147] Then the fact that Purbhu Das was an active member, as the Judge found, of the joint family, and was so at the time of the kobala, which latter fact was not mentioned in argument before us, is conclusive. The family did not consist of two persons jointly interested in the family property, but of three persons so interested. We take the Judge's finding to negative the supposition that Juneswar was the manager of the family. But even if he was, this sale did not pretend to be made by him in that capacity; nor was there any family object to be gained by it. It was simply an appropriation by him, without any partition, of part of the family property. Nor does the doctrine lately introduced, that sons are bound by force of a pious obligation incumbent on them to make good the acts of their father, extend to nephews in respect of the acts of their uncle, or to brothers of the acts of brothers. No

doubt the Mitakshara law has been a good deal worn away by the decisions of recent years, which it is our duty to follow. But we are not aware of any authority according to which the sale by Junoswar in the present case could be sustained.

We think that the plaintiff has failed to show a good title to the property claimed, and that on this ground also the suit should have been dismissed.

As to the view taken by the Subordinate Judge, that having regard to s. 13 of the Code of Civil Procedure and the case of *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (I. L. R., 2 Cal., 152), the defendant is not entitled to rely on this ground, as he did not put it forward when he brought his suit for pre-emption; we think it enough to point out that this suit is not between the same parties as the former suit. We should hesitate before holding that the bar arising from the acts of his father which, as we have decided, precludes the plaintiff from disputing Ruttonjote's right to compromise the pre-emption suit, had such an operation as to entitle him to treat it as if, for all purposes, it had been brought against him, and so to avail himself, against the defendant, of s. 13, explanation 2 of the Civil Procedure Code. Were it necessary to deal with this question, we should have to consider the bearing upon it of the recent decision of the Privy Council in *Amanut Bibee* v. *Imdad Hossein* (L. R., 15 I. Ap., 106), decided **[148]** on March 16th of this year. But for the purposes of this appeal, it is needless to determine that question. If the plaintiff is estopped, he cannot recover, for that reason, in this suit. If he is not, defendant is not barred by s. 13 from showing that under the Mitakshara law plaintiff has no title, and in either case the suit must fail.

We should add that had we felt able to sustain the decree of the Subordinate Judge, we should have felt some difficulty in doing so without giving the defendant an opportunity of showing how far, if at all, the very great increase in the value of the property since the pre-emption suit is attributable to the paying off of incumbrances at that time affecting it by the defendant. It has admittedly doubled in value at the least.

We set aside the decree of the Subordinate Judge, and dismiss the suit with all costs here and in the original Court

C. D. P. *Appeal allowed.*

NOTES

[*See* also 20 Cal., 296, 22 Cal., 909.]

[16 Cal. 148]

APPELLATE CIVIL.

The 4th September, 1888.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI

Sarat Chunder Dey and others............Defendants 1 to 5

versus

Gopal Chunder Laha Plaintiff and others, Defendants 6 to 10.*

Benami transaction -Estoppel- Persons claiming under person who creates the benami.

The mere fact of a benami transfer does not in itself constitute such a misrepresentation as to bind all persons claiming under the person who creates the benami.

O made a benami gift of his property to his wife *A*. The deed of gift was registered and purported to be made in consideration of the fixed dower due to *A*. There was no mutation of names; but *O* managed the property as *A*'s am-muktar under a general power-of-attorney executed by her in his favour. On the death of *O*, *A* mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against *A*, the mortgaged property was purchased by the defendants. On the death of *A*, *H* and *R*, the son and daughter of *A*, sold their shares in the property, which they had inherited from their father *O*, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of *H* and *R*, and for partition.

[149] *Held*, that the acts of *O* were not such as to constitute an estoppel as against his heirs and, therefore, the plaintiff was entitled to the relief he sought.

Luchmun Chunder Geer Hossein v. Kally Churn Singh (19 W. R., 292) explained.

SUIT for declaration of title and partition.

Umed Ali Ostagar died on the 6th August 1879, possessed of considerable property, and leaving him surviving his widow Azru Bibi, Ahmed Hossein, Rohimunnessa and Bunnijan, his children by Azru, and a son Palkjan by a second wife who predeceased him. Some time before his death, on the 4th January 1878, Umed Ali by a deed, which purported to be a *hiba-bil-ewaz*, or a deed of gift in consideration of a sum of Rs. 11,361 due to his wife Azru in respect of her fixed dower, conveyed, amongst other properties, the property in dispute in this suit to Azru Bibi absolutely. There was no mutation of names; but Azru executed a general power-of-attorney in favour of her husband Umed Ali, who, under colour of such authority, managed the properties as her am-muktar.

On the strength of this deed Azru Bibi, on the 22nd April 1880, mortgaged the properties covered by it to one Kalimuddin to secure the repayment to him of an advance of Rs. 2,000. The mortgage-deed was attested by Ahmed Hossein, who held a power-of-attorney from her sister Rohimunnessa, dated the 17th December 1879. The mortgage-debt was not repaid, and Kalimuddin in 1881, brought a suit against Azru Bibi on the mortgage in the Court of the Second Subordinate Judge of the 24-Pergunnahs, and obtained a decree on the 7th December of the same year. At an auction sale on the 15th May 1882 in execution of this decree, Khetter Mohun Dey and Grish Chunder Dey, the predecessors in title of the defendants Nos. 1 to 5, purchased the mortgaged properties and obtained possession. Prior to the decree in the year 1881,

* Appeal from Appellate Decree No. 1660 of 1887, against the Decree of H. Beveridge, Esq., Additional Judge of 24-Pergunnahs, dated the 18th June 1887, reversing the decree of Baboo Karuna Das Bose, Munsif of Sealdah, dated the 30th December, 1886.

Palkjan instituted a suit in the original side of the High Court for the administration of the estate of his father Umed Ali Ostagar. The sale in execution of the mortgage decree took place before the written statements, in which Ahmed Hossein and Rohimunnessa supported the *hiba*, were filed by them in Palkjan's suit.

[150] On the 4th May 1884 Azru died; and, on the 28th July 1885, Ahmed Hossein and Rohimunnessa, the son and daughter of Azru, sold their respective shares in the property in this suit, which they had inherited from their father Umed Ali Ostagar, to the plaintiff Gopal Chunder Laha, who took a conveyance of the same in the name of his servant Janoki Nath Chatterjee, defendant No. 10. On the strength of his purchase the plaintiff Gopal Chunder Laha, in December 1885 instituted a suit in the Court of the Munsif of Sealdah for a declaration of his right to the said shares of Ahmed Hossein and Rohimunnessa in the property in suit, and for partition. He also prayed for the removal of a pucca wall erected by the defendants Nos. 1 to 5.

The material issues tried by the Court of First Instance were:--Did Umed Ali make a valid gift of the property to his wife? Even if the gift be not valid, is not the plaintiff estopped from disputing its validity by the conduct of his vendors and their predecessors in title? There was no dispute as to the share the plaintiff would be entitled to if the *hiba* was declared invalid.

It was contended, on behalf of the plaintiff, that the deed of 4th January 1878 was a benami transaction; that it did not convey any estate in the property; and that, as against the defendants Nos. 1 to 5, the plaintiff was entitled to the shares of Ahmed Hossein and Rohimunnessa. It was also contended that the mortgage of the 22nd April 1880, to enforce which the suit of 1881 was brought, did not pass any interest in the property, and that, therefore, the defendants Nos. 1 to 5 did not acquire any interest in it under the sale of the 15th May 1882 in execution of the mortgage-decree.

The defendants Nos. 1 to 5 contended *inter alia* that the *hiba* was a valid document, possession having been given under it to Azru Bibi, that the plaintiff was estopped by the conduct of his vendors and their predecessors in title from questioning the validity of the *hiba*, and that they were *bona fide* purchasers for value without notice.

The Munsif found that there was no consideration for the *hiba*; that Umed Ali had proclaimed to the world that he had made a valid *hiba* of his property in favour of his wife Azru Bibi; that he had given effect to it by putting her into possession; that he had **[151]** allowed his wife to use her own seal in respect of the property; and that, as his wife's am-muktar, he led the world to believe that she was the real owner of the property. He also found that, after Umed Ali's death, Azru Bibi dealt with the property as her own. He further found that the defendants Nos. 1 to 5 were *bona fide* purchasers for value without notice, and the plaintiff's purchase was only an unconscionable bargain.

He held that the *hiba* as a deed of dower was invalid, but that it was valid and binding as a deed of gift, seisin having been given in accordance with the requirements of the Mahomedan law. He also held that the plaintiff was estopped from questioning the validity of the *hiba* by the conduct of his vendors and their predecessors in title. Accordingly the Munsif dismissed the suit.

The plaintiff appealed to the Additional Judge of the 24-Pergunnahs. The Judge agreed with the Munsif in holding that the *hiba* was invalid as a deed of dower and as being without consideration; but, as he was of opinion that there was no evidence that Azru Bibi did got possession until after the death of her husband, he held that the *hiba* was also invalid as a deed of gift.

Upon the question of estoppel, he found that Umed Ali did nothing beyond execute and register the deed of gift; that there was no evidence that Umed Ali had held out Azru Bibi to the world as the owner of the property, or that he had parted with possession of it. He, therefore, held that the conduct of Umed Ali fell far short of what was required to constitute an estoppel. He also held that neither Ahmed Hossein nor Rohimunnessa was estopped from disputing the *hiba*, and consequently the plaintiff was not. The Judge further held that the existence of the suit in the High Court, in which the validity of the *hiba* was in question, went far to disprove the plea that the defendants were *bonâ fide* purchasers for value and without notice. He accordingly allowed the appeal, and ordered the removal of the wall erected by the defendants.

Defendants Nos. 1 to 5 appealed to the High Court.

Mr. *Woodroffe*, Baboo *Nil Madhub Bose* and Baboo *Shib Chund Paul* for the Appellants.

Mr. *Evans*, Baboo *Pran Nath Pandit* and Baboo *Okhoy Coomar Banerjee* for the Respondents.

[152] The **Judgment** of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

The plaintiff sues as purchaser of the shares in certain property of Ahmed Hossein and Rohimunnessa, the son and daughter of one Umed Ali Ostagar, of whose estate the property in question formed part, and who died in the year 1879, leaving him surviving his widow Azru, Ahmed Hossein, Rohimunnessa, and Bunnijan, his children by Azru, and a son Palkjan, by a second wife. The defendants purchased the property, in which the plaintiff claims the shares of Ahmed and Rohimunnessa, at an execution sale, which took place on the 15th May 1882. The sale at which the defendant purchased this property was in execution of a decree in a mortgage suit brought by one Kalimuddin, the mortgagee, in 1881, and the decree in which was made in December 1881. The plaintiff says that the mortgage, to enforce which the suit of 1881 was brought, was ineffectual to pass any interest in the property, and that no interest in the property passed to the defendant under the sale on the 15th May 1882 in execution of the mortgage decree. The mortgage was entered into between Azru Bibi, the widow of the deceased Umed Ali Ostagar, and Kalimuddin. Azru claimed to be entitled to the property mortgaged under a *hiba* executed by her husband on the 4th January 1878, by which *hiba*, in consideration of the sum of Rs. 11,361, due to her in respect of her fixed dower, Umed Ali conveyed the property in question amongst other properties to her absolutely. On the part of the plaintiff, it is said that this *hiba* was a mere benami transaction, and conveyed no estate in the property, and that as against the defendants he is entitled to the shares of Ahmed and Rohimunnessa, inherited by them from their father. It has been held as a matter of fact by the lower Court that the *hiba* was a benami transaction. But it is contended by the defendants that the plaintiff cannot recover, claiming as he does under Ahmed and Rohimunnessa, on the ground that they, his assignors, were estopped from disputing the validity of the *hiba*, and that he in this case cannot dispute it. The case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (19 W. R., 292) has been cited on behalf of the defendants. And apart from the principles laid down in that decision, which was a [153] decision of the Privy Council, the circumstance of Ahmed Hossein having attested the deed of mortgage to Kalimuddin is relied on as estopping him from questioning his mother's power to execute the document, and a power-of-attorney executed by Rohimunnessa, amongst others, in favour of Ahmed, on the 17th December 1879, is relied upon as having a similar effect as regards her.

As to Ahmed we are unable to hold that the mere witnessing by him of that document, *i.e.*, the mortgage, or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the *hiba* to confer upon Azru, and the fact that Azru had no power to create, a good title as against him, of which knowledge on his part there is no proof As regards Rohimunnessa, we need say no more than that we cannot consider the execution by her of the power-of-attorney above alluded to as having the effect attributed to it by the defendants. As to any other ground of estoppel affecting Ahmed and Rohimunnessa, it is true that in the proceedings on the Original Side of this Court in Suit No. 601 of 1881, filed by Palkjan, for administration of Umed Ali Ostagar's estate, both Ahmed and Rohimunnessa did support the validity of the *hiba*, but there is nothing to show that their having done so, or their being about to do so, was ever communicated to the defendants by any one--certainly not by them. Indeed, the defendant's purchase at the execution-sale took place before the written statements filed by them in the suit in this Court were presented by them.

Upon the whole, therefore, we do not find any circumstance in this case such as to justify us in holding (assuming it to be material) that Ahmed Hossein and Rohimunnessa were, by acts of their own, estopped from disputing as between them and the defendants the validity of the *hiba*, which is the source of their title.

The next question is whether in this case the decision of their Lordships of the Privy Council in *Luchmun Chunder Geer Gossain* v *Kally Churn Singh* (19 W. R., 292) is an authority which we can apply in this case, so as to hold that Ahmed and Rohimunnessa, as heirs of Umed Ali Ostagar, became estopped as to **[154]** the *hiba*. Now in that case, there were circumstances which do not exist in the present: there had been a long course of public acts and declarations by Ubotar Singh, the grantor of the deed of sale to his wife Ulpa, which in that case was held to have been a benami transaction ; and, further, Ubotar Singh, during his lifetime, as far as possible, by transfer of possession and otherwise, did all that he could to cause his wife to bear towards the public the character of owner. In the present case there was nothing save, *first*, the execution of the deed. *secondly*, the registration of it; *thirdly*, the execution of a general power-of-attorney by Azru in favour of her husband; and, *fourthly*, the fact that a seal was made for her, to constitute acts of the kind relied on in the case before their Lordships. And of none of them, save the execution of the deed itself, is it shown that the mortgagee or the present defendants were informed and aware. Again, before the sale on the 15th May 1882, in the suit in which that sale took place, the validity of the *hiba* was impeached by Palkjan, the plaintiff in the original suit in the High Court. It is true that Palkjan's claim was dismissed: still the fact that that claim was made was one that we understand the Additional District Judge to hold ought to have put the defendants upon enquiry. And although it is true that at that time the proceedings in the suit in the High Court did not contain an express denial by Palkjan of the validity of the *hiba*, the fact that he at least contested its validity, and that in the schedule to his plaint in that suit he included the properties in the estate left by his father, the administration of which he sought, must have appeared to the defendant had he made enquiry. Further, it is to be noted that there was no mutation of name in respect of this property to that of Azru Bibi, and there is nothing in the case to show that up to the time of the death of Azru's husband, she had (save in having executed that purely formal document, the power-of-attorney, under colour of which affected

authority the property was managed, *i. e.*, really enjoyed by her husband) anything to do with the possession of the property or the enjoyment of any of its profits. Under these circumstances, we cannot hold that the Additional District Judge—either in determining, as he has done, that no estoppel was created, or in holding, as he has done, that the defendants do not occupy the position of *bona fide* pur-**[156]** chasers without notice—was wrong : and this absolves us from considering the further question, which we might, perhaps, have otherwise found it necessary to determine, viz., whether, if Ahmed and Rohimunnessa were estopped from disputing the *hiba*, that estoppel would have been one binding on the plaintiff in the absence of proof of knowledge on his part of the circumstances that gave rise to it.

We may add that we share the regret expressed by the Additional District Judge in coming to this conclusion in such a case. We would further say that we are sensible of the great importance of carrying out to the full the principle of the decision of the Privy Council in the case above cited, but that case does not go so far as to decide that the mere fact of a benami transfer in itself constitutes such a misrepresentation as to bind all persons claiming under the person who creates the benami, and, however salutary it might be that such should be the rule of law, we cannot hold that such a rule exists.

We, therefore, affirm the decree of the Additional District Judge, save as to that portion of it which orders the defendant to remove the wall built by him, for which we can see no warrant. As to that we must reverse the decree of the Court below. The respondent is entitled to remove the wall if it is on his land, but he is not entitled to a decree compelling the defendant to remove it. In other respects the appeal is dismissed with costs.

C. D. P. *Decree varied.*

NOTES.

[This case was reversed in **(1892) 20 Cal., 296 P.C.]**

[16 Cal. 155]

APPELLATE CIVIL

The 12th December 1888.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

Aubhoy Churn Maji............one of the Defendants

versus

Shoshi Bhusan Bose and others............Plaintiffs.*

Appeal—Suit for rent—Question as to amount of rent—Sub-division of Tenancy—Rent receipts signed by one of several co-sharers—Bengal Tenancy Act (VIII of 1885), ss. 88, 153.

Several plaintiffs, co-sharers, sued two defendants to recover the sum of Rs. 78 odd for arrears of rent in respect of a tenure, the annual amount of rent payable being alleged to be

* Appeal from Appellate Decree No. 506 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 5th of January 1888, modifying the decree of Baboo Dukhina Churn Mozumdar, Munsif of Diamond Harbour, dated the 20th of July 1887.

Rs. 15. One of the defendants appeared [156] and pleaded that the tenure had been some time previous divided by the principal plaintiff (who was the *kurta* of the family and collected the rent), and that after the division he had paid Rs. 7-8 per annum, being the rent in respect of his half of the tenure, to the *kurta* ; in support of such payments he produced *dakhilas* or rent receipts signed by the *kurta*. The suit was dismissed by the Munsif, but on appeal the Additional Judge gave the plaintiffs a decree for the amount of rent claimed less the amount proved to have been paid by the defendant who contested the suit, as shown by the *dakhilas*. He held that the division had not been proved, and that the *dakhilas* did not amount to the written consent required by s. 88 of the Bengal Tenancy Act. The defendant appealed to the High Court, and at the hearing it was objected that, under the provisions of s. 153 of the Act, no appeal lay.

Held, that an appeal did lie, inasmuch as there was a question as to the amount of rent annually payable, the plaintiffs claiming Rs. 15 and the defendant alleging only Rs. 7-8.

Held, further, that the *dakhilas* or rent receipts did not amount to a written consent as required by s. 88 of the Bengal Tenancy Act, and that the decree of the lower Court must be upheld.

IN this case there were two defendants, and the plaintiffs sued to recover arrears of rent and for ejectment, alleging that the defendants held 5 bighas of land at an annual rent of Rs 15; that they had not paid the rent from 1290 to 1293 ; and that there was a sum of Rs. 74 odd due to them on account of such rent, interest and cesses.

The defendant No. 2 alone contested the suit and pleaded that the original tenure had been sub-divided by the plaintiff No. 1, who acted as *kurta* of the family, and alone managed the property and collected the rent. He further pleaded that in respect of the 2½ bighas of land, which had been allotted to him on the division, he had already paid the rent to plaintiff No. 1.

The other defendant did not appear or contest the suit. At the hearing of the case in the Court of First Instance, the plaintiffs abandoned their claim for ejectment, and the only issues raised were: (1) Whether the defendant No. 2 had paid the rent as he alleged , and (2) whether the holding had been sub-divided by plaintiff No. 1, and, if so, whether the division was valid.

The Munsif found that the plaintiff No. 1 was the collecting agent of the plaintiffs, and that he had always granted *dakhilas*; that a division of the holding was effected by him in the way [157] alleged by defendant No. 2 ; and that the plaintiffs were bound by his acts. In proof of his allegation as to the payment of the rent in respect of his 2½ bighas, defendant No. 2, in addition to other evidence, produced *dakhilas* purporting to be signed by plaintiff No. 1, which signature the latter denied. The Munsif, however, found them to be genuine, and decided the first issue also in favour of the defendant.

Upon these findings the first Court held that the plaintiffs were not entitled to any relief and dismissed the suit with costs.

Upon appeal the Additional Judge reversed that decree. He agreed with the finding of the lower Court that defendant No. 2 had proved the payments of the rent alleged by him On the other issue, however, he held in favour of the plaintiffs. The material portion of his judgment upon that point was as follows :—

"Defendant says Shoshi Bhusan made a separation in Choit 1291, and granted *dakhilas* accordingly, in which it was stated that defendant held 2½ bighas at a rental of Rs. 7-8. I am not quite sure if this amounts to the written consent required by s. 88 of the Bengal Tenancy Act [see the case of *Gour-Mohun Roy* v. *Anund Mundul* (22 W. R., 295)]. But however that may be, I think that defendant's plea of separation must fail on the ground that Shoshi Bhusan

alone granted the *dakhilas*. He is not the guardian of the minor plaintiffs, and I do not think that it is within the scope of a manager's authority to divide tenures or distribute rents. Shoshi Bhusan is not the *landlord* referred to in s. 88 of the Tenancy Act, but only one of the landlords. I think, therefore, that defendant is still bound to pay the rent of the whole tenure."

He accordingly gave the plaintiffs a decree for the rents of the tenure at Rs. 15 per annum less the payments proved to have been made by the defendant No. 2, as shown by his *dakhilas*, the decree being against both defendants.

Against that decree defendant No. 2 now appealed to the High Court.

Baboo *Karuna Sindhu Mukerjee* and Baboo *Jogendra Chunder Ghose* for the Appellant.

Baboo *Bhobani Churn Dutt* for the Respondents.

[158] At the hearing of the appeal a preliminary objection was taken that no appeal lay to the High Court.

The **Judgment** of the Hight Court (MITTER and MACPHERSON, JJ.) was as follows:—

We think that in this case the preliminary objection taken to the hearing of the appeal should not prevail. Under s. 153, if there be a question as to the amount of rent annually payable by a tenant, then an appeal lies. In this case there was a question of that nature. The defendant (appellant before us) contended that the amount of rent payable annually by him was Rs. 7-8, and not Rs. 15 as claimed in the plaint. That being so, we overrule the preliminary objection. Upon the merits of the appeal it appears to us that the District Judge has disbelieved the oral evidence that was adduced by the appellant to establish that the distribution of the rent between himself and his brother was effected with the sanction of the landlord, and the District Judge was further of opinion that the rent receipts filed by the defendant-appellant, which were genuine, did not amount to a written consent required by s. 88 of the Bengal Tenancy Act. In this view of s. 88 we concur. He adds that even accepting that the rent receipts are sufficient to bring the case within the purview of s. 88 of the Bengal Tenancy Act, still the receipts having been granted by Shoshi Bhusan, the *kurta* of the family, were not sufficient to bind the other members of it. I am not inclined to agree with the District Judge in that view, but he being of opinion that the oral evidence as to the sub-division of the rent and of the land of the original tenure with the sanction of the landlord is not trustworthy, and that the receipts did not amount to a written consent required by s. 88, it is immaterial to consider whether the act of Shoshi Bhusan, the *kurta* of the family, was binding in this respect upon the other members. We dismiss this appeal with costs.

H. T. H. *Appeal dismissed.*

NOTES.

[As regards sec. 153 this case was approved in (1890) 17 Cal., 489.

As regards evidence of consent, this was distinguished in (1898) 25 Cal., 531 : *see* also (1904) 31 Cal., 1026 ; 8 C.W.N , 923]

[159] CIVIL REFERENCE.

The 7th January, 1889.

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

Shuttrughon Das Coomar............Plaintiff

versus

Hokna Showtal and others............Defendants.*

Right of Suit Suit for compensation for wrongful seizure of Cattle—Cattle Trespass Act (I of 1871).

A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit.

Nomaz Mollah v. *Lall Mohun Tagadgeer* (15 W. R., 279) approved of; *Aslem* v. *Kalla Durzi* (2 C. L. R., 344) dissented from.

REFERENCE under s. 617 of the Code of Civil Procedure from the Second Munsif of Midnapore.

The plaintiff brought this suit to recover from the defendants the sum of Rs. 24, being the amount of fine paid by him in releasing his cattle, which he alleged had been wrongfully seized and impounded by the defendants. The defendants contended that the provisions of Act I of 1871 were a bar to a suit for compensation for illegal seizure of cattle, and further that the seizure and detention of the plaintiff's cattle were not illegal and wrongful.

The Munsif found that the seizure was illegal and wrongful and decreed the suit; but having regard to the conflicting rulings in *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (15 W. R., 279) and *Aslem* v. *Kalla Durzi* (2 C. L. R., 344), he made his judgment contingent on the opinion of the High Court, on the question whether the provisions of Act I of 1871 operated as a bar to the maintenance of a suit for compensation for wrongful seizure of cattle in a Civil Court.

No one appeared for the Plaintiff.

Baboo *Karuna Sindhu Mookerjee* for the Defendants.

The **Judgment** of the Court (PIGOT and BEVERLEY, JJ.) was as follows :—

In this case there are two conflicting decisions, and the Small Cause Court Judge has very properly referred the case to us. The question is whether an action for wrongful seizure of cattle will lie [160] in a Civil Court. Mr. Justice MITTER and Mr. Justice MACLEAN, in the case of *Aslem* v. *Kalla Durzi* (2 C. L. R., 344), have held that it would not, the remedy by Act I of 1871 being, in the opinion of both those learned Judges, the only remedy available. On the other hand, in the case of *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (15 W. R., 279), it was held by Mr. Justice LOCH and Mr. Justice AINSLIE that a suit would lie, notwithstanding the provisions of Act III of 1857, the similar Act then in force. That case does not seem to have been before the learned Judges who decided the case of *Aslem* v. *Kalla Durzi* (2 C. L. R., 344) which was not argued. Under these circumstances, we must form our opinion by the light of those two cases, and upon such grounds as appear to us to exist upon a consideration of the statute. The peculiar remedy for the wrongful

* Civil Reference No. 22A of 1888, made by Baboo Bhubun Mohun Gangooly, Second Munsif of Midnapore, dated the 7th of September 1888.

seizure of cattle, and the special limitation provided for it, are the same as existed under Act III of 1857, referred to in the case of *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (15 W. R., 279). Such a remedy does not, we think, exclude the ordinary remedy which a man possesses under the law. It might be, as Mr. Justice LOCH points out, a hard thing that a man, who has not been able to pursue his remedy under the summary Act within ten days, should, because that Act offered him that remedy, be barred from exercising a right which existed for him before. Therefore, agreeing with the decision in the case of *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (15 W. R., 279) we consider that this suit will well lie.

C. D. P.

NOTES.

[*See* also (1903) 27 Mad., 183.]

---

[161] PRIVY COUNCIL.

The 20th and 23rd March, the 19th, 21st and 24th April, and 23rd June, 1888.

PRESENT:

LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

Mahomed Abdul Kadir and others............Defendants

versus

Amtal Karim Banu............Plaintiff.

[On appeal from the High Court at Calcutta.]

Acquiescence—Ratification of transfer of property—Limitation Act (XV of 1877), s. 10 Trust.

A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. On the question, whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it: *Held*, that, if the mother had exceeded her powers in executing the solehnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction; and the solehnama was upheld.

As to limitation, it was not to be inferred from the evidence that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters; and, therefore, s. 10 of Act XV of 1977 was inapplicable. So that, as regarded the property included in the solehnama, suits instituted in 1882 by the daughters would have been barred by time.

CONSOLIDATED appeals from two decrees (13th April 1885) following one judgment of the High Court, varying two decrees (20th November 1883) following one judgment of the Subordinate Judge of Dacca in two suits, heard together.

The suits out of which these consolidated appeals arose were brought on the 7th July 1882 by two sisters against their two brothers, each sister suing separately and including the other sister as a co-defendant. The suits were heard together, and in the Courts below one judgment was given in both, the claims resting on similar grounds. The sisters were now severally respondents in the two appeals preferred by the brothers. **[162]** The general question raised was, whether the respondents, daughters of a Mahomedan proprietor, deceased in 1845, were entitled to possession with an account of past profits of their respective shares in his estate against their two brothers, who, after the father's death, had received the rents and profits of the estate; the respondents having parted with the shares to the brothers by transfers which they now sought to have set aside.

The facts are stated in their Lordships' judgment.

On the death of the father Mahomed Idris Khan in 1845, the plaintiffs, their father's widow Khadija, mother of the latter, and two sons of the deceased by a former wife, also another daughter, represented on this record, became entitled to proportionate shares in his estate.

The question between the parties involved the right of Khadija's daughters to have set aside the following documents of transfer alleged to have been executed on their behalf. The first was a solehnama, or deed of settlement of disputes, dated 6th January 1847, executed by Khadija for herself, and as guardian of her then minor daughters, and by Abdul Kadir, the eldest son, on his own behalf, and on that of his then minor brother, and two other minor sisters.

The second was a daemi miras ijara, or perpetual hereditary lease, dated 26th August 1864, purporting to have been executed by a mukhtar, Pran Nath Chuckerbutty, on behalf of the sisters, now plaintiffs, in favour of their brothers, in consideration of receiving Rs 600 a year each. This they did receive till 1881.

As to the plaintiff's right to have these instruments set aside, and to recover possession of their shares, and to have an account taken from the time of Mahomed Idris's death in 1845, the Courts below differed, the first Court holding that the instruments in question were binding on the plaintiffs, and that these suits were also barred by limitation; the High Court holding, on the contrary, that neither of these instruments had been established against the respondents, and that limitation did not bar the suits.

The High Court (FIELD and BEVERLEY, JJ.), as to the solehnama of 1847, were of opinion that Khadija's execution of it was not binding upon the minors, her interests being adverse to **[163]** theirs. As to the daemi miras potta, which purported to have been executed on 26th August 1864 by the mukhtar Pran Nath Chuckerbutty, the Court was not satisfied with the evidence of his having been duly empowered. That being so, the daemi miras potta must fall to the ground. The Court also held that, even if the authority to the mukhtar had been proved, the defendants had not shown that the sisters understood the transaction which the mukhtarnama authorized, or that they had proper advice before entering into the transaction, which was not for their benefit.

As regards limitation, the Judges were of opinion that, less than two years before the suits were brought, the defendants were, as agents and trustees on behalf of the plaintiffs, managing and in possession of the property, both before and after 1864. It was only when the plaintiffs endeavoured to obtain an increase of the Rs. 60 per annum each, that the defendants set up an adverse title based on the miras potta of 1864, of which instrument the plaintiffs were not aware till the month of Aughran preceding the institution of these suits; which, accordingly were not barred. The High Court directed an account of the plaintiffs' shares in Mahomed Idris's estate from the date of his death in 1845 to be taken.

On this appeal, Mr. *R. V. Doyne*, for the Appellants, argued that the grounds on which the High Court had reversed the decision of the Subordinate Judge were insufficient.

The solehnama of 1849 had been executed by Khadija, as mother and guardian of her minor daughters, and the High Court had not drawn a correct inference from the evidence in finding that the daughters' interests had been injured. Whatever might have been urged at one time on behalf of the daughters against the instrument, their claim to set it aside could not be maintained after the lapse of twenty years from the time of their attaining full age. This long acquiescence amounted to a ratification by the daughters themselves. So also in regard to the daemi miras ijara of 1864, the plaintiffs had been for many years receiving the annuities for which it provided, and thus it was not a correct conclusion that the ijara must fall with the mukhtarnama.

[164] The plaintiffs' knowledge of the nature of the then intended lease was established by the evidence, and the plaintiffs had not shown any sufficient reason for setting aside their own act. Again, the High Court had erred in considering the law of limitation to be inapplicable. The possession of the appellants as lessees under the ijara of 1864 for more than twelve years before the institution of these suits had been shown, and thus the suits were barred.

The High Court say that the appellants' possession and management rendered them agents and trustees on behalf of the sisters. But this is incorrect. In regard to the solehnama, at all events, by which the taluks were separated, the brothers had no charge whatever of the shares or interests of the sisters, each daughter had become entitled to her share, and the mother (not the brother) was her guardian. There was no trusteeship as between the brother and the sisters. The suits were barred by Act XV of 1877, unless it should be held that the provisions of s. 10, relating to trusts for specific purposes excepted them from the operation of the general law. But it was clear that no such trust was involved by the brothers having, as manager, collected rents; and money actually received by the managers for the plaintiffs' use must be sued for within three years: *see* Art. 62, which prescribed that period counting from the date of the receipt of the money. Reference was made to Arts. 109, 120, 123, 127 and 144. In order to constitute the manager a trustee within s. 10, the property must have been vested in him; but it was not vested in him, nor had he accepted any such trust. Reference was made to the introduction of this exception into the law of limitation, and Regulation III of 1793, Acts XIV of 1859, s. 2, IX of 1871, and XV of 1877, s. 10, were referred to. Also, it was not sufficient to show a bare fiduciary relationship. *Ahmed Mahomed Pattel* v. *Adjein Dooply* (I. L. R, 2 Cal., 323), *Kherodemoney Dassee* v. *Doorgamoney Dassee* (I. L. R., 4 Cal., 455), *Greender Chunder Ghose* v. *Mackintosh* (I. L. R., 4 Cal., 897), *Sarodapershad Chattopadhya* v. *Brojo Nath Buttacharjee* (I. L. R., 5 Cal., 910, 915, 921), *Manickavelu Mudali* v. *Arbuthnot & Co.* (I. L. R., 4 Mad., 404), *Arunachala Pillai* v. *Ramasamiya*

Pillai (I. L. R., 6 Mad., 402), were cited in **[165]** reference to s. 10. Reference was made to Lewin on the Law of Trusts, Chap. XXX, s. 1, p. 863; Darby and Bosanquet on the Law of Limitation, p. 183.

Mr. *J. Graham*, Q.C., and Mr. *J. H. A. Branson*, for the Respondents, argued that, in accordance with the judgment of the High Court, which was correct, neither the solehnama of 1849, nor the daemi miras potta of 1864, should be maintained against them. In regard to the former, the mother was not entitled to convey as she had purported to do, nor was she authorized by her position with reference to her daughters to convey; and the transfer was in disregard of the interest of infants.

As to the miras potta, the finding of the High Court that there was no satisfactory evidence of the execution of the muktarnama authorizing Pran Nath Chuckerbutty to sign for the sisters, was correct. And both the Courts below had been right in finding that the nature of the transaction had not been explained to them as it should have been.

Again, the judgment of the High Court had correctly proceeded upon their opinion of the law of limitation being inapplicable. The collection of rents by the managing member of the family estates did, as soon as they were in his hands, constitute him a trustee on behalf of the sharers. He was liable to account to them in respect of their shares. He was their agent to collect for the family, and this relation once established, the liability to account followed.

As to what would establish a liability to account, reference was made to *Wall* v. *Stanwick* (L. R., 34 Ch. D., 763), *Hobbs* v. *Wade* (L. R., 36 Ch. D., 553), *Thomas* v. *Thomas* (2 K. & J., 79), *Hurrocomaree Dassee* v. *Tarine Churn Bysack* (I. L. R., 8 Cal., 766), *Durga Prasad* v. *Asa Ram* (I. L. R., 2 All., 361)

As to a suit against a managing member of a Hindu family, reference was made to *Obhoy Chunder Roy Chowdhry* v. *Peary Mohun Gooho* (13 W. R., F. B., 75; 5 B. L. R., 347).

[166] As to the guardianship of the minor sisters, Macnaghten's Mahomedan Law, p. 62, and Tagore Law Lectures, 1873, p. 477, were referred to.

Mr. *R. V. Doyne* replied.

On June 23rd their Lordships' **Judgment** was delivered by

Sir R. Couch.—These are consolidated appeals in two suits brought by the respondents respectively against the appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The respondents (the plaintiffs) are the daughters of Moulvi Mahomed Idris, who died at Dacca in December 1845, by his second wife, Khadija, who survived him. The appellants, Abdul Kadir and Abdur Rahman, are his sons by his first wife, Biju, who died before him. By her he had also two daughters, Amatulla and Amtal Rahman, who survived him. At the time of their father's decease the respondents were living with him at Dacca, and, almost immediately afterwards, they left Dacca with their mother Khadija, and went to live at the house of their maternal grandfather, and continued to live there until Khadija married again. From there, soon after her second marriage, the respondents were removed by their brothers and were taken to the house of the brothers in Sylhet, where they lived until 1864. At that time, they being about 22 or 23 and 20 or 21 years of age, respectively, arrangements were made by their brothers for their marriages, and they were taken to Dacca, and, 15 or 20 days after their arrival there, were married to their present husbands. From the death of Mahomed Idris the property left by him was managed by the elder brother, the first appellant, and apparently by the younger, the

second appellant, also, after he came of age, and the brothers received the rents and profits of the property.

In each of the suits the plaintiff claimed possession of a 1 anna 15 gundahs share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by Mahomed Idris, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

[167] There were two grounds of defence. One, as to properties called in the plaint taluks Nos. 3 and 4, was founded upon a solehnama, dated the 6th of January 1847, made between Abdul Kadir for himself and as guardian of his minor brother Abdur Rahman and his minor sisters Amatulla and Amtal Rahman, and Khadija for herself and as guardian of her minor daughters Amtal Karim and Amtal Kadir. By this, after reciting that there was a dispute in respect of the immoveable property left by Mahomed Idris, for settling the dispute between them the parties made an amicable settlement to the effect that out of the taluks which were left by Mahomed Idris, and detailed in a schedule, the taluk No. 3, Alum Reza, bearing a jamma of Rs. 1,293-3-8, and jammai land with nankur and khanabari (homestead land) appertaining thereto, and taluk No. 4, Asadar Reza, bearing a jamma of Rs. 1,400-11-11, with jammai land and nankur khanabari appertaining thereto in Joar Baniachung, Zillah Nabigunge, and two annas share of the houses described, were given in lieu of a sum of Rs. 11,250, with interest, on account of the dower of the deceased mother of Abdul Kadir and his minor brother and sisters which was due to them from their father, by Khadija on her own account and as guardian of her daughters, and the said property was made over to them; and taluk No. 9, Mahomed Manwar, bearing a jamma of Rs 343-12-3, and the jammai land and nankur khanabari in proportion to the aforesaid jamma, and taluk No. 11, Mahomed Mansoor, bearing a jamma of Rs. 168-1-8, with jammai land and nankur khanabari appertaining thereto in Pergunnah Langla which were covered by the kabinnama of Khadija, were given to her by Abdul Kadir and other land in the taluks mentioned, was divided by giving to Abdul Kadir and his minor brother and sisters 10½ sixteenths as their share, and to Khadija and her daughters 5½ sixteenths as their share.

The other ground of defence was that the plaintiffs having been married and settled to live permanently at Dacca, they made a proposal to the brothers to give them a daemi mirasi ijara for ever, at a permanently fixed jamma, of their shares of the properties left by their father, and the brothers (the appellants) agreed to take it on the condition of paying Rs. 100 a month, Rs. 50 being paid to each of the plaintiffs.

[168] Their Lordships will first take the case of the solehnama. It is dated the 6th of January 1847, and thus was made two years after the death of Mahomed Idris. It was found by the Subordinate Judge to have been executed by Najumul Hossein, the father of Khadija, and that he had power to execute it on her behalf It was argued by the learned Counsel for the respondents that Khadija had no authority to convey the shares of her daughters. In the view their Lordships have taken, it is not necessary to give an opinion upon this question, and the learned Counsel for the appellants having been relieved from replying upon this part of the appeal, he has not been heard upon this objection. The Subordinate Judge was of opinion that Khadija had had the benefit of good and independent advice, but that the defendants had failed to prove that the solehnama was beneficial to the plaintiffs. He held, however, that the plaintiffs having allowed 20 years to elapse,

even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court, on appeal from the decrees which he made, held that the transaction was not binding on the plaintiffs, especially in the absence of evidence to show that it was the best arrangement which could under the circumstances be made in their interest.

In their Lordships' opinion, the High Court, in deciding that the solehnama did not bar the right of the plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance with it. That Khadija took possession was proved by her having subsequently made an alienation of part of the property assigned to her. There is, indeed, no direct evidence as to what the brothers did with the taluks Nos 3 and 4, but it may be fairly inferred that they did not treat them as part of the joint property in which the plaintiffs had shares, and that they received the rents of them as property which belonged only to themselves and their minor sisters. Assuming that Khadija had no power to transfer the plaintiffs' shares, **[169]** or that they might have had the solehnama set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. There was also the defence of the law of limitation. The High Court. in dealing with this, made no distinction between the taluks Nos. 3 and 4 and the other property. They said that up to a period less than two years before the institution of the suits the defendants were as agents and trustees in possession of and managing the property on behalf of the plaintiffs. This may have been the case after Khadija's second marriage and the plaintiffs being taken to the brothers' house, but there is no evidence that the brothers should be regarded as trustees for the plaintiffs at the time of the execution of the solehnama. Section 10 of Act XV of 1887 is, therefore, not applicable, and it is unnecessary for their Lordships to put a construction upon this section It appears to them, if it were necessary to decide it, that, as regards the property included in the solehnama, the suits are barred by the law of limitation.

The defence under the daemi miras ijara-potta, or perpetual lease, has now to be considered. The case of the defendants is that the plaintiffs executed a mukhtarnama, dated the 7th Bhadro 1271 (22nd August 1864), by which, reciting that they had inherited from their father $3\frac{1}{2}$ annas share of the property named in it, and the same was being let out in perpetual miras ijara to the brothers Abdul Kadir and Abdur Rahman, they appointed Moonshi Pran Nath Chuckerbutty as a mukhtar for the purpose of signing their names on the perpetual miras ijara-potta and causing registration of the same. And that, on the 26th of August 1864, Pran Nath Chuckerbutty signed their names to a daemi miras ijara-potta of the taluks mentioned in the schedule to it, at an annual rent of Rs. 1,200, namely, Rs. 600 on account of the share of each, to be paid by instalments of Rs. 600, and the document was registered.

There is now no dispute as to the execution of the potta by Pran Nath Chuckerbutty. The material question is whether the mukhtarnama was executed by the plaintiffs. It is attested by five witnesses, of whom only two were examined, and the absence of the others was not in any way accounted for. Of one **[170]** of the witnesses examined, Chamu Bibi, the Subordinate Judge said: "I find it difficult to believe that she could, without any assistance. recollect the execution of the mukhtarnama so circumstantially as it was described by her. It seems to me as very probable that her knowledge of the details was

not derived entirely from her memory. That circumstance, together with the dependence of the witness on the defendants, makes her evidence unreliable, unless corroborated by other evidence." The other witness, Masudar Reza, had been in the service of the defendants for many years, but had left it five or six years before the trial, and did not appear to have then any connection with them. He said: "The Bibis put their marks on that mukhtarnama. I saw the aforesaid Bibis putting their marks. Remaining behind a screen they put their marks by extending their hands. I saw it. From respectable people there I ascertained and believed that the aforesaid Bibis put their marks. I do not recollect the names of the persons from whom I ascertained it." This witness is described in the attestation as resident of Kumartoli, and one of witnesses not examined is described as inhabitant of Kumartoli in Dacca. The potta is attested by nine witnesses, three of whom are described as of Kumartoli, and others as being at Dacca. If the mukhtarnama was really executed as described, it is singular that it was not attested by some of these persons or of "the respectable people there," of whom Masudar Reza spoke.

The other evidence to prove its genuineness consisted of an order dated the 22nd of August 1864, signed by Mr. Pennington, Principal Sudder Amin, on the back of the mukhtarnama, stating that it had been produced "to-day" by Moonshi Giasuddin, Mohurir, and, as an inquiry was necessary, ordering the Nazir to make it; and a report of the Nazir, also on the back of it, dated the 23rd of August, which stated that he went to the residence of the plaintiffs, and that they were identified by their relations Khaja Abdulla, Khaja Abdul Wajed, and Khaja Abdul Nubbi, and admitted the execution of the mukhtarnama and agreed to its terms Mahomed Yusuf, the Nazir, was examined, and said he did not recollect anything about the inquiry, and that the signature at the foot of the report resembled his writing, [171] but he could not swear it to be genuine or not. On the next day, the 23rd, the mukhtarnama was ordered to be given back to the man who presented it, namely, Giasuddin. As Principal Sudder Amin, Mr. Pennington had no authority to order the inquiry to be made. Giasuddin was a Mohurir of the Court of the First Subordinate Judge and general mukhtar of the defendants, and Mr. Pennington may have thought that the mukhtarnama was for business in the Court. The High Court properly held that the report was not, by itself, evidence of the facts stated in it. Khaja Abdulla and Abdul Wajed were examined. On the testimony of the former the Subordinate Judge said he placed little reliance. The latter deposed to seeing rent being paid and received on twelve or fourteen occasions, and that receipts were granted for it and he saw them signed. It was said by Khaja Abdulla that Pran Nath Chuckerbutty was present when the mark signatures were put and when the Nazir made the inquiry, and yet he was not called as a witness, although he appeared to be living and might have been examined. Their Lordships are not satisfied that the Nazir ever made the inquiry.

It remains to notice a fact which, though possibly consistent with the truth of the defendants' case, raises a strong suspicion against it. A number of receipts were produced by the defendants appearing to be given by Amtal Kadir each for sums of Rs. 50. They contained a statement that she had given a lease in perpetuity to her brother Abdul Kadir and others in lieu of a salary or allowance of Rs. 50 as malikana money, and acknowledged the receipt of Rs. 50 as allowance for the month mentioned in the receipt. They seem to have been worded so as to support the case set up in the defendants' written statement. They were rejected by both Courts as not genuine. No other receipts were produced, nor any accounts showing that rent had been paid to the plaintiff. Thus Abdul

Wajed's evidence as to receipts being signed appeared to be false. The High Court, differing from the Subordinate Judge, said they were not satisfied that the defendants had succeeded in proving the execution of the mukhtarnama, and the evidence does not satisfy their Lordships that it was executed.

The Subordinate Judge found that certain properties in one of the schedules to the plaint did not appear to be covered by [172] the miras potta, and he gave the plaintiffs a decree for those properties with proportionate costs, and dismissed the suits as regards the remainder of their claims. The High Court reversed that decree, and declared that, in addition to the shares of the properties decreed to the plaintiffs by the lower Court, they were entitled to shares of the remaining properties other than the taluks Nos. 9 and 11 which were allotted to Khadija by the solehnama, and had been sold and were in the possession of persons who were not parties to the suits, and they were also entitled to shares of such property or properties specified in the second schedule to the plaint as upon the making of the inquiry thereinafter directed might be found to have been purchased out of the surplus profits of the properties other than the said two taluks, and to a share of the surplus profits of the properties in the first schedule, other than the said two taluks, from December 1815 to the date of delivery of possession, and they ordered accounts to be taken from that date. As to the accounts, it appeared that the plaintiffs had, up to November 1881, been receiving Rs. 1,200 annually. Their Lordships think the evidence of Abdul Wahed, the husband of Amtal Karim, shows that this sum was agreed to be taken as the plaintiffs' share of the profits, and was so received by them until they asked, in November 1881, to have their allowance increased, from which time they refused to receive it. Their Lordships, therefore, consider that the accounts decreed by the High Court should only be taken from November 1881. The result is that, in their opinion, the decree of the High Court should be varied by omitting therefrom the taluks Nos. 3 and 4 which were included in the solehnama, and ordering the accounts to be taken from November 1881 instead of December 1845. They will humbly advise Her Majesty accordingly. As to the costs of these appeals, they think the partial success of the appellants does not entitle them to the costs, and they order that the parties bear their own costs.

Decree varied.

Solicitors for the Appellants: Messrs. *Wrentmore and Swinhoe.*

Solicitors for the Respondents : Messrs. *Watkins and Lattey.*

C. B.

NOTES.

[*See* also (1899) 1 O.C., 31.]

[173] PRIVY COUNCIL.

The 26th, 27th and 28th April and 23rd June, 1888.

PRESENT :

LORD WATSON, LORD HOBHOUSE AND SIR R. COUCH.

Kali Krishna Tagore...........Plaintiff

versus

The Secretary of State for India in Council and another........ .. Defendants.

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13– Act IX of 1847 –Alluvion.

To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided ; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this : as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided.

This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted.

Held, that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882, Civil Procedure Code.

APPEAL from a decree (4th March 1885) of the High Court, varying, on cross-appeals, a decree (20th August 1883) of the Subordinate Judge of the Backergunj District.

On this appeal the first question was whether, between the parties to this suit, there had been a hearing and adjudication of the matters now directly and substantially in issue. Both suits related to the ownership of land gained by alluvion of the river Arial Khan in the Backergunj District, between two river-bordering zamindaries,—the one, Nazirpur, belonging to the plaintiff, and the other, Saistabad, belonging to the second defendant. On these estates land was washed away by the river between the years 1830 and 1811, and afterwards, by its recession, five churs were formed separated by *dones*, or streams. It then was disputed to which zamindari part of them belonged, as being formations on the original site of the land lost by diluvion. Also the right of the Government to assess and settle new formations in the channel came into question.

[174] In 1841, as the result of proceedings before the Special Commissioner of Murshedabad, a chur named Gopalpur was made over to Gopal Lal Tagore, then the owner of Nazirpur ; and another chur, named Chatua, was made over to the owner of Saistabad. In after years the river Arial Khan made channels through both these churs ; and the changes took place, which are described in their Lordship's judgment.

In 1860 a survey was made, under orders of the Revenue authorities, in pursuance of Act IX of 1847 (regarding the assessment of lands gained by alluvion or dereliction). Also, in 1868, the accretions were mapped in a Thak survey. Further formations by alluvion took place about 1871 ; and, in 1873,

Muazzem Hossein took possession of a portion which he alleged to be an accretion to his chur Chatua. But the officers of the Diara Survey, taking a different view, measured it as excess land of Chatua, and it was represented in the Diara Survey map of 1881 as beyond the boundary of that mauza. On the 24th September 1879 Muazzem's claim to this was heard and rejected by the Superintendent of Diara Surveys, whose order was, on the 6th February 1881, suppported by the Commissioner of the Dacca Division, it being found that the newly-formed lands claimed by the owner of Chatua were not accretions to it, or part of it. Muazzem then, without resorting to the Civil Courts to dispute the order of the Revenue Courts, accepted a settlement of the land as in excess of Chatua; and an amulnamah was granted by the authorities enabling him to receive the rents of the cultivators located on it.

Meantime, the plaintiff, who was not a party to the proceedings taken by the Diara Survey officers, filed a suit (No. 1 of 1881), in the Court of the Subordinate Judge, against Muazzem, claiming the land as a formation on the original site of land lost by diluvion from his chur Gopalpur. He alleged that it had appeared gradually since 1873, having become cultivable since 1877. For his defence Muazzem, besides alleging that the land was an accretion to his chur Chatua, insisted that it could not be decreed to the plaintiff as against the Government, through whom he had a title to the possession of the land measured as excess. The judgment of the Subordinate Judge **[175]** (23rd February 1882) was in favour of the plaintiff as to a portion of the disputed lands. He found that it was included in the Thak of 1868 as part of Gopalpur. Excepting the 300 bigahs marked D on a map made by an Amin of his Court, that being the land settled as the excess of Chatua, the decree was for the plaintiff. But as to plot D, his judgment was that so long as the order of the Superintendent of Diara Surveys, directing that this should be measured as excess of chur Chatua, remained in force, "the plaintiff's right to it must be held to be either extinguished, or in abeyance" The decree dismissed the suit as to this plot, and from that decree the plaintiff did not appeal. The defendant Muazzem appealed to the High Court, and his appeal stood over until it was heard along with the appeal in the present suit in March 1885. The plaintiff then filed the present suit (9th January 1883) against the Government, represented by the Collector of the District, the first defendant, and making Muazzem the second defendant. He claimed a declaration of his proprietary right in, and possession of, the 300 bighas (marked D on the Amin's map), as being "re-formation on the original site of land within his zamindari," describing it in para. 12 of his plaint by reference to the survey maps. He referred to his previous suit, No. 1 of 1881, and the exception of D. from the decree of 23rd February 1882, and he claimed mesne profits.

The defence of the Government was that the suit, contesting the proceedings of the Diara survey officers, could not be maintained; and that the land in dispute belonged in fact to neither of the zamindars, having been formed by the drying up of a navigable *done* which existed during the time of the first survey. The defendant Muazzem alleged his right through the Government, as well as independently.

The Subordinate Judge was of opinion that the question had been determined in favour of the plaintiff by the decision of 23rd February 1882, and decreed the claim, save as to the 300 bighas (marked D on the Amin's map), with mesne profits, for three years, against Muazzem.

From this judgment both the zamindars (plaintiff and defendant) appealed to the High Court; but the Government did not **[176]** appeal, and accordingly was made respondent in both appeals. The appeals were heard by a Division

Bench (PIGOT and O'KINEALY, JJ.), together with the appeal in the suit No. 1 of 1881 by consent of parties, and one judgment (4th March 1885) was delivered in the three appeals, or in both suits. In the appeal in the suit No. 1 of 1881 the High Court was of opinion that the evidence was in favour of the plaintiff, and they dismissed the appeal.

In considering the present suit, the Judges observed that the first question was as to the effect of the decree in the prior suit, No. 1 of 1881 ; and in their opinion that decree defined the limit of the estoppel arising from the proceedings. Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the judgment was that a declaratory decree should be refused. The result was a decree dismissing the present suit.

On this appeal, Mr *J. D. Mayne* and Mr. *C. W. Arathoon* for the appellant argued that the High Court was wrong in holding that the decree of the Subordinate Judge of 23rd February 1882, in the suit of 1881, barred the present suit. In deciding that the plaintiff in the suit of 1881 had made good his claim to the land which was adjudged to him, the judgment had not so defined the quantity as to preclude the plaintiff's recovering what he now sued for, on his making proper parties to the suit ; and the decree in that suit should have been read with the judgment on which it was based. Also, there was a difference in the issues now raised from those in the former suit, the Government being a party on the present record. A reference to the judgment showed at once that there had not been in the former suit any final decision against the plaintiff's claiming the lands now in suit, viz., the 300 bighas excluded from the decree in the former suit ; because the reason given for the exclusion was that the order of the Superintendent of Diara Surveys, dated 24th September 1879, remained in force treating the land as excess lands. That order could be set aside in proceedings against the Government There was, therefore, only the decision that the 300 bighas (marked D on the Amin's map) could not be recovered in that suit. Neither of the respondents had raised [177] the question of estoppel in their written statements, nor had an issue on this point been framed, or disposed of in the Court of First Instance.

Reference was made to Act XII of 1879, s. 6 ; and to the Civil Procedure Codes (Act X of 1877, s. 13, and Act XIV of 1882, s. 13).

It was also contended that the finding of the Subordinate Judge as to the *done*, or stream, in which the accretion was formed, not having been shown in the earlier maps as included within the plaintiff's land, was an error on his part.

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson* appeared for the first respondent, the Secretary of State for India in Council. They contended that the plaintiff's suit was barred by the decision of 23rd February 1882, as *res judicata*. The plaintiff had put forward in the present suit the same claim that he made in the former. The defence in the former suit was that it was for him to make the Government a party as to the 300 bighas in question. The plaintiff, thereupon, should have applied for leave to make it a party or for leave to abandon that part of his claim which contravened the orders of the Diara Survey Superintendent and the Commissioner of the Dacca Division, with liberty to bring a fresh suit. He made neither the one application nor the other ; and his suit, as to this part of his claim, was dismissed by a Court competent to give relief between the parties, or those who should have been made parties. No new circumstances had since arisen. The test was not whether there had been an adjudication, or not, upon a title then put forward ; but whether, but for the plaintiff's own conduct, there would not have been an

adjudication. They referred to the explanations, 2 and 3, under s. 13, Civil Procedure Code.

Mr. *J. D. Mayne* replied.

On a subsequent day (23rd June) their Lordships' **Judgment** was delivered by—

Sir R. Couch.—This is an appeal in a suit brought by the appellant against the Secretary of State for India in Council (represented by the Collector for the district of Backergunj), **[178]** and Maulvi Syed Muazzem Hossein Chowdhry, to obtain possession of about 300 bighas of land (described as marked D in a map prepared by the Civil Court Amin in a previous suit), being re-formation on the original site of the plaintiff's zemindari, and to have it declared that the proceedings and orders in connection with the Diara Revenue Survey of disputed lands, by which the land had been attached as liable to be assessed for revenue, and a temporary settlement of it made with the defendant Muazzem Hossein Chowdhry, could not stand against the plaintiff's right, and were not binding on him.

The written statement of the Collector of Backergunj denied that the land in dispute was a re-formation on the original site of the plaintiff's land, and asserted that it was not included in the old Thakbust or Survey boundaries as plaintiff's estate. It also stated that the boundary between the plaintiff's land called Gopalpur, thakked in No. 1585, and the defendant Muazzem Hossein's land called Chatua, thakked in No. 1625, was not a line during the time of the Thakbust or Survey measurement, but a big and navigable *done* (or stream), the bed of which was the property of no individual, and as such was at the disposal of the Government under the present law; that the land in dispute was formed by the drying up of the big and navigable *done* which existed at the time of the first survey between Gopalpur and Chatua, and as such was assessable as surplus under the existing law. Muazzem Hossein in his written statement relied upon the proceedings of the revenue authorities with regard to the diara as being final, and also claimed the land as re-formation on the original site of his lands.

The appellant and Muazzem Hossein are proprietors of two contiguous estates, viz., Nazirpur and Saistabad, respectively. Some time before 1842 considerable portions of these estates were diluviated by the river Arial Khan. On the re-appearance of the land, in the shape of five churs separated from each other by *dones*, resumption proceedings were instituted by the Government, but ultimately the churs were released, and an Amin named Sumbhu Nath was deputed by the Collector to make over to the proprietors the different portions of the re-formed land appertaining to their estates. In 1842 the Amin after making a measurement **[179]** of the lands, prepared separate chittas and a sketch map assigning different portions of the land to the several proprietors The lands assigned to the ancestor of Muazzem Hossein were named chur Chatua, and those released to the appellant's father, Gopal Lal Tagore, were called chur Gopalpur. Some years after, but it is not clear when, the river again changed its course, and, flowing through Chatua and Gopalpur, washed away portions of those two mouzas. In 1868 a Thak survey was made, and after that the river gradually receded towards the east, and is now flowing through the appellant's land of Gopalpur. The land in dispute, which the appellant claims, is the newly-formed land on the west of the river, in contiguity with the lands of Chatua. After this last re-formation the western portion of the land in dispute, together with some other land, was measured by the Diara Survey authorities in 1879 as excess lands of Chatua. Muazzem Hossein objected to this, and claimed

the land as re-formations on the site of the diluviated land of his mouza Chatua. The objection being disallowed, instead of bringing a suit to set aside the order of the revenue authorities, he accepted a settlement of the land from the Government as an accretion to his mouza. In 1881 the appellant sued him for this and other lands, and he pleaded that the land claimed was a re-formation of the diluviated land of Chatua, and also claimed to hold as before of the Government. An issue was settled, "whether the land in dispute is a re-formation on the site of the plaintiff's chur Gopalpur, or on the site of the land of chur Chatua, released to the defendant." The Court found this issue in favour of the plaintiff (the present appellant), but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside, "the plaintiff's right to the portion of the disputed land measured as surplus accretion to Chatua, and settled with the defendant, must be considered as either extinguished or in abeyance. Consequently the plaintiff is not entitled to recover it *now*." It was ordered that the plaintiff should recover possession of a portion of land described by reference to a map prepared by the Amin, excluding therefrom the portion covered by the plot marked by the Court as D in the map. This plot is the land which is the subject of this appeal.

[180] By the Act IX of 1847, "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction in the Provinces of Bengal, Behar and Orissa," it is enacted that the Government of Bengal, in all districts or parts of districts of which a revenue survey may have been completed and approved by Government, may direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey. In 1860 a survey was made under this Act.

It is said by the Subordinate Judge in his judgment in this suit that, on comparison of the Thak and Survey maps by the Civil Court Amin, it has been found beyond doubt that the land in dispute was then thakked as part of the plaintiff's mouza Gopalpur, and that the assertion of the defendants to the contrary was erroneous.* And he held the map to be an admission by the Government of the plaintiff's title. It could not be disputed that it made a *prima facie* case against the Government. However the case of the appellant was not rested only upon this admission. The proceedings in 1842 were put in evidence by him, and from an examination of these their Lordships have come to a conclusion in his favour. The decision of the Special Commissioner of Murshedabad and Calcutta, dated the 15th December 1841, contains a history of the proceedings for assessment of Government revenue on the five churs which appear to have begun in 1833. It is stated that the Collector decreed the case in favour of the Government, and, on an appeal from his decision, it was set aside by the Special Commissioner, and it was ordered that whatever accreted lands might, on investigation, be found to have accreted to the original site by the Government officers, should be released from the claim of the Government.

In October 1842 Sumbhu Nath, the Amin who, as has been stated, was deputed to make over to the proprietors the different portions of the released lands made two reports, one relating to 14,359 bighas 14 cottahs 3 dhoors of land and the other to 6,792 bighas 16 cottahs 6 dhoors. In the former of these reports **[181]** is the following passage:—"The measurement by Anund Chunder Mookerji and Joychunder Chatterji" (a measurement made in the year before

the decree of the Special Commissioner), "shows that there were 20,391 bighas 13 cottahs of land inclusive of *done* in the five plots of chur. The lands in those five plots of chur, inclusive of khal and *done*, amount, by my measurement, to 21,152 bighas 10 cottahs 9 dhoors of land in all, and so there is an excess of 760 bighas 17 cottahs 9 dhoors of land measured by me in the five plots of chur." In the other report, where he speaks of the quantity of land being relinquished to other parties than the appellant's ancestor, Gopal Lal Tagore, he says "including khals and *dones*." Thus the *dones* appear to have been included in the plots. At page 61 of the record there is a document described as the measurement chitta of the lands in five plots of chur included in the Haria and Chaola rivers being the subject of dispute between the Government and Gopal Lal Tagore in Cases Nos. 1474 and 1555 pending trial.

In several places a *done* is mentioned as included in the quantity of land. In the Amin's sketch map, which accompanied the reports, the *done* in question appears to run between Dag. 8 in the 3rd plot and Dag. 15 in the 4th plot, the latter being described as land of Nazirpur. The description of Dag. 15 in the chitta is "north of the lands formed by alluvion after diluvion of mouza Kala" (worm-eaten), "to which the appellants Kumla D" (worm-eaten), "and others named in the decree No." (worm-eaten) "are entitled east of Dag. 8, west of the *done* to the west of the 5th plot and south of the lands of Jharna Bhanga chur, 4th plot." Thus on the opposite side to where the *done* in question was situate, we have a *done* between the 4th and 5th plot given as the boundary, but, on the other side, Dag. 8, and not the *done*, is given as the boundary, and in the description of Dag. 8 it is said to be west of the 4th plot. In the summary at p. 84 of the land of Nazirpur, the zamindari of Gopal Lal Tagore, the total quantity, including the 4th plot, is given, and of this quantity all the plots, except the first, appear in a column headed "Waste land with *done*." It appears to their Lordships that in 1842 the whole of the land and water within the ambit **[182]** of the five plots or churs was measured and released by the Government, and no part of the *dones* was reserved. The evidence of what was done at that time, instead of rebutting the evidence of the map of 1860, supports it. The finding of the Subordinate Judge, that the part of the *done* which in 1842 covered the disputed land was not given to any of the parties to whom lands were allotted by Sumbhu Nath, is, in their Lordships' opinion, opposed to the evidence.

The Subordinate Judge refused to make a decree against the Secretary of State, and made a decree, which was unnecessary, that the appellant should recover possession of the land of which possession was decreed in the former suit. The present appellant and Muazzom Hosein both appealed to the High Court, the latter having also appealed against the decree in the former suit. The three appeals were heard together. The appeal in the suit of 1881 was dismissed. In the other appeals the High Court did not give any judgment upon the facts. They said the first question was as to the effect of the decree in the suit of 1881; that the claim of the plaintiff in respect of the portion marked D in the map "was dismissed, that is to say, the relief prayed for by him in respect of it was not granted. Whatever were the reasons which led the lower Court to take that course and not to grant the plaintiff any relief in respect of that portion of the property, the decree as it stands constitutes the record of the rights of the parties, and is the source that defines the limits of the estoppel arising from the proceedings. We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree, . . it must be treated as a decree binding as between him and the 2nd defendant, the effect being that there is no claim against the defendant in

respect of that property." Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in s. 6 of Act XII of 1879, and s. 13 of Act XIV of 1882. It is, that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally [183] decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the defendant in respect of the property.

Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the High Court, having thus decided as to the estoppel, considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the appellant being, in their Lordships opinion, entitled to more than a declaratory decree. The appeal of the present appellant to the High Court was dismissed, and that of Muazzem Hossein in this suit was allowed, the result being that the suit was entirely dismissed.

Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the plaintiff, and they will humbly advise Her Majesty to reverse the decrees of the lower Courts, and to make a decree awarding possession to the plaintiff of the lands mentioned in the 12th paragraph of the plaint with mesne profits for three years previous to the institution of the suit, and from that until the delivery of possession or until the expiration of three years from the date of the decree, whichever first occurs.

As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason [184] for the costs of this suit in the Subordinate Court not being now awarded to the plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgment should have been given in his favour. Their Lordships will humbly advise Her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. R. Wilson & Co.*

Solicitors for the Respondent, the Secretary of State for India in Council. — The Solicitor, India Office, Mr. *E. T. Treasure.*

C. B.

NOTES.

[For construing a decree and to ascertain whether a finding is *res judicata* or not the pleadings and the judgment may be referred to:—**(1892) 19 Cal., 189**; (1894) 18 Bom.,

597; 542; (1896) 18 All., 344; (1897) 24 Cal., 504; (1906) 29 Mad., 42; (1906) 33 Cal., 116. *See* also (1888) 1 M.L.J., 313; (1889) 12 Mad., 500; (1889) 14 Bom., 31; (1890) 15 Bom., 625; (1891) 16 Bom., 1; (1892) 15 All., 3; (1893) 3 O. C., 273; (1895) 17 All., 174; (1900) 17 M. L. J., 423; (1903) 31 Cal., 95; 9 C. W. N., 679; (1903) 27 Bom., 418; (1904) 27 All., 37; (1905) 1 C. L. J., 337; (1907) P. R., 57.]

[16 Cal. 184]

PRIVY COUNCIL.

The 21st July, 1888

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, AND SIR R. COUCH.

Haidar Ali and another............Appellants

versus

Tassadduk Rasul and others............Respondents.

Ex parte Haidar Ali.

[On petition from the Court of the Judicial Commissioner of Oudh.]

Privy Council, Practice of—Practice relating to substitution of parties on revivor—Representative character to be ascertained by lower Court.

On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of the Court below; which, also, should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below.

PETITION to revive an appeal from a decree of the Judicial Commissioner of Oudh, that Court having made an order (17th March 1888) rejecting a petition to bring on to the record certain persons alleged to represent parties deceased.

This petition related to an appeal to Her Majesty in Council, preferred by Haidar Ali and Fazl Ali, from a decree of the Judicial Commissioner. After the admission of that appeal, the present petitioner, on 1st December 1887, applied in the Judicial [185] Commissioner's Court stating that two of the defendant-respondents, viz., Ali Khan and Ikram Khan, had died, and asking that certain persons, whom he named, might be substituted for the deceased on the record; also that a guardian *ad litem* might be appointed for such of them as were minors. On notice being given of this petition, it was opposed by the defendants-respondents as barred by time. A relation of one of the minor heirs applied to be appointed his guardian *ad litem*; and also the Agent of the Court of Wards represented that the estate of one of the respondents, a minor, had come under his charge, under ss. 161 and 162 of Act XVII of 1876.

The Judicial Commissioner rejected the petition. He was of opinion that, after the admission of the appeal to Her Majesty, he had no longer any authority in the suit, his Court being, in his view of the matter, no longer competent for any judicial act relating to it.

On this petition, which stated the above facts, Mr. *R. V. Doyne* appeared. The application was to revive the suit against the persons named. The Court below could ascertain the facts as to their real relationship to the deceased parties.

Their Lordships' **Judgment** was delivered by **Lord Hobhouse** :—

Their Lordships think it is quite impossible for them to make an order upon these materials for altering the record. They have not got the facts before them, and it is very inconvenient that those facts should be tried here. There ought to be some finding of the Court below. The usual course is as laid down in Mr. Macpherson's book. He says (page 241) :—"Of course in such cases the proper evidence must be given of the representative character of the persons by or against whom the revivor is sought. The title is more generally established upon petition to the Court below, which thereupon makes any inquiries which it may deem necessary, and orders the petition and proofs to be transmitted to England for such order as the Judicial Committee of the Privy Council may think fit to make."

The Court gives its own opinion as to who are the parties proper to be substituted upon the record. It has been the practice, so far as their Lordships can recollect, for a great [186] number of years; and they now must request the Judicial Commissioner to follow that which is the ordinary practice and to make a certificate or statement on which their Lordships can act.

Solicitors for the Petitioner :—Messrs. *Barrow and Rogers.*

C. B.

NOTES.

[See (1909) 10 C.L.J., 332 where Mookerjee, J. discussed all the case-law on this subject.]

[16 Cal. 186]

APPELLATE CIVIL.

The 2nd March, 1888.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE TOTTENHAM.

Syama Sunderi Dassya and another............Plaintiffs

versus

Jogobundhu Sootar............Defendant.*

Evidence—Thak-maps—Boundary—Title, question of.

The sole question for determination being a question of the boundary of two taluqs, the Judge hearing the case refused to give effect to a certain thak-map which had been prepared in 1859, and upon the face of which appeared what were admitted by the parties then owning the taluqs to be the boundary lines of the taluqs at the time, no evidence was given showing that these boundary lines had ever been altered.

Held, that the map was clearly evidence of what the boundaries of the properties were at the time of the permanent settlement, and also as to what they admittedly were in 1859.

* Special Appeal No. 2357 of 1886, against the decision of Baboo Bani Madhub Mitter, First Subordinate Judge of Dacca, dated the 18th August 1886, reversing the decision of Baboo Nil Money Nag, Second Munsif of Munshigunge, dated 31st January 1885.

SUIT for the recovery of possession of certain land. Plaintiff No. 1 alleged that he had purchased taluq No. 703 at an auction sale held under Act XI of 1859, and that he had been formerly put into possession thereof by the Collector; he further alleged that he had sold an eight-anna share in this taluq to plaintiff No. 2; that he and his co-plaintiff had endeavoured to occupy these lands, but were prevented from so doing by the defendant who alleged that the land claimed did not belong to taluq No. 703, but to taluq No 600; and that he was a howlatdar under the proprietors of this latter taluq.

The Munsif held that as the dispute was not one between two rival taluqdars, and as the defendant had failed to establish [187] his connection with the proprietors of taluq No. 600 or to show that he had been in possession for over twelve years, the plaintiffs were entitled to recover if they could show that the land belonged to taluq No. 703, and after finding that the land fell within the boundaries of taluq No. 703, as given in a certain thak-map produced by the plaintiffs which had been prepared in 1859, held that the land appertained to taluq No. 703 and gave the plaintiffs a decree.

The defendant appealed to the Subordinate Judge on the ground that the thak-map being the only evidence produced to show that the land fell within the boundaries of taluq No. 703, there was no evidence of title on which to give the plaintiffs a decree.

The Subordinate Judge found that the defendant was in possession of the lands in dispute, and that therefore the onus of proving title lay on him, and that he had failed to prove this, the thak-map being no evidence of title, it being at most only evidence of possession at the time of the preparation of the map, and no evidence at all that the lands formed portion of taluq No. 703 at the time of the permanent settlement; and on the authority of the cases of *Mohesh Chunder Sen* v. *Juggut Chunder Sen* (I. L. R., 5 Cal., 212) and of *Joytara Dassee* v. *Mahomed Mobaruck* (I. L. R., 8 Cal., 975) held, reversing the decision of the Munsif, that the plaintiffs had failed to establish their title. Plaintiff No. 1 having died, his wife and sole heir was substituted on the record in his place.

The plaintiffs appealed to the High Court.

Baboo *Rash Behary Ghose* for the Appellants contended that the thak-map was cogent evidence as fixing the boundary of taluq No. 703, and as showing the land in dispute as being within the plaintiffs' taluq.

Baboo *Basanto Kumar Bose* for the Respondent.

The **Judgment** of the Court (PETHERAM, C. J., and TOTTENHAM J.) was as follows :- -

We think that the Subordinate Judge has taken a wrong view of what is, or is not a question of title, and it is necessary that this case should be returned to him for re-trial.

[188] The suit is a suit brought by the purchasers at a revenue sale of a taluq against the holder of a neighbouring taluq, to recover possession of a piece of land which, he says, belongs to his taluq, and which the defendant says belongs to the owner of another taluq, under whom he holds. The only question to be tried is, where is the boundary line between the two properties ?

The plaintiffs, as I said just now, bought at a revenue sale, and the effect of that sale was to put them in the same position as that which the person occupied with whom the property was originally settled, that is to say, on default of payment of the revenue, the Government puts up for sale the whole estate out of which the revenue which had defaulted was payable, and the purchaser at such sale is entitled to get the whole of the settled estate which

was sold for non-payment of the revenue. Well, the plaintiffs bought that, and the question which has to be decided is, what is the estate which had been sold, and that depends upon the position of the boundary between it, and the one next to it.

There is no dispute as to the title to the taluqs; it is admitted that the plaintiffs are entitled to the one, and the defendant or his superior landlords to the other, and the titles do not come into question in any way; the only question as I said before is, where the boundary line is to be?

It appears that, in the year 1859, a thakbust survey was made and maps were prepared, and upon the face of these maps appear, what were admitted by the parties to be, the boundary lines of the various estates at that time, and if they were admitted to be so at that time, that is the strongest evidence that they were so at the time of the permanent settlement, because there is nothing to show that there has been any change in the physical features of the place, or the relative positions of the boundary lines, from that time, down to the time of the thakbust survey. So that the thakbust maps are clearly evidence to show what the boundaries of the properties are. No doubt, the boundary of a property may, in one sense, be said to be a question of title, because upon the question, where the boundary is, depends the question which person is entitled to the property. But by title, within the meaning of the Acts, meant the nature of a man's title, and not what lands he holds under that title. We **[189]** think, therefore, that the Subordinate Judge was wrong in giving no effect to this thakbust map. It is not only evidence, but is very good evidence as to what the boundaries of the property were at the time of the permanent settlement, and also as to what they admittedly were in 1859.

Under these circumstances, we set aside the decision of the Subordinate Judge, and remand the case to him in order that he should reconsider the matter, giving effect to the thakbust map, and to the remarks which we have now made in this case. Costs will abide, and follow, the event.

T. A. P. *Case remanded.*

NOTES.

[As regards the evidentiary value of *thakbust* maps, *see* also 18 Cal., 224; 22 Cal., 252; 30 Cal., 291; 7 C.W.N. 843; 10 C.L.J., 527; 27 Cal., 860; 35 Cal., 621; **13 C.L.J., 625**; 15 I.C., 341; 17 C.W.N., 151.]

[16 Cal. 189]

ORIGINAL CIVIL.

The 16th August, 1888.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, Mr. JUSTICE WILSON AND Mr. JUSTICE TOTTENHAM.

Luckhi Narain Khettry............Defendant

versus

Satcowrie Pyne............Plaintiff.*

Registration Act (III of 1877), ss. 23, 24, 76, 77—Limitation for registration. or order of refusal of a document admitted for registratian by Registrar—Denial of execution—Refusal to attend—Limitation for suit under s. 77 of the Registration Act.

No period is prescribed by Act III of 1877, within which a document which has been admitted for registration, may be registered, or within which the order of refusal by the Registrar to register the document must be made.

There is nothing in ss. 76† and 77 to compel the Registrar in cases where there has been no express denial of execution, but where the executant refuses to attend at his office, to make his order of refusal within the time limited for admission of execution by ss. 23‡ and 24§. Limitation in respect of a suit under s. 77 begins to run from the date of such order. *Mukhun Lal Panday* v. *Koondun Lal* (15 B. L. R., 228 ; S. C., L. R., 2 I. A., 210 ; 24 W. R., 75) and *Shama Charan Das* v. *Joyenoolah* (I. L. R., 11 Cal , 750) relied on. *In the matter of Buttobehary Banerjee* (11 B. L. R., 20) dissented from.

---

* Original Civil Appeal No. 21 of 1888, against the judgment of E. J. Trevelyan, Esq., one of the Judges of this Court, dated the 15th June 1888.

Refusal by Registrar. †[Sec. 76 :—Every Registrar refusing—

(a) to register a document except on the ground that the property to which it relates is not situate within his district or that the document ought to be registered in the office of a Sub-registrar ; or

(b) to direct the registration of a document under section 72 or section 75, shall make an order of refusal and record the reasons for such order in his Book No. 2, and on application made by any person executing or claiming under the document, shall, without unnecessary delay, give him a copy of the reasons so recorded.

No appeal lies from any order under this section or section 72.]

‡ [Sec. 23 : —Subject to the provisions contained in sections 24, 25 and 26, no document other than a will, shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution, or in the case of a copy of a decree or order, within four months from the day on which the decree or order was made, or where it is appealable, within four months from the day on which it becomes final :

Time for presenting documents.

Provided that, where there are several persons executing a document at different times such document may be presented for registration and re-registration within four months from the date of each execution.]

§ [Sec. 24—If owing to urgent necessity or unavoidable accident, any document executed, or copy of a decree or order made, in British India, is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, such document shall be accepted for registration.

Provision where delay in presentation is unavoidable.

Any application for such direction may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.]

THIS was an appeal from the judgment of TREVELYAN, J., in a suit under s. 77 of the Registration Act III of 1887, to compel [190] registration. The facts of the case and the judgment of the lower Court are reported in I. L. R., 15 Cal., p. 538.

Mr. *Hill* for the Appellant.

Mr. *Pugh* and Mr. *Sale* for the Respondent.

Mr. *Hill*.—The suit is barred by limitation. In cases where there is no express denial of execution, but a refusal to attend at the Registrar's office, the Registrar is bound to make his order of refusal within the time limited for admission of execution; and limitation, in respect of a suit to compel registration, begins to run from the expiration of such period. The case of *In the matter of Buttobehary Banerjee* (11 B. L. R., 20) is in my favour.

The cases of *Edun* v. *Mahomed Siddik* (I. L. R., 9 Cal., 150) and *Lakhimoni Chowdhrain* v. *Akroomoni Chowdhrain* (I. L. R., 9 Cal., 851) show that compliance with every provision of the Act is a condition precedent to the maintenance of a suit under s. 77. Refusal to attend is denial within s. 73: *Radha Kissen Rowra Dakua* v. *Choonee Lal Dutt* (I. L. R., 5 Cal., 445); but here there is no evidence of refusal nor subsequent enquiry under s. 74.

Mr. *Sale* for the respondent.—There is no period of limitation within which the Registrar is bound to make his order of refusal; there is only a period of limitation within which a document must be presented for registration. The Registrar has assumed that the executant denies execution from his refusal to attend. The case of *In the matter of Buttobehary Banerjee* (11 B. L. R., 20) is distinguishable from the present one. I rely on the case of *Shama Charan Das* v. *Joyenoolah* (I. L. R., 11 Cal., 750), which follows the case of *Mukhun Lal Panday* v. *Koondun Lal* (15 B. L. R., 228; s. c., L. R., 2 I. A., 210; 24 W. R., 75), and is exactly in point

Mr. *Hill* in reply.—The Privy Council case of *Mukhun Lal Panday* v. *Koodun Lal* (15 B. L. R., 228; s. c., L. R., 2 I. A., 210; 24 W. R., 75) was decided under the Act of 1866. Between the Act of 1866 and the present Act there is a great difference. The former Act contained a period of limitation [191] as to registration, but none as to the time within which parties were to appear to admit. The present Act fixes a period for the appearance of parties.

The **Judgment** of the Court (PETHERAM, C.J., and WILSON and TOTTENHAM, JJ.,) was delivered by-

Petheram, C.J.—This is a suit brought under the provisions of s. 77 of the Registration Act, to compel registration of a deed. "The deed was executed on the 18th September 1886. It was presented for registration on the 12th January 1887 by the claimant, who applied for a summons against the executant. He was unable to serve the summons, and on the 30th August 1887, the Registrar refused registration, on the ground that more than eight months had elapsed."

So much I have taken from the judgment of Mr. Justice TREVELYAN. The suit was commenced on October 28th, 1887, and the only defence has been that it is barred by limitation.

The statement by the learned Judge in his judgment of the ground of refusal is incomplete; because the statement on the face of the document of the ground for the refusal given by the Registrar is this: "Summons and warrant were issued, but could not be served on the party, as his whereabouts were not known to the claimant. As more than eight months have elapsed since the execution of the deed, and as the claimant has applied for return of the deed, registration is refused." We find then, that the reason given by the Registrar for the refusal was, that the applicant had been unable to obtain

the attendance of the executant for the purpose of proving by his evidence the execution by him of the document, and that more than eight months had elapsed and the claimant had applied for the return of the document. And as I understand it, the Registrar, upon these facts, assumed or found as a fact that the alleged executant had denied execution of the deed, and he thereupon refused to register it. If that is so, then it comes to be a case in which the Registrar refused to register, because the execution of the deed is denied by the alleged executant; and this, in our opinion, brings the case within the meaning of s. 76 of the Registration Act.

[192] Several cases have been cited before us on the subject. The first case is that of *In the matter of the Registration Act, 1871, and In the matter of Buttobehary Banerjee* (11 B. L.R., 20). That case was decided by Mr. Justice MACPHERSON; and Mr. Justice MACPHERSON in that case undoubtedly did hold that the time must be reckoned from the expiration of the four months, and that all the proceedings must be had within that period. The point involved in that case has been subsequently discussed in the case of *Shama Charan Das* v. *Joyenoolah* (I.L.R., 11 Cal., 750) which was decided by a Division Bench of this Court in the year 1885. Apparently on the argument of the latter case, the decision of Mr. Justice MACPHERSON, to which I have just referred, was not brought to the attention of the Court; and in considering the matter now, we must give it due consideration. It seems to us that the case, *Shama Charan Das* v. *Joyenoolah* (I. L. R., 11 Cal., 750), and that in the Privy Council, *Mukhun Lal Panday* v. *Koondun Lal* (15 B. L. R., 228; S. C., L. R., 2 I. A., 210; 24 W. R., 75), are directly in point, and are authorities in support of the view taken by the learned Judge in the Court below, and binding on us. But as Mr. Justice MACPHERSON, in the case cited, took a different view, we proceed to examine the provisions of the Act on the subject. The application to register in this case was made to a Registrar.

The sections which relate to this case are ss. 23, 24, 34,* 35,† 74, 76 and 77.

---

*[Sec. 34:—Subject to the provisions contained in this part and in sections 41, 43, 45, 69, 75, 77, 88 and 89, no document shall be registered under this Act, unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26:

Inquiry before registration by registering officer.

Provided that if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee in addition to the fine, if any, payable under section 21, the document may be registered.

Such appearances may be simultaneous or at different times.

The registering officer shall thereupon—

(*a*) inquire whether or not such document was executed by the persons by whom it purports to have been executed.

(*b*) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and

(*c*) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear.

Any application for a direction under the proviso in this section may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

Nothing in this section applies to copies of decrees or orders.]

†[Sec. 35:—If all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document;

Procedure on admission of execution.

or, in the case of any person appearing by a representative, assign or agent, if such representative, assign or agent, admits the execution;

or, if the person executing the document is dead, and his representative or assign appears before the registering officer, and admits the execution,

By ss. 23 and 24 the document must be presented for registration within four or eight months, as the case may be, and by ss. 34 and 35 the execution may within that time be proved by admission ; and (s. 35) in cases in which such admission is not made, and the registering officer is a Registrar, he shall follow the procedure prescribed in Part 12 of the Act.

Sections 76 and 77 of Part 12 relate to refusal by the Registrar. Section 76 provides that, if the Registrar refuses to register for any reason but want of jurisdiction, he shall record the reasons for such refusal and make an order to that effect. No period is prescribed within which a document, which has been **[193]** admitted for registration, may be registered, or within which the order of refusal must be made ; but it is obvious, that the order of refusal must be made at some time *after* the expiration of the time allowed for admitting the document, except in cases in which there has been an express refusal. Section 77 provides that a suit to compel registration may be brought within 30 days from the making of the order of refusal ; and the contention of the defendant in the present case amounts to this, that in cases where there has been no express denial of execution, but where the alleged executant has refused to attend, the registering officer must make an order of refusal *within* the time limited for admission of execution, and that the 30 days mentioned in s. 77 will begin to run immediately on the expiration of such time. The law does not say so expressly, and we think it impossible to imply such a meaning, for (amongst others) the reason, that the order of refusal could not be properly made until *after* the expiration of the *whole* period limited for admission by the parties; and if it were made afterwards, and the period of limitation began to run at the expiration of the period limited for admission, it would begin to run from a time before that at which the action could have been brought. And it seems to us that the period of limitation can only begin to run when the order of refusal was made, at which time, and not before, the cause of action accrued.

On the whole then, both on principle and authority, we think the learned Judge in the Court below was right in the conclusion at which he arrived, and we dismiss this appeal with costs.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Sen and Co.*
Attorney for the Respondent: Baboo *D. N. Dutt.*
C. D. P.

NOTES.

[The same view was taken in 25 Cal., 93 ; 29 All., 284 ; (1912) 16 I. C., 614 (Cal.).

See also (1912) 34 All., 315 where the refusal to register was deemed not to have been based on *denial of execution*, the summonses to the executants having been returned *unserved.*]

the registering officer shall register the document as directed in sections 58 to 61, inclusive.

The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.

Procedure on denial of execution, etc.

If any of the persons by whom the document purports to be executed deny its execution,

or if any such person appears to be a minor, an idiot, or a lunatic,

or if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution,

the registering officer shall refuse to register the document : Provided that, where such officer is a Registrar, he shall follow the procedure prescribed in Part XII of this Act.]

[194] APPELLATE CIVIL.

The 8th January, 1889.

PRESENT:

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Doorga Singh and others............Defendants Nos. 1 -4

versus

Sheo Pershad Singh and others............Plaintiffs and another Defendant.*

Sale for arrears of Revenue—Fraud —Bidders, Dissuasion of.

In a suit by some of the co-sharers in a mouzah against the others to set aside a sale for arrears of revenue, the finding of the Court of First Instance established that a certain co-sharer in a mouzah had intentionally withheld the payment of a small arrear of Government revenue, and had thereby caused the property to be sold under Act XI of 1859, purchasing it himself at a small sum in the name of certain other persons; and had also dissuaded certain intending bidders from bidding at such sale:

Held, that the evidence did not warrant such a finding, but that assuming these facts to have been established, the right of the co-sharer to buy up the estate at the Revenue sale was not based upon any right or interest common to himself and his co-sharers, and that, in the absence of misrepresentation or concealment, the fact that he had intentionally defaulted as found, did not constitute fraud; nor did the fact, that he had deterred others from bidding for the property, necessarily constitute an act of fraud.

Bhoobun Chunder Sen v. *Ram Soonder Surma Mozoomdar* (I. L. R., 3 Cal., 300), distinguished.

THE plaintiffs, who were nine-anna shareholders in a certain mouzah, brought this suit to set aside a sale held for arrears of revenue on the 6th June 1883.

The defendants, Nos. 3 to 23, were the owners of a four-anna share in this mouzah, the remaining three-anna share of which was held by two persons who had opened out a separate account with the Collector with regard to their share. The arrears, for which the property was advertised and put up for sale, amounted to twelve annas eight-and-a-quarter pie. It further appeared that, at the time this arrear fell due, the property was under attachment on account of road-cess and other taxes.

On the 4th June (two days prior to the sale), defendant No. 6 applied to the Collector for permission to pay the amount in [195] arrears, and an order was passed on such application, allowing him to pay all Government demands, including this arrear of twelve annas eight-and-a-quarter pie. Defendant No. 6, however, failed to pay in such arrears, and on the 6th June the property was sold and purchased at a low price by him in the names of defendants Nos. 1 and 2; and subsequently certain other of the defendants were made co-sharers in such purchase. The plaintiffs sought to set aside the sale, alleging the fraud above-mentioned, and, at the hearing, produced evidence showing that certain intending bidders had been dissuaded from bidding at the sale by certain of the defendants, and although fraud was alleged in the plaint there was no specific prayer for equitable relief.

The defendants denied these facts and alleged that this arrear was in reality due by the plaintiffs.

---

* Appeal from Original Decree, No. 308 of 1886, against the decree of Baboo Sham Chunder Dhur, Subordinate Judge of Sarun, dated the 21st August 1886.

The Subordinate Judge, although doubting whether a sale under Act XI of 1859 could be set aside on the ground of fraud, found that the fraud above-mentioned had been established, and held, on the authority of the case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (I. L. R., 3 Cal., 300), that the plaintiffs were equitably entitled to relief, and directed the purchasers to re-convey to the plaintiffs their nine-anna share of the mouzah, on re-payment of a proportionate amount of the purchase-money to the purchasers, with interest at the rate of 4 per cent. from the day of sale.

Defendants Nos. 1, 2, 3 and 4 appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Moulvie *Mahomed Yusuf* for the Appellants.

Baboo *Mohesh Chunder Chowdhry.*—There being no specific prayer for equitable relief the lower Court should not have granted it; the prayer of the plaint was for recovery of possession after setting aside the sale; no issue was settled as to whether the plaintiffs were entitled to this relief; on the facts alleged and found no fraud has been made out entitling the plaintiffs to relief, and the finding on the question of fraud is not substantiated by the evidence. The case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (I. L. R., 3 Cal., 300) is distinguishable from the present.

[196] Mr. *Gregory*, Baboo *Mahabir Sahai* and Baboo *Amarendra Nath Chatterjee*, for the Respondents, contended that the action of the defendant No. 6 was fraudulent.

The **Judgment** of the Court (PETHERAM, C., J., and BANERJEE, J.,) was delivered by

Banerjee, J.—This appeal arises out of a suit by the plaintiffs, respondents, to recover possession with mesne profits of a nine-anna share of a certain property, Mehal Chuck Shah Mohamedpore, after setting aside a sale, held on the 6th of June 1883, of a larger share of the Mehal, that is, a thirteen-anna share, made up of the nine-anna share in suit, and of another 4-anna share belonging to the defendants Nos. 3 to 23, for arrears of Government revenue due in respect of the said thirteen-annas.

The grounds upon which the plaintiffs seek to have that sale set aside are—*first*, irregularity in the sale, and, *secondly*, fraud on the part of the defendants. The irregularities set out in the plaint need not be considered here, as the judgment of the lower Court, as to the existence and effect of those irregularities, was given against the plaintiffs, and no cross objections have been urged before us against that judgment. We would only add that, upon the face of the judgment, there does not seem to be any ground for holding that the sale was bad by reason of any irregularity.

The fraud alleged in the plaint is said to have consisted in this, that the property was sold for a very small amount of arrear, less than one rupee; that the plaintiffs were not aware of the existence of the arrear; that the defendants, the plaintiffs' co-sharers, intentionally left this small amount unpaid, with the object of purchasing this property; and that they purchased the property themselves for a price which is less than its proper value. One of the plaintiffs was examined as a witness in the case. He was asked to state in what the fraud consisted, and he stated that it consisted in the facts alleged in the plaint of which the substance has been given above.

It appears that, in the evidence adduced on behalf of the plaintiffs, an additional element of fraud was introduced, namely **[197]** that the plaintiffs' co-sharers, when bidding at the auction, dissuaded intending purchasers from

buying. I should add here that the plaintiffs further alleged in their plaint that their co-sharers bought the property *benami* in the name of the defendant No. 1.

The defence was that there was no fraud; that the arrear that was due was due really from the plaintiffs; that the purchase by the defendant No. 1 was not a *benami* purchase; and that the property did not sell for anything less than its fair price.

The Court below, as I have already said, decided against the plaintiffs upon the question of irregularity, but it gave the plaintiffs a decree to the effect that the defendant Durga Sing and his co-sharers in the purchase do reconvey to the plaintiffs the nine-annas share of the property upon receiving from them a proportionate amount of the purchase-money with interest at the rate of 4 per cent. from the date of payment thereof; and it gave the plaintiffs that decree upon the ground that the defendants, the purchasers, were guilty of fraud in causing the sale of the property in the manner alleged in the plaint, and in dissuading intending purchasers from buying.

Four of the defendants have appealed against that decree—the defendants Nos. 1 to 4—and the main grounds urged on their behalf are—*first*, that the Court below was wrong in giving the plaintiffs the decree for equitable relief that it has given when the plaintiffs did not ask for any such relief but only sought to recover possession after setting aside the sale, and when the issues raised in the case did not embody the questions necessary to be decided before the plaintiffs could be held entitled to that relief; *secondly*, that upon the facts alleged in the plaint, or found by the Court below, no fraud was made out such as should entitle the plaintiffs to relief; and, *thirdly*, that upon the evidence the Court below was wrong in finding certain facts in the plaintiffs' favour which were said to constitute the alleged fraud.

With reference to the first contention, we do not think the appellants are entitled to succeed upon it. It might be possible that, by reason of the frame of the suit and of the issues [198] raised in the Court below, the appellants were precluded from raising various points in their defence and adducing evidence to substantiate those points. But, as all the necessary parties are before the Court, and the plaint contains a statement of all the necesary facts, we do not think that such a bare possibility of prejudice would entitle the appellants to succeed in this appeal, unless it was shown, or suggested, how they might have been actually prejudiced. As nothing has been shown, or suggested, to make this out, we think this ground must fail.

But we think the appellants are entitled to succeed upon the second and third grounds. We shall consider those grounds separately. The facts alleged in the plaint together with the additional fact noticed above, which was developed in the evidence, come, shortly stated, to this—that the defendants, who were co-sharers with the plaintiffs in the property in arrear, intentionally withheld payment of a certain portion of the Government revenue due in respect thereof, and bought the property themselves, after having dissuaded others from bidding. And the question is,—Do these facts constitute any fraud, considered singly, or collectively? The Court below has answered this question in the affirmative, and given the plaintiffs a decree, relying upon the case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (I. L. R., 3 Cal., 300). But that case is clearly distinguishable from the present. There the defendant undertook to apply to the Collector on behalf of all the co-sharers to save the mehal from the impending sale, and having sent his co-sharers away, with the assurance that he would do everything to protect their interests neglected to make any application, and bought the estate himself. That was a clear case of fraud. Here it is not even suggested that the defendants in any

way prevented the plaintiffs from becoming aware of the existence of the arrear, or from paying it off, as they could if they chose. Every co-sharer in a zamindari may, if he chooses, bring it to sale by not paying the revenue; but every other co-sharer can save it from sale by paying the arrear, and can recover the amount from the defaulter. The fact of the defendants being co-sharers in the property, did not clothe them with any fiduciary character, which disqualified **[199]** them from buying this property, unless it was for the benefit of all the co-sharers. The Revenue Sale Law, Act XI of 1859, contains sufficient indication to show that a defaulting co-partner is at liberty to buy the estate in arrear.—See s. 53 of the Act.

The authority of decided cases is also in support of this view. We may refer to the case of *Ram Lall Mookerjee* v. *Jodunath Chatterjee* (9 C. L. R., 337), which is a somewhat similar case, as bearing upon this question. The principle applicable to the case of one of several joint tenants obtaining renewal of a lease is inapplicable to the case of a co-sharer in zamindari buying it at a revenue sale for this simple reason. All the joint tenants having an interest in the old lease, which forms the basis of the right to obtain a renewal, the benefit of a renewal obtained by any one of them is held to belong to them all—See *Clegg* v. *Fishwick* (1 Mac. & G., 298). But the right of a co-sharer to buy an estate at a revenue sale is not based upon any right or interest that is common to him and his co-sharers.

If the fact then of the defendants having been co-sharers with the plaintiffs did not clothe them with any fiduciary character, and if the fact of their having committed default in the way and for the purpose alleged in the plaint did not, in the absence of misrepresentation or concealment on their part, constitute any fraud, let us see whether the additional fact of their having deterred others from bidding for the property amounted to fraud. Upon this point the only authority that can be cited in favour of the respondents is a passage in Sugden's Vendors and Purchasers, at page 93 of the 13th edition, which is to this effect—"Fraud will, of course, be a sufficient ground for re-opening the biddings. Therefore, if the parties agree not to bid against each other, the Court could re-open the biddings."

Now this passage has been considered in the case of *Carew's Estate* (26 Beav., 187), and it has been held that there is no real authority in support of it, and that an agreement between two bidders not to bid against one another would not be a sufficient ground for annulling the sale. And in a later edition of the work **[200]** the text has been altered and a note added in accordance with the above ruling—(Sugden on Vendors and Purchasers, 14th edition, p. 117).

The same view is taken in the case of *Galton* v. *Emuss* (1 Col., 243), and the law on the point is thus stated in the last edition of Dart's Treatise on the Law of Vendors and Purchasers (p. 121):—"An agreement between two persons not to bid against each other at an auction is legal, and such an agreement has been held to be valid where the sale has been held by order of Court." And in this Court, in a case very similar to the present, it has been held that a combination among certain purchasers not to bid against one another does not constitute any fraud or impropriety such as would have the effect of vitiating the sale - See the case of *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (13 C. L. R., 1).

There is, therefore, really no authority in support of the position that dissuading of bidders was necessarily an act of fraud. Now, if neither the fact of the defendants being co-sharers and buying the estate after making an intentional default in the payment of revenue, nor the fact of their having entered into combination with other bidders, separately, constituted any fraud; we do not

see how, taken together, they could be said to constitute fraud. Even upon the facts found, therefore, we are unable to confirm the decision of the Court below. Of course, if the defendants had the conduct of the sale, and had dissuaded intending purchasers to bid, or if there had been misrepresentation made by these defendants as to the nature of the title, or as to the value of the property, and if, in consequence of such misrepresentation, persons had been deterred from bidding, that would have constituted fraud, and would have entitled the plaintiffs to a decree. But no such thing is proved, or even alleged here.

Whilst we think that, even upon the facts found, the appellants are entitled to succeed, at the same time we deem it right to add that we cannot agree with the Court below in the findings of fact arrived at by it, namely, in the first place, that the default was wholly intentional and made by the defendants [201] with the object of buying the property themselves; and in the second place that there was really any deterring of intending bidders. And first as to whether or not the default was intentional from the beginning, this is how the facts stand. The amount of the Government revenue in arrear was, as I have stated above, very small, less than one rupee. The defendant Dip Narain, on the 4th of June, that is, two days before the sale, made an application to the Collector for permission to pay in the amount, alleging that it was through no fault of his that an arrear had fallen due. Thereupon the order passed by the Collector was to this effect—that the arrears of rent, road-cess, postal contribution, and embankment tax be taken,—and the amount due under all these heads came up to a little over Rs. 20 (see Exhibits vi, vii, pp. 38, 39 of the Paper-book). Now it appears from the evidence—and it is admitted by one of the plaintiffs, Ram Gholam Singh, who was examined as a witness in the case—that the different co-sharers had not come to a settlement as to the road-cess, and it was for that reason that the road-cess arrears were not paid. That being so, it is clear to our minds that, originally, there was no intention on the part of the defendants of allowing the mehal to get into arrears, with the object of buying it themselves. What the defendants really wanted was to obtain a settlement of their disputes as regards the payment of this road-cess. It was only when the defendant Dip Narain found from the order of the Collector, that the payment of the arrears of Government revenue alone would not be accepted, and that he had to pay not only those arrears but also the road-cess and the other items, as to which there was a dispute, if he wanted to save the mohal; that he made default in paying the amount, which the Collector ordered him to pay; and so the mohal was put up for sale. It seems that the plaintiffs' default, in paying the road-cess arrears, may well be regarded as having ultimately led to the sale.

Then as to the other fact, namely, that the defendants deterred intending purchasers from bidding. In the first place it is worthy of note, as I have already pointed out at the very outset, that this element of fraud was not alluded to in the plaint, nor even was it mentioned, when one of the plaintiffs was [202] examined as a witness. It was developed in the evidence, and, from the nature of that evidence, we are not at all convinced that the fact deposed to by the plaintiffs' witnesses was true. The Court below has believed those witnesses, considering them to be respectable witnesses. We should not have felt justified in dissenting from the conclusion of fact arrived at by the Court below upon the evidence of those witnesses, if we did not find that evidence so extremely vague, as to the facts deposed to, and so very unsatisfactory, as to the circumstances which led to the presence of the witnesses at the time and place where they say they were, that we could not rightly act

upon it. All that they say is, that certain of the co-sharers of the plaintiffs prohibited them and other persons from bidding as they were going to buy the property themselves. In the first place, it does not seem to be very likely that persons who went with the *bona fide* intention of bidding, and of bidding up to a certain amount, would so soon, and so readily, upon a mere request, be dissuaded from bidding and from making the bargain that they intended to make. We fail to discover, in the evidence, any sufficient motive that could have induced intending bidders to be dissuaded from bidding. And, in the second place, the account that these witnesses give of the reasons for their presence in the Collectorate at the particular point of time does not seem to us to be at all satisfactory.

Upon the whole, therefore, as well upon the question of law as upon the questions of fact considered above, we feel constrained to dissent from the judgment of the Court below; and we may add here that the evidence adduced to show that the plaintiffs have suffered injury by reason of their property having been sold for a price below its proper value is, in our opinion, neither satisfactory nor precise. Upon all these grounds, therefore, we think that the decree of the Court below must be set aside, and the plaintiffs' suit dismissed with costs in both Courts

T. A. P. *Appeal allowed.*

NOTES.

[There has been a conflict of cases on the point whether an intentional default vitiates the purchase by the defaulter himself.

In (1913) 20 I. C., 317; (1902) 1 C. L. J., 565 this case was followed; but in (1907) 21 I.C., 355; (1911) 9 I.C., 507; (1910) 7 I.C. 772; this case was not followed.

In **(1913) 20 I. C., 510**, JENKINS, C.J. and MOOKERJEE, J. confirming (1911) 9 I. C., 507 held that when a revenue sale was caused by the default of a co-owner and the property was afterwards purchased at that sale by that co-owner there may be such relations between the defaulter and his co-owner as would make it right for the Court to consider such a sale as made for the benefit of both and that the facts of each case should determine whether this doctrine should govern the rights of parties in the case.

An agreement not to bid is not in itself a fraud :—(1893) 18 Bom. 342; (1896) 19 Mad., 315; (1900) 24 Bom., 622; (1901) P. R., 37; (1904) 1 C. L. J., 85.]

[203] *The 21st January, 1889.*

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Debi Singh and others............Defendants

versus

Sheo Lall Singh and others............Plaintiffs.*

Partition—Jurisdiction of Civil Court—Partition by Civil Court of a portion of a revenue-paying estate—Civil Procedure Code (Act XIV of 1882), s. 265—Revenue-paying estate, partition of, into several revenue-paying estates.

The meaning of s. 265† of the Code of Civil Procedure is that where a revenue-paying estate has to be partitioned into several revenue-paying estates, such partition must be carried out by the Collector.

Zahrun v. *Gowri Sunkar* (I. L. R., 15 Cal., 198) approved.

* Appeal from Original Decree No. 254 of 1887, against the decree of Baboo Kali Prosunno Mukerjee, Subordinate Judge of Gya, dated the 24th of August 1887.

†[Sec. 265:—If the decree be for the partition or for the separate possession of a share of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector and according to the law, if any, for the time being in force for the partition, or the separate possession of shares, of such estates.]

Partition of estate or separation of share.

THIS was a suit brought in the Court of the Subordinate Judge of Gya, for the partition of a certain village which formed a portion of a revenue-paying estate. The plaintiffs, Sheo Lall Singh and Punit Singh, held 5 annas and 6 pie in proprietary right and 4 annas as mokuraridars under the defendants.

The defendants, Nos. 1 to 7, were proprietors of the remaining 6 annas 6 pie share in this mouzah. The plaintiffs asked in their plaint that a single plot of 9 annas 6 pie might be allotted to them.

The defendants contended that the suit would not lie, and that the partition ought to be made by the Collector; that the plaintiffs as mokuraridars were not entitled to a partition of their mokurari share as against them; and also took exception to the mode of allotment of the properties asked for by the plaintiffs.

The Subordinate Judge held that the suit was maintainable by a Civil Court; that the plaintiffs were entitled to a partition of the lands held by them as mokuraridars; and he therefore decided that the plaintiffs were entitled to partition of their 5 annas 6 pie milkiat share, and of the 4 annas held by them as mokuraridars and directed the same to be made by the Civil Court Amin.

The defendants appealed to the High Court on the ground that the decree should be given effect to by the Collector and not by the Civil Court Amin.

[204] Mr. *C. D. Linton*, for the appellants, submitted that the decisions of this Court, as well as of the Courts of the other Presidencies, show that Civil Courts have jurisdiction to determine a party's right to have his share divided, and to make a decree accordingly, but the power to make a partition of lands paying revenue to Government was restricted to the Collector. In other words, s. 265 of the Code of Civil Procedure, coupled with s 29 of the Partition Act (Bengal Act VIII of 1876), placed the execution of the decree entirely in the hands of the Collector, and in support of his contention referred to s. 396 of the Code of Civil Procedure, which provided for the partition of immoveable property not paying revenue to Government, and cited the following cases: --

Chunder Nath Nundi v. *Hur Narain Deb* (I.L.R., 7 Cal., 153); *Damoodur Misser* v. *Senabutty Misrain* (I. L. R., 8 Cal., 537); *Badri Roy* v. *Bhugwat Narain Dobey* (I. L. R., 8 Cal., 649); *Zahrun* v. *Gowri Sunkar* (I. L. R., 15 Cal., 198); *Ramanuja* v. *Virappa* (I. L. R., 6 Mad., 90); *Parbhudas Lakhmidas* v. *Shankarbhai* (I. L. R., 11 Bom., 662); and *Dev Gopal Savant* v. *Vasudev Vithal Savant* (I. L. R., 12 Bom., 371).

Mr. *R. E. Twidale*, Baboo *Golap Chund Sircar* and Baboo *Nil Kant Sahai* for the Respondents.

The **Judgment** of the Court (PETHERAM, C. J., and BANERJEE, J.) was delivered by—

Petheram, C.J.--This is an appeal from a decision of the Subordinate Judge of Gya, in a suit brought by the plaintiffs against the defendants to partition the plots of land, contained in a revenue-paying estate among the persons entitled to the estate, but there is no claim in the plaint to have the estate or the revenue payable to Government partitioned, in the sense that it should be turned into several revenue-paying estates.

The Subordinate Judge has decreed the suit, and has directed that the Civil Court Amin shall give effect to it, and the only ground of appeal here is, not that the decree is wrong, but that the decree must be given effect to, not by the Civil Court Amin, **[205]** but by the Collector of the district, and various cases have been cited before us in support of that view. It is said that, by s. 265 of the Code of Civil Procedure, whenever the estate, in respect of which partition has taken

place, is a revenue-paying estate, that partition must be carried out by the Collector. But it seems to us that the meaning of that section is, that where a revenue-paying estate has to be partitioned into several revenue-paying estates, that partition must be carried out by the Collector, because the revenue is affected, and it is for the Collector to say how much revenue shall be assessed upon each portion of the estate, so that there may be a proper security for that revenue, and we think that that is the view which was intended to be taken by Mr. Justice PRINSEP and Mr. Justice PIGOT in the case of *Zahrun* v. *Gowri Sunkar* (I. L. R., 15 Cal., 198).

In that case, the learned Judges say—"Section 265 of the Code of Civil Procedure of 1882, which is generally a re-enactment of s. 225[1] of the Act of 1859 evidently contemplates the existence of the jurisdiction of the Civil Courts to try suits for partition of estates, or for the separate possession of the share of an undivided estate paying revenue to Government, but at the same time it leaves it to the Collector only to give due effect to any order passed by a decree of a Civil Court." And then they go on to say,—"The effect of s. 29 of the Butwarrah Act, as we understand it, is, that the rights of the parties as between themselves in respect to any portion of the estate may be determined by the Civil Court, but that any decree of the Civil Court will not affect the joint liability of the sharers in respect to the payment of the entire revenue assessed on the estate until the Collector has taken proceedings in accordance with that Act."

It seems to us that the meaning of the learned Judges in that case was to say, that the Civil Courts might deal with the matter and might give effect to their decisions, so long as they did not attempt to affect the joint liabilities of the sharers in respect of the whole estate as it stood before. That decision we think does not differ from the various decisions which have **[206]** been cited before us, in which it seems to us that the learned Judges, when speaking of the partition of revenue-paying estates were speaking of the partition of such estates into several revenue-paying estates. That is a totally different thing from the partition of the lands within an estate as between the sharers leaving the whole estate liable for the whole revenue, which is the case before us.

For these reasons we think that this case is concluded by the case of *Zahrun* v. *Gowri Sunkar* (I. L. R., 15 Cal., 198) which I have cited, and with which we entirely agree, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[In (1896) 23 Cal., 679 it was held that partition of lands in a revenue paying estate could only be made by a Collector; but this was overruled in (1897) 21 Cal., 725 where it was held that a Civil Court could partition revenue paying estates save when the partition sought a separate allotment of revenue. *See* also (1905) 2 C.L.J., 351, where there is a discussion of the principles by Mookerjee, J.

Some amendments have been made in the C.P.C., 1908. See sec. 54 which corresponds to sec. 265 of the previous Code; O. 20, r. 18 which is new and in which provision is made for partition in accordance with decree by the Collector or by any gazetted officer subordinate to him and deputed by him in this behalf.]

---

[1] [Sec. 225 :—If the decree be for the division of an estate, or for the separate possession of a share of an undivided estate, paying revenue to Government, the division of the estate or the separation of the share shall be made by the Collector under the orders of the Court, according to the rules in force for the partition of an estate paying revenue to Government.]

Division of estate or [illegible] be made.

[16 Cal. 206]

CRIMINAL REVISION.

The 14th January, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE MACPHERSON.

Ganouri Lal Das and others
versus
The Queen-Empress.*

Rioting—Unlawful Assembly—Right of private defence of property—Penal Code (Act XLV of 1860), ss. 97, 103, 104, 105, 141 and 147.

A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on to the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M., they proceeded to work at the *bund* until the afternoon. At about 4 P.M., a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T*'s men, some five of whom were more or less severely wounded with the *lathies*.

The occurrence resulted in the conviction of some of *M's* servants for rioting under s. 147 of the Penal Code.

[207] *M's* people wholly denied any right on the part of *T* to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M's* people was not an "unlawful assembly;" that the interference by *T*'s people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so.

Held that the prisoners had been rightly convicted.

Held, further, that as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that as, upon the facts of the case as found, no offence had been committed by *T's* people, their acts amounting merely to a civil trespass, and that as there was no pressing or immediate necessity of a kind, showing that there was not time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case.

It was further contended that *M's* people did not assemble to enforce a right or supposed right within the terms of s. 141† of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one.

---

* Criminal Revision No. 405 of 1888, against the order passed by C. A. Wilkins, Esq. Sessions Judge of Bhagulpore, dated the 6th of November 1888, affirming the order passed by Baboo Poorno Chunder Mitter, Deputy Magistrate of Bhagulpore, dated the 24th of September 1888.

†[Sec:—141.—An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is—

Unlawful assembly.

First.—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any Public Servant in the exercise of the lawful power of such Public Servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence: or

Fourth.—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or:

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.]

Held, that they were members of an assembly the common object of which was, by show of criminal force and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. (4).

Queen v. *Mitto Sing* (3 W. R., Cr., 41), *Shunker Singh* v. *Burmah Mahto* (23 W. R., Cr., 25), and *Birjoo Singh* v. *Khub Lall* (19 W. R., Cr., 66) referred to and commented on.

IN this case the petitioners were convicted by the Deputy Magistrate of Bhagulpore of rioting under the provisions of s. 147 of the Indian Penal Code, and sentenced to undergo one year's rigorous imprisonment each, and to enter into recognisance bonds in the sum of Rs. 200 each to keep the peace for a period of two years, or in default to undergo two years' simple imprisonment.

Against that conviction and sentence they appealed to the District Judge, who confirmed the conviction and sentence. On the 28th November they applied to the High Court under its revisional powers to send for the record, and to set aside the conviction and sentence on grounds which appear sufficiently in the judgment of the High Court.

[208] On that application a rule was issued calling on the District Magistrate to show cause why the conviction and sentence should not be set aside, and the prisoners were released on bail pending the hearing of the rule.

The rule now came on to be heard.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *Bonnerjee*, Mr. *M. Ghose* and Mr. *M. P. Gasper*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Taruck Nath Palit*, Baboo *Jogesh Chunder Dey*, Baboo *Jogendra Chunder Ghose* and Baboo *Monmotho Nath Mitter* in support of the rule.

Mr. *Phillips* and Baboo *Umakali Mukerjee* for the Prosecution.

The facts of the case appear fully stated in the judgment of the High Court and in that of the District Judge, the material portion of which was as follows :—

"The facts are these. Some three years ago, in 1293 F. S., the Thakur's family of Barari in Bhagulpore, purchased a six-annas odd share in village Fazilpore. The lands of this village are irrigated by a water-course, known as the Sanis *Daur*, which issues from the river Karalya. On both banks of this river lie the lands of a native lady, whose husband is known as the "Mohashoyji ;" her brother is Baboo Surjya Narain Singh, a leading pleader of this Court; and it is a matter of public notoriety, and has been more than once asserted at the hearing of the appeal without denial, that this pleader is the general adviser of the Mohashoy and of the latter's wife, who rarely acts without his advice.

"The Thakur's family claim to have acquired by their purchase the right to erect or keep in repair a *bund* or embankment across the Karalya river, just at its junction with the Sanis *Daur*, with the object of diverting the waters of the stream into the water-course, and thus to irrigate the lands of Fazilpore. Accordingly, on the 24th June last, their local agents took a body of coolies to the spot to repair or renew this embankment. Whilst they were at work, they noticed that a number of men were being collected together. They appear to have come at once to the conclusion that the Mohashoy's people were about to oppose them in force; and I cannot help thinking that they [209] knew that they had reason to believe that such a result might ensue. A messenger was at once sent off to Bhagulpore, a distance of some twelve miles. He came first to Barari, and thence went to the thannah where he arrived at 11 P. M., and lodged his information.

"In the meantime, the threatened attack had been delivered; a large body of men, said to amount to some 1,200 in all, advanced to where the work was going on, headed by the appellants. After the usual preliminary discussion, the order was given to attack, and some 25 or 30 of the rioters detached themselves from the main body and fell upon the Thakur's men, five of whom were more or less severely wounded with *lathi* blows; then the rioters dispersed.

"The Sub-Inspector, who had been in the interior when information had been lodged the previous night, was on the spot next day. He commenced his investigation. On the second July a counter-charge was laid by the appellant Ganouri, this also was investigated, and ultimately members of both parties were sent up for trial under charges of rioting. The result is the conviction against which the present appeal is lodged.

"On these allegations, the Deputy Magistrate drew up what he calls three 'issues' for determination. The first issue raises the point as to whether the Thakur's men had any right to build a *bund* in the river? The Deputy Magistrate acknowledges that a Criminal Court has no power to determine this issue, and yet, in the same breath as it were, proceeds to answer it, for reasons given, in the affirmative. The question is one purely for a Civil Court to decide; and I may dispose of it in these words, and also by saying that, so far as the record discloses, there does not appear to be any legal evidence to show that it has ever been decided by a competent Court.

"The second issue deals with the question as to whether the Thakurs' men came to repair an existing *bund* or to build a new one? The Deputy Magistrate has decided that they came to build a new one. But, so far as the evidence goes, it seems to me to establish that what they went to do was to erect an embankment on the spot where, as they allege, it stood in previous years; not to build one in an entirely different spot. In fact, **[210]** they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away: for the purposes of this case it is hardly material to enquire which.

"The third issue puts the question as to whether the Mohashoy's men used force, and, if so, whether the five appellants were of their number? No question of the right of private defence of property is raised. It is not even pleaded; but if, on the facts found, it is proved to exist, none the less will it avail the accused. [See *In re Kali Chura Mookerjee* (11 C L. R., 232)].

"The first point to ascertain is whether the acts charged by the prosecution are made out, that is, whether the appellant party did attack and beat the Thakurs' party whilst the latter were engaged in working on the *bund*? As to this I have no hesitation in returning an affirmative. The evidence has been very lengthy, and a great deal of time has been taken up both in recording, and in commenting upon it in both Courts. It will be sufficient for me to say that, as a whole, I accept the story for the prosecution; there is no evidence to show that any persons, other than the accused and their party, inflicted the wounds which undoubtedly were inflicted on members of the Thakurs' faction; and there is ample, and it seems to me credible, evidence to show that certain members of the Mohashoy's party did inflict those wounds in the manner alleged.

"The next point to determine is which faction acted on the aggressive? A great deal has been made of the evidence of Babu S. N. Singh (W. 18) and of Sujait (W. 25), and it is contended that this evidence proves conclusively that the Thakurs were prefectly well aware of the fact that they could erect no *bund* except with the express permission of the Mohashoy. I do not agree with this contention. In the first place, the evidence of these two gentlemen

does not seem to me to be wholly reliable; the first, at least, must be looked upon as personally interested in this case; and the memories of both of them must have misled them as to what actually occurred. Moreover, all that they say as to the alleged request of Babu Hari Mohun Thakur is nothing more nor less than hearsay. Mr. *Ghose*, indeed, **[211]** urged that it was admissible as having been elicited in cross-examination. I am unaware of any rule of law which renders hearsay more admissible in cross-examination than in examination-in-chief, and in the case of *Bhatori Mushabaini* (H. C., Cal., Cr. App. No. 337 of 1882), a Divisional Bench held that hearsay evidence should not be recorded, even on the part of the accused. The evidence might perhaps have been admissible to contradict Babu H. M. Thakur had he been examined, but he was not. Moreover, the letter (Ex. S) of the 20th October 1887 shows *primâ facie* that Babu H. M. Thakur, though he wished for a settlement of the dispute as to whether he could take "earth" from the Mohashoy's zemindari in order to repair his *bund*, distinctly claimed the right of repairing it when he chose. Further, there is a great deal of oral evidence on the record, which I see no reason to disbelieve, to the effect that such repairs had been constantly made by the Fazilpore Zemindars, aided by the proprietors of adjacent villages whose lands are equally irrigated by means of this water-course. I thereupon come to the conclusion that, whatever right may or may not exist, the Thakurs, in proceeding to repair or renew this embankment, were acting in the *bonâ fide* belief that they were entitled to do so. And I do not find that they proceeded to enforce this (supposed) right in the sense of s. 141, Indian Penal Code, for the repairing party were not larger in number than was necessary for the purpose; they evidently did not go to fight, for they at once informed the authorities when a breach of the peace appeared likely; and they did not go armed and ready to use force. They used no force; this is clear, because not one single wounded man has been produced from amongst the Mohashoy's faction, or from amongst any other assemblage of men.

"This being so, the acts of the Mohashoy's faction were clearly illegal. An earthen *bund* in a running stream cannot be made a permanent erection in a few hours; and there was no imminent danger to the property, for there was little or no water in the stream at the time. There was thus ample time to invoke the interference of the authorities, especially as it seems clear that the working party had been observed at an early hour of the day, before the work could have progressed far. The **[212]** Mohashoy's faction, therefore, were deprived of the right of private defence (s. 99, Indian Penal Code), even if the Thakurs' faction had been the aggressors and were trespassers. Moreover, their resistance (or attack) was not made on the spur of the moment; it was deliberate, after measures had been taken to assemble an overwhelming force. In two words, they took the law into their own hands on an occasion when the law deprives them of the right to do so."

The District Judge then proceeded to go into the question of the identity of the accused, and concluded as follows:—

"For the reasons above given, I confirm the conviction and sentence in the case of each accused. I do not think the sentence at all too severe: these open acts of violence, in defiance of the law, are of such frequent occurrence in these districts, that deterrent sentences are absolutely necessary. I have found by experience that sentences of six months' imprisonment and fine have no deterrent effect; and I have already had occasion to remark that I shall be prepared to uphold more severe sentences in all well-established cases of rioting with *lathial* weapons, such as this one. The medical evidence establishes the

fact that the hurt caused to the Thakurs' people, though not "grievous" in the sense of s. 320, Indian Penal Code. was certainly severe in the case of one or two of them; in fact, they got an unmerciful and painful beating with *lathies*. The appellants will surrender to their bail in order to serve out the unexpired portions of the sentences passed upon them."

The nature of the arguments advanced at the hearing of the rule are sufficiently stated in the **judgment** of the High Court (PIGOT and MACPHERSON, JJ.), which was as follows:—

This case comes before us in revision.

Ganouri Lall Dass, Dursan Lall Dass, Koonjal Jetti, Murat Singh and Moonshi Singh were convicted, under s. 147 of the Indian Penal Code, of the offence of rioting, by the Deputy Magistrate of Bhagulpore, and sentenced to undergo one year's rigorous imprisonment each, and were further directed in the words of the sentence "to execute recognisance bonds in the sum of Rs. 200 each for keeping the peace for a period of two years, or in default to undergo two years' simple imprisonment each."

[213] On appeal to the District Judge the conviction and sentence were confirmed, and on the 28th November this rule was obtained in this Court, calling on the District Magistrate to show cause why the conviction and sentence should not be set aside. The prisoners were released on bail pending the hearing of the rule.

One member of the present Bench not having sat in the Bench which granted the rule, we heard the rule opened at length by Mr. *Woodroffe* for three of the petitioners and also heard Mr. *Evans* for the other two. Cause was then shown by Mr. *Phillips* against the rule, and Mr. *Evans* was heard in reply for all the petitioners.

The case was argued at great length; we do not say at too great length, having regard to the importance of some of the questions raised before us.

The chief question discussed before us was, whether the acts of the persons convicted did, under the circumstances of the case, come within the provisions of the Indian Penal Code relating to the offence of rioting?

The disturbances, out of which this conviction arose, took place on the 24th June, at a spot on the river Karalya, close to where a water-course called the Sanis *Daur* (or otherwise the Raggahai Khurra) issues from that river.

Around this spot, and on both sides of the river, are lands belonging to Mohashoy Taruk Nath Ghose, of whose cutchery Ganouri Lal is tehsildar and Dursan Lal is patwari; the other three petitioners appear to be peadas of the same cutchery; the Mohashoy is described in the petition in this case as the "master" of the petitioners.

Some distance (about two miles) from the point where the *Daur* issues from the river are the lands of Fazilpore, 6 annas of which were bought in 1293 F. S. by the Thakurs' family of Barari. These lands are irrigated by the water-course, which appears to be supplied from the river alone.

The disturbance of June 24th took place in consequence of a number of persons having on that day gone, under the direction of servants of the Thakurs, to the place where the water-course issues from the river, and having, just below the point of junction, bunded up the course of the river (which was then dry or almost [214] dry) for the purpose of diverting the waters of the stream into the water-course. It has been a matter of dispute in the case whether or not there was there at the time a *bund* partially washed away, which these persons repaired or attempted to repair; or whether what they went to do was to construct a *bund*, there being none actually there at the time; and it

was denied on the part of the Mohashoy's people that a *bund* had ever been at this spot. The Deputy Magistrate (whose finding we refer to only because it is referred to by the District Judge) holds that the Thakurs' people went "to construct a new *bund* as the one which stood there before was washed away." The District Judge says, "they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away": adding, for the purposes of this case, "it is hardly material to enquire which."

The District Judge finds that such repairs had been before the Thakurs' purchase constantly made by the Fazilpore zemindars, aided by the proprietors of adjacent villages, and that the Thakurs in proceeding to repair or renew the embankment were acting in the *bona fide* belief that they were entitled to do so. The Thakurs' people went in considerable numbers, apparently coolies, save five or six peadas. The District Judge finds that they were not more in number than was necessary for the purpose of repairing the *bund*, for which purpose they went: that they did not go to fight; that they did not go armed and ready to use force; and that they did not use force on this occasion.

Upon these findings, it follows that the acts of the Thakurs' party did not constitute an offence under the Indian Penal Code.

The party arrived at the spot at about 10 A. M. (two ghurries of the day), and worked at the *bund* until the afternoon, by which time they had raised it to a considerable height; and also made it of considerable width. While they were engaged on the work, different bodies of men in large numbers were seen gathering in the neighbourhood, and marching towards the spot with drums or tomtoms beating. The Thakurs' men sent a messenger to Bhagulpore Thannah, about 10 or 12 miles off, who, however, did not reach it until 11 P. M.

[213] At about 4 P. M. the bodies of men, previously seen gathering, came together to the number, as stated, of 1,200 in all, many of them armed with *lathies*, to where the work was going on, headed by the petitioners. Most of the Thakurs' party had either left, or then fled, and very few were left. Twenty-five or thirty men detached themselves from the main body and fell upon the Thakurs' men, five of whom were more or less severely wounded with *lathie* blows, and three left senseless on the ground. The assembly then dispersed. It is contended that these acts do not amount to rioting under the Indian Penal Code in the present case.

The Mohashoy's people wholly denied any right on the part of the Thakurs to construct or repair or to have in existence, in the river bed, any *bund* such as the Thakurs claimed. They had expressly denied the existence of any such right, and refused permission to the Thakurs to exercise it. They had done so, in communications which passed between the two zemindars, in October and November 1887.

The District Judge thought the evidence of these communications inadmissible as hearsay. We think they were admissible; although we do not think that, upon the fair construction of them, they at all negative the existence of that *bona fide* belief on the part of the Thakurs in the right in respect of the *bund*, which the District Judge finds they had.

It is plain that on the part of the petitioners' master, the Mohashoy, the Thakurs' alleged right was strenuously denied; or, to put in different words his contention, his right to have the channel of the river free and unobstructed by any *bund*, was strenuously asserted by him a right in which, it may not be improper to remark, his villagers probably were interested as well as their landlord.

It is contended, under these circumstances, that the assembly of which the petitioners were members was not an unlawful assembly.

It is pointed out, with perfect justice, that they have not, nor has any one of them, been found guilty of inflicting the wounds, or any of the wounds inflicted on members of the Thakurs' party; so that, if they were not members of an unlawful assembly, they must go free.

[216] It is argued that the interference by the Thakurs' people with the channel of the river justified the assembly in coming to stop them from working there, and the show and the use of force in compelling them to do so. It was not expressly contended that the amount of injury inflicted on the persons wounded was, such as it was, within the right of the assembly to inflict; it was argued that it would not be fair to use the violence employed as evidence of an unlawful purpose in the coming of the assembly.

But the right under the law to use force was asserted in argument.

This contention was founded, partly on the words of the Indian Penal Code and partly on some of the decisions on that enactment.

It could hardly be supported, we venture to think, upon any supposed policy contemplated by the framers of the Code. The intention can hardly be imputed to the eminent persons who framed, or to the Legislature which enacted the Code of legalising, in certain cases, the levying of private war. We apprehend there can be no doubt that, according to English law, the assembly in this case would be an unlawful assembly, or that executing their purpose as they did, there would have been a riot, for which every member of the assembly would be liable.

Dalton's Justice of the Peace, in a passage constantly cited (as, for instance, in Burns, J. P., "Riot"), pp. 445-446, Ch. 137:—"Every man in peaceable manner may assemble a meet company (and may come) to do any lawful thing; or to remove or cast down any common nuisance done to them. Every private man, to whose house or land any nuisance shall be erected, made, or done, may in peaceable manner assemble a meet company with necessary tools, and may remove, pull, or cast down such nuisance, and that before any prejudice received thereby: and for that purpose, if need be, may also enter into the other man's ground. A man erects a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron, and other things necessary to remove the said weir and made a trench in his land, that they did erect the weir, to turn the water so, [217] as they might the better take up the said weir, and they did remove the same nuisance. This was holden neither any forcible entry, not yet any riot.

"But in the cases aforesaid, if in removing any such nuisance the persons so assembled shall use any threatening words (as to say they will do it in spite of the other; or they will do it though they die for it, or such like words), or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot; and, therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only without disturbance of the peace or threatening speeches. For the manner of doing a lawful thing may make it unlawful."

Russell, 4th Edition, Vol. I, 380:—"But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful;

from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it though they die for it, or the like), or in any other way behave in apparent disturbance of the peace, it seems to be riot * * * If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not."

[218] The latter part of this passage is taken from Chief Justice TINDAL'S charge to the Stafford Grand Jury in 1842 (C. &. M., 663).

We have, of course, to consider whether the Indian Penal Code has by omission or expression made a sort of violence or threat of violence lawful in India, which is criminal in England. The sections of the Code relating to the right of private defence of property were referred to.

Section 97, * paragraph 2, is that which recognizes in certain cases this right; and ss. 103, 104 and 105 lay down the limitations of it.

The first and leading characteristic of the right is, that it exists as against an act of theft, robbery, mischief, or criminal trespass, or an attempt to commit one of those offences. No such right is conferred by any words in these sections, save as against the perpetrators of offences under the Penal Code. The Code confers a right of private defence not as against mere trespass, but as against crime. That is the general scope of it. There may perhaps arise cases of difficulty; cases *inter apices juris* must always, from time to time, arise, and when they do, be dealt with. But this is not such a case. Upon the findings of the District Judge, we must take it that no offence was committed by the Thakurs' people. The matter does not rest there. The District Judge says that no case was made for the petitioners in the first Court of the exercise of the right of private defence. Nor was it. The defence made was, so far as it touched this question at all, one of civil trespass only. Again, it is shown, and was on another aspect of the case pressed upon us by Mr. *Woodroffe*, that long after the disturbance, the *bund* remained as it was when the attack took place. There was no water in the river to be then diverted. There was no pressing immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities. Even apart from this, the District Judge finds it clear that the working party had been observed early in the day before the work could have progressed far; but in place of having recourse to the authorities, the Mohashoy's party, acting with deliberation, assembled, after preparation, in **[219]** great force, and went to stop the work at the *bund*. We do not think the right of private defence arose in this case.

Right of private defence of the body and of property.

* [Sec. 97 : —Every person has a right, subject to the restrictions contained in s. 99, to defend—

* * * * *

Secondly.—The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.]

Then it is argued that the assembly did not assemble to enforce a right or supposed right within the terms of s. 141.

On the morning of the 24th the Mohashoy was, it is said, in the enjoyment and possession of the right claimed, namely, to have the river channel free. When the assembly went there in the afternoon, they went not to enforce a right, but to defend a right. They went to prevent the continuance of acts which altered the *status quo ante*. It was not intended by the Code to make assemblies which are assembled in support of the *status quo* unlawful. An assembly to alter is unlawful; an assembly to defend is not. This, as we understand, is the argument.

This argument possesses some attractive subtlety. But we do not feel able to accept it. It is dangerous to attempt to lay down any general rule, and there may perhaps be cases in which an assembly to defend a right may not be unlawful; at least, we shall not now affirm that there cannot be. But to accept the general proposition enunciated would be a very different matter. There are many rights of which it may be affirmed that when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by s. 141. What it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions.

The section refers to "right or supposed right." This would seem to make a division into: *(1st)* rights in actual enjoyment when interfered with; *(2nd)* rights claimed, though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, etc., defends the right by restoring the *status quo ante* and with it the actual enjoyment.

If the proposition contended for be true, then, not merely the right to the actual occupation of property in physical possession, [220] but a right of way, a right to draw water from a well, a right to enjoy ancient lights, and many others, may, if interrupted, be vindicated by force or show of force. So long as they are uninterrupted, they are in possession so far as such rights can be. To defend them by force against interruption is to enforce them; and this, if done by five or more is, in many if not in most cases, forbidden by the law.

This proposition, in truth, embodies the view which was expressed by CAMPBELL, J., sitting alone, in the case of *Queen* v. *Mitto Sing* (3 W. R., Cr., 41) in the passage at page 43, beginning with—"I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession." It is not the judgment of a bench of this Court, and with great respect we dissent from this passage and from that which follows it, and decline to be bound by either.

Leaving the discussion of this general proposition, which, if established, would be a defence in this case, we must refer to the judgment of PHEAR, J., in the Pachgachia case [*Shunker Singh* v. *Burmah Mahto* (23 W. R., Cr., 25)] which was much relied on.

The Court there held that the right of private defence existed.

The Pachgachia people were in "the enjoyment of the use of water which they were then having at the very time." The Amba people came to stop the water by force, if necessary. PHEAR, J., says: "They" (meaning the Pachgachia people) "were not bound under all circumstances to stand quietly by while their opponents wrongfully and by force committed serious mischief."

We think we must take this as a finding upon the character of the act committed by the Amba people; and, that being the finding, the right of private defence arose, there not being time to have recourse to the authorities. The act of the Amba people was held to be an attempt to cause such a change in the property (the actual taking of the water then flowing being treated as property) as to affect it injuriously, and so to be an attempt to commit mischief.

Further, it appears on reference to the papers in the case, that the Pachgachia people had gone to keep their channel clear, and had remained on the spot during the night previous to the **[221]** disturbance: they were actually in possession of the flow of water so far as that was possible; and the Amba people then came to stop it, and on the finding of the lower Court were the aggressors. Some of the language used in the case, no doubt, affords ground for the argument, properly pressed upon us, that it decides in general terms that the maintenance of the actual subsisting enjoyment of a right is not the enforcement of a right within the meaning of s. 141. If the case could only be read as supporting that proposition, we should think it our duty to refer it to a Full Bench. We think, however, that it does not go so far as to decide that.

We understand the case of *Birjoo Sing* v. *Khub Lall* (19 W. R., Cr., 66), also relied on to include a finding to a similar effect. COUCH, C.J., says: "He (the petitioner) went there to do what persons had a right to do, viz., endeavour to prevent mischief being done to property which belonged to them; and I think that he cannot, under the circumstances that have been stated, be considered to have been a member of an unlawful assembly so as to be answerable for any acts of violence which were committed by the assembly or any member of it in prosecution of the common object."

In this case therefore, also, the defence of what was held to be property, against what was held to be mischief, constituted the justification accepted by the Courts.

In the present case, if the right claimed by the Thakurs does exist, their people were lawfully engaged upon the *bund* and the *bund* was lawfully there. The petitioners were members of an assembly, the common object of which was by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear, by preventing the construction of the bund and by demolishing it so far as it was constructed: though the demolition was not carried out after the effects of the violence used became apparent— a not unusual circumstance in this country. We think the case comes under s. 141, para. 4.

We see no reason for holding that any omission in the charge occasioned a failure of justice in the course of the three months' trial which took place.

[222] As to the *alibi* set up on behalf of prisoners 2 and 3, we see no reason to doubt that the District Judge fully considered the evidence bearing upon that question; and, so far as we may allow ourselves to express an opinion on the question of fact before him, we should say that we entirely agree with him. The letters are not satisfactory, and even if these accused were present at the well where the bodies are said to have been searched for on the day in question, that would not be inconsistent with their having been, as they are sworn to have been, at the riot afterwards.

We must discharge the rule to set aside the conviction.

But we think we are at liberty to diminish the severity of the sentence imposed. There was a serious question of right raised between the parties. The Thakurs' people stayed quiet after the refusal of permission in October-November until just before the rains were nigh; they were the persons to come on the

ground with good reason to know they might be opposed. This does not furnish a justification for the accused; but it does, we think, entitle us to refrain from treating the case as one fit for the exemplary sentence imposed. We quite feel the importance of the District Judge's observations. But, under the circumstance, we think a sentence of six months' imprisonment will meet the ends of justice. We are happy that a line of argument in reply, which we feared might have rendered it impossible for us to reduce the sentence, was not pursued.

Subject to this reduction, we let the sentence stand as it is.

H. T. H. *Rule discharged.*

NOTES.

[Precautions may be taken in defence of possession of land against aggression and force used therefor is not an offence within sec. 143, I.P.C.,—(1890) 14 Bom., 441; (1897) 24 Cal., 686; but where both sides, by force of arms, seek to vindicate their rights or supposed rights, then neither side is presumably acting to protect itself but only trying to get the better of the other:—(1898) 20 All., 459; (1893) 21 Cal., 392; (1899) 26 Cal., 574; (1908) 35 Cal., 368; (1908) 35 Cal., 384. The actual possession in such cases is of some importance, (1907) 35 Cal., 103: but the material question in the offence is not whether there was a right but whether force was employed or not:—(1890) 14 Mad., 126: (1905) 1 C. L. J., 104; (1908) 35 Cal., 384.]

[223] PRIVY COUNCIL.

The 1st and 2nd November, 1888.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE AND SIR R. COUCH

Secretary of State for India in Council............Defendant

versus

Luchmeswar Singh............Plaintiff.

[On appeal from the High Court at Calcutta.]

Landlord and Tenant—Long continuance of a tenancy at a low and unvaried rent—Zemindar's right against tenant—Origin and special purpose of the tenancy—Cessation to use the land for such purpose—Burden of proving permanent tenure—Inference of tenancy-at-will, or from year to year.

The evidence having shown the origin and particular purpose of a tenancy, long continued at a low and unvaried rent, viz., from 1798 until 1873, when the tenant ceased to use the land for the purpose; *held*, that it was not to be inferred from that evidence that an agreement had been made between the parties that the tenant should hold a permanent tenure; and *held*, that, on such cessation, the tenant could only resist a suit to eject him by proving, or giving grounds for the inference of, an agreement with the owner of the land that he should have something more of a lease than the ordinary tenancy-at-will, or from year to year; also, that the facts here presented did not lead to that inference.

APPEAL from a decree (20th August 1886) affirming a decree (14th July 1885) of the District Judge of Tirhoot.

The question raised by this appeal was whether or not the appellant, as representing the Government of India, had in former years obtained the perpetual tenancy of village lands, within the zemindari of the Darbhanga Raj, at a fixed rent. The object of the plaintiff's suit was to establish his right to proprietary possession, as on the termination of a tenancy, of village Malinuggur which had been occupied at a rent, and without any written lease,

by the Government of India, for the purposes of its stud at Pusa, from the year 1798, when the stud was established, to its closing in 1873. The defendant asserted a right to continue to hold the village at the same fixed rent, viz., Rs. 972 per annum, which had never varied.

The issues raised questions as to the nature of the plaintiff's right, and of the defendant's possession ; also whether the latter had been adverse to the former, and, if so, since when ; and, generally, whether the plaintiff was entitled to obtain possession from the defendant.

[224] The village Malinuggur from time immemorial formed part of the Zemindari of Darbhanga. About the year 1764, before the East India Company obtained the Diwani, a jaghir for life of this village, and of others with it, was granted by the power then ruling to a Maharaja Rajbullubh, and, in February 1784, a sanad in affirmance of that grant was given to the jaghirdar by the Company. In 1798 the Company's servants arranged with him that the lands of Malinuggur, with another village, Iktiarpore, should be leased by him to the Government for the purposes of the stud then about to be established at Pusa. But, in July of the same year, before any potta was executed, the jaghirdar died ; and the jaghir lands came into the possession of the Government authorities on the lapse of the jaghir.

The Zemindar of Darbhanga, Raja Madho Singh, predecessor of the respondent, whose rights as well as those of other Zemindars, to settlement of all the lands in their zemindaris, had been recognized in Regulation I of 1793, and whose lands had been made subject to the decennial settlement, arranged with the Government officers that the lands of both the above villages should be made over to the Superintendent of the Stud at a rent.

On the 7th April 1800, the permanent settlement of the Tirhoot estates of the Darbhanga Raj was made, and an amaldastak recognizing the Raja's proprietary right in, among other estates, the resumed jaghir, was given to him. Annexed to the Raja's application for, and agreement to settlement, was a list containing the entry of Malinuggur among the villages in the Zemindari of Darbhanga at the rent then paid, viz , Sicca Rs. 911. And on this paper it was that the insertion of the words, "Mokarrari Astabal Company," was made at some subsequent time.

From 1798, in respect of Malinuggur the Government made an annual payment of Rs. 972, which was not varied.

In 1860, by reason of the respondent's minority, his estates were placed under the charge of the Court of Wards, and so continued till their release in September 1879. In December 1872, the Government decided to close the stud establishment at Pusa, and the inquiries directed as to what lands connected with it were in the disposition of the Government led to the assertion by the latter of a right to hold Malinuggur as on a mokarrari tenure.

[225] The District Judge found that, from the year 1800, the possession of the defendant had not been adverse to the plaintiff's right, and that limitation was no bar to the suit, and he referred to *Perhlad Sein* v. *Doorga Pershad* [12 Moore's I. A., 286 (331) ; 2 B. L. R., P. C., 111 (128)] as an authority to show that the plaintiff had a *primâ facie* title to the village as zeminder of the zemindari within which it was situate. He cited the observation of the Judicial Committee in that case to the following effect : "The appellant is the Zemindar. As such he has a *primâ facie* title to the gross collections from all the mouzahs within his zemindari. It lay upon the respondents to defeat this right by proving the grant of an intermediate tenure." His decree declared that the defendant had no right to permanenlty hold Malinuggur at a fixed annual rent, and awarded possession to the plaintiff.

On an appeal to the High Court, a Division Bench (WILSON and PORTER, JJ.) gave the following judgment: —

"Under the Regulations, Government was bound to settle these villages with the proprietor, if willing to accept the terms of the settlement; and there is no evidence adduced on the part of Government to show that, at the time this village was settled with the Maharaja of Darbhanga in 1800, any arrangement was made that Government should hold the village in perpetuity at a fixed rate of rent. It is admitted that the village did remain in the possession of Government for the purposes of the stud; but the terms on which the property was held are not apparent on the record, for we are not inclined to differ from the learned District Judge when he holds that the words 'Mokarrari Astabal Company,' in the petition for settlement of the 7th April 1800, are a subsequent insertion. Government has not produced any receipts for rent during the 73 years (1800 to 1873) the stud was in existence, although at paragraph 13 of the written statement put in on behalf of Government, it is asserted 'that from the date of the permanent settlement in 1800, the fixed annual rent of Sicca Rs. 911-10-6 has been paid to the Darbhanga Raj without variation or change.' The first evidence we can find of the payment of rent is in certain proceedings of 1876, when the Darbhanga estates were under the [226] mangement of the Court of Wards. The Accountant of the Collectors's Office, on being called upon for an explanation with regard to the *dastur* money payable to the Darbhanga Raja, writes, under date 8th February 1877 · 'Besides the *dastur* money, Rs. 972-8 was paid on account of rent of the Government stud in Mouzah Malinuggur, Pergunnah Kusma, along with the *dastur* money, and has been so written.'

"In the following years, this money appears to have been incorporated with the *zar-dazsturat*. We think that the District Judge in this case is right in holding that the onus of proving the nature of the tenancy rests with the defendant, who sets up a title adverse to the proprietor. It is a significant fact that all the other landed property acquired by the stud was held under *pottahs*; but with regard to this property no *pottah* is forthcoming, and doubts have always been expressed by the Government officers whether any proper title has been acquired thereto. It must be borne in mind that this village was acquired as an outlying farm for the purpose of pasturage and for growing oats. There can be little doubt, as pointed out by the learned Counsel for the respondent, that if the Stud Officers had found the land unsuitable for the purposes required, or if the village had been swept away by the river, Government might have given back the property to the Raja, who could not possibly have established, as against Government, any agreement to hold the village in perpetuity at a fixed rate of rent. As regards the contention that Government has expended a large sum of money in the improvement of this village, there is no evidence of this on the record. It is true that a bund was constructed to protect the village from inundation and some trees were planted; but there is nothing to show whether that was done by Government or the tenants on the land.

"The fact that the Government has held a valuable property for more than eighty years at a very low rate of rent, and was permitted to do so without demur so long as the land was required for the public purpose for which it was originally granted, viz., for the purposes of the stud, does not, now that the stud has been abolished, afford any answer to the claim of the Maharaja as proprietor of the estate to recover back his property.

[227] "In this view of the case, we see no reason to disturb the decree of the lower Court, and dismiss this appeal with costs."

On this appeal Mr. *W. F. Robinson* Q. C., and Mr. *J. D. Mayne*, for the appellant, argued that the construction to be put on the whole transaction of 1798 was that the Government took possession of Malinuggur as of a tenure terminable at its pleasure only, and at a fixed annual rent. In the Courts below sufficient weight had not been given to the fact that the Government had been in possession since 1798 at a rent which had never varied, and without any proviso as to the continuance of the stud. The question was as to the inference that ought to be drawn as to the actual understanding, or agreement, that existed between Raja Madho Singh and the authorities. At the time when possession was obtained, the Government was in a position to make terms more favourable to itself than the getting of a mere tenancy-at-will. The Government could have made another grant of the lapsed jaghir. The protection of tenancies at fixed rents came into the legislation of Regulation VIII of 1793 (see s. 49); and it was not the presumable agreement that the lands acquired for the Pusa stud, at that time established without any limit as to its duration, should be occupied for any period short of what the Government might determine. There was nothing in what was done in 1798, or 1800, to show that the Government altered their position, which originally was to take a mokarrari potta from the jaghirdar, into that of tenants-at-will to the zemindar, at a rent liable to enhancement from time to time. There was enough to shift the burden of proof on to the respondent to establish such a change in their plans.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne*, for the respondent, argued that, upon the facts, there was no ground for the inference that the Government obtained a permanent lease at a fixed rent; and there were the findings of two Courts against it. The burden of proof was on the appellant to establish a permanent lease. As the Government might at any time, on discontinuing the stud, have relinquished the tenancy, so neither could the zemindar be held bound by the presumed grant of a permanent interest. The case cited in the judgment of the Court of **[228]** First Instance, *Perhlad Sein* v. *Doorga Pershad* [12 Moore's I. A., 286 (331); 2 B.L.R., P.C, 111 (128)] was referred to, and it was contended that it was not a tenable theory that, when the jaghir was attached in 1798 as lapsed, the Government so held the lands comprised on it as their own estate, that they could, in effect, confer upon themselves a perpetual lease, binding on the Raja, who was zemindar of Darbhanga, when he accepted the settlement. Unless carried to that extent, no argument could be founded on the lapse of the jaghir.

Mr. *J. D. Mayne* was heard in reply.

Their Lordships' **Judgment** was delivered by—

Lord Hobhouse.—In this dispute about the village of Malinuggur, it appears that the Government of India have been in possession ever since the month of July 1798. It is not disputed that during the whole of that time, and for long before, the village was part of the *Milkiut*, that is, of the zemindari or proprietary estate of the Darbhanga Raj. The Raja now seeks to recover the property. The Government takes the ground that it has made to the Raja, in some shape or other, either as a matter of account or as a matter of actual payment, one uniform payment for 80 years before this dispute arose, and they claim to be perpetual tenants of the village at a fixed rent. At one time, when they put in their written statement, the Government set up that there was an actual mokarrari lease granted to them, and they did so in perfect good faith, upon the ground that a document in the Collector's office, being the petition of the Raja for permanent settlement, contained a description of Malinuggur as being the mokarrari property of the East India Company It has, however,

been found by both the Courts below that that description is an interpolation or a mistake of some kind, and that the true version of the petition is that which we have in the record, which, if their Lordships understand it rightly, is a copy of the original petition given out from the Collector's office to the Raja, and found in the duftur of the Raja. Therefore that contention is not now insisted upon; and their Lordships have it that in the petition [229] of the Raja for a permanent settlement, which contains a list of a very large number of mouzahs, there are a considerable number, about 16, specified as being held under mokarrari grants, and that the mouzah Malinuggur is not so specified.

But then the Government say that, whether there is or is not a lease, the true inference from the facts is that there was a binding agreement for a perpetual tenancy by them under the Darbhanga Raj. They insist very strongly that it would be irrational to suppose that for such a number of years the Raja would have gone on accepting a payment which had come to be very far below the value of the land, unless he was bound by an agreement of that kind.

That leads their Lordships to consider under what circumstances possession was first taken by the East India Company, and their payment to the Raj settled on the basis on which it has been made for so many years.

It appears that this village of Malinuggur was part of a jaghir granted to one Rajbullubh, apparently by the Nawab Nazim. It was granted certainly before the year 1764, and that was before the Diwani of Bengal, Behar, and Orissa was taken over from the Nawab Nazim by the East India Company. Therefore the British Government found the jaghirdar in possession. In the year 1784 his position was apparently confirmed by a grant from the British Government. Nothing turns upon the special language of that grant, and it is only valuable as showing what the position of the jaghirdar was at that time. It is clear that at that time the village was known to be part of the *Milkiut* of the Darbhanga Raj. What exactly the relations were between the Raja and the jaghirdar does not appear. But the jaghirdar was in possession, and of course was free of revenue.

In 1798 the Government desired to take the mouzah of Malinuggur for the purposes of a stud of horses which they were setting up, or had set up, in the immediate neighbourhood. Rajbullubh was quite willing that they should take his land, and he sent in an account of the revenues extending over 17 years with a request to know what the Government would propose to pay him, and to see the form of the potta that they proposed. Before anything further was done upon those [230] negotiations, the jaghirdar Rajbullubh died. The next step in the transaction was that the jaghir was attached, which was done immediately, in the month of July 1798. Within a week apparently of Rajbullubh's death, the Company attached the jaghir, no doubt for the purpose of securing the revenue. Thus the Company got into possession.

The next step after that is the report of Mr. Graham, the Agent of the Company, which bears date the 27th August 1798. After taking notice of what had passed with the jaghirdar, and of his death, and that the lands had been attached by the Government, he makes this proposal. He says:—"I now propose, as the lands (being part of the *Milkiut* of Raja Madho Singh") —that is Darbhanga—"will continue in the hands of Government until the conclusion of the decennial settlement; that it be recommended to the Governor-General in Council to put the lands appertaining to mouzahs Malinuggur,"— and another village which we may leave out of consideration—"under charge of Captain William Frazer, the Superintendent of the Stud, at a

net rent of Sicca Rs. 1,500 from the commencement of the ensuing Fasli year 1206"—that would be 1798 or 1799—" leaving it to the Collector to lay the Malikana to Raja Madho Singh," and so forth.

It would seem that what Mr. Graham advised was done. The Government were in possession; the decennial settlement was going on; their agent had come to a conclusion in his own mind what was a fair rent to pay for the village of Malinuggur; and he advises that the Superintendent of the Stud shall take possession and shall pay the amount which he had settled as fair. That seems to have been done, because, when we come to the permanent settlement, we find on the face of the Raja's petition, and again on the face of an account in the Collector's office, which shows the sums payable to Raja Madho Singh for the resumed Jaghir mehal of Rajbullubh, that those sums, so far as they are due from Malinuggur, amount to the proportion attributable to Malinuggur of the Rs. 1,500 which Mr. Graham advised to be paid for the two villages. Upon that footing the permanent settlement was made. The Raja was the proprietor. The Company were bound by the Regulation [231] to make the settlement with the proprietor. They did make that settlement, and, as far as their Lordships can judge, they made it exactly on the same footing on which they had been dealing with the village during the currency of the decennial settlement, that is to say, for the space of some two years before the permanent settlement was effected.

That is the whole of the contemporary evidence. There is no other evidence which bears upon the position of the parties excepting this, that we find that from that time forward up to the year 1872, matters remained in precisely the same position. The Government continued in possession of the village; they continued to use the lands for the purpose of the stud; and they continued to be charged at the same rate as was entered in the petition and in the Collector's account.

In 1872 the Government came to the conclusion that they had better give up the stud, and it was accordingly given up, and the village has been used for ordinary agricultural purposes, since that time. At that time the present Maharaja of Darbhanga was an infant, and some three or four years after he attained his majority he demanded possession. The mode in which that demand was made, and the time at which it was made, have been observed on by the Counsel for the Government; but in their Lordships' opinion, nothing whatever turns upon the correspondence which took place in the years 1881 and 1883; but whatever were the rights of the parties in 1872, when the stud was given up, precisely the same rights exist now.

Under these circumstances their Lordships think there is no substantial doubt that the Courts below, who have both decided that the Government cannot establish the inference that they are perpetual tenants, are right. The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things, there would be strength in [232] that argument, but as the origin of them is known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the plaintiff to explain the possession; it is the business of the defendants to show that it leads to the inference of a perpetual tenancy. But even if the *onus probandi* did not lie so clearly on the defendants, their Lordships think

that the reasonable explanation has been given by the Courts below, and that there probably was some understanding, which might have amounted to an agreement, that the Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud the rights of the landlord would revert, and it was he and not the Government who would have the benefit of the increased value of the land. That hypothesis seems more probable than the alternative one, and it is of course always more satisfactory when we can arrive at a reasonable explanation of the facts instead of merely resting the case upon the failure of one party to make out his case against the order.

The result is that their Lordships think the Courts below were quite right, and that this appeal must be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitor for the Appellant: *The Solicitor, India Office*, Mr. *Treasure.*

Solicitors for the Respondent: Messrs. *Sanderson and Holland.*

C. B.

NOTES.

[*See* the notes to **3 Cal., 696** in the LAW REPORTS REPRINTS where several of the leading cases on the subject are collected. *See* also (1898) 25 Cal., 896 where this case was cited in the order of reference; (1898) 26 Cal,, 204 where the tenure was presumed to be permanent from the nature of the grant.]

---

[233] APPELLATE CIVIL.

The 3rd December, 1888.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

Abdul Majid............Plaintiff

versus

Jew Narain Mahto and others............Defendants.*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13.

The decision of an issue in one of two suits tried together, which is not appealed against, cannot be treated as *res judicata* so far as the same issue is concerned in an appeal from the decision in the other suit.

A, a *ticcadar* sued *B* for rent in respect of a holding in the *ticca*. In that suit *B* pleaded that he was a partner of *A* in the *ticca* transaction, and that no rent was due from him in consequence thereof. *B* then sued *A* for an account of the partnership in the same transaction and *A* in that suit denied the partnership. Both suits were heard together by the Munsif who held *A* was not a partner. *B* appealed against the judgment and decree in the account suit, but did not appeal against that in the rent suit. It was contended on the appeal that the question as to whether *B* was or was not a partner was *res judicata*, by reason of the decision in the rent suit not being appealed against and having become binding.

* Appeal from Appellate Decree, No. 2394 of 1887, against the decree of Baboo Troylokya Nath Mitter, Subordinate Judge of Patna, dated the 29th of July, 1887, affirming the decree of Baboo Purno Chunder Ghose, Munsif of Patna, dated the 24th of March, 1887.

Held, that s. 13 of the Code of Civil Procedure did not apply, and that the question was not *res judicata*. There was no bar at the time the issue was tried and decided by the Munsif, and the Appellate Court was bound to decide the appeal upon the evidence.

THE plaintiff instituted this suit against the defendant Jew Narain Mahto and others for an account of a certain *ticca* transaction, alleging that he was a partner with the defendants therein; that the defendants had been managing and collecting the rents on behalf of the partnership and had not rendered him any account or paid him his share of the rent; and that they denied his right thereto. In the suit the defendants denied that the plaintiff was a co-partner, and contended that on this account the suit should be dismissed.

Prior to the institution of the suit Jew Narain and his co-defendants had instituted a suit against the plaintiff for rent, alleging that they were the *ticcadars*; that the plaintiff was a tenant of a portion of the *ticca* property, and was liable to pay rent to them; and that rent was due from him to them.

[234] In that suit Abdul Majid pleaded, *inter alia*, that he was a partner of the defendants in the *ticca*.

The issues in the present suit were settled on the 20th September 1886, and in the rent suit on the 14th June 1887, and the question, as to whether the plaintiff was or was not a partner was raised in both suits. The two suits were tried together by the Munsif, the evidence taken in one suit being treated by the consent of parties as evidence in the other. In the rent suit the Munsif gave judgment, holding that the plaintiff was not a partner in the *ticca* transaction, and in this suit his judgment was to the effect that for the reasons given in his judgment in the rent suit, he held that the plaintiff was not a partner, and consequently it was unnecessary to try the other issues in the suit. He accordingly dismissed the suit with costs.

Against the Munsif's decree in the rent suit no appeal was preferred, but the plaintiff appealed against the decree in this suit. When the appeal came on to be heard before the Subordinate Judge, a preliminary objection was raised on behalf of the defendants, that, because the plaintiff had not appealed against the decision in the rent suit, the question as to whether he was a partner or not, was *res judicata*, and that the appeal should, therefore, be forthwith dismissed.

This view was accepted by the Subordinate Judge, and the plaintiff's appeal was dismissed on that ground.

The plaintiff then appealed to the High Court, and on the appeal first coming on to be heard, the case was remanded to the Subordinate Judge, in order that he might arrive at a finding upon the evidence as to whether the plaintiff was a partner or not, the question of *res judicata* being reserved for determination after the judgment of the Lower Appellate Court on the facts had been given.

On the remand the Subordinate Judge held that the plaintiff had proved his allegation that he was a partner, and the appeal now came on to be heard before the High Court.

Baboo *Saligram Sing* for the Appellant.

Mr. *C. Gregory* and Munshi *Mahomed Yusoof* for the Respondents.

[235] The **Judgment** of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The plaintiff in this case brought a suit against Jew Narain Mahto and others for an account in regard to his share in a certain *ticca* transaction; his allegation being that he was a partner with the defendants in that *ticca*. It appears that these defendants had brought against him a suit for rent, alleging

that they were the sole *ticcadars*, and that he, the plaintiff in this case, that is Abdul Majid, as a tenant of a portion of the *ticca* property, was liable to pay rent.

In that suit Abdul Majid, the plaintiff in this suit, amongst other things, pleaded that no suit for rent would lie against him, as he was a partner in the *ticca*. It is thus clear that the issue whether the plaintiff in this suit, Abdul Majid, was a partner in the *ticca* with the defendants or not, was common in these two suits. Evidence was taken in these two suits bearing upon this issue, and it seems that by consent of the parties the evidence taken in one suit upon this issue was considered as evidence in the other. The Court of First Instance decided this issue against the appellant before us, that is to say, it came to the conclusion that he was not a partner in the *ticca* with the defendants. Against the decree for rent, which was passed against the appellant, he did not prefer any appeal, but against the decree which was made in the suit for an account, that is to say, against the order of the Munsif dismissing Abdul Majid's suit, there was an appeal preferred. On the appeal the first question that had to be decided by the Appellate Court was whether the appellant Abdul Majid was a partner with the defendants in the *ticca* transaction or not, and it was contended on behalf of the defendants before the Lower Appellate Court that that question was no longer open between the parties, and that it could not be decided in the Appellate Court on the evidence, because the matter was *res judicata*. That contention rested upon the ground that as the same question had been decided between the parties in the rent suit, and as against the decision in the rent suit no appeal was preferred, that decision, so far as this question of partnership is concerned, is final between the parties in the present suit for an account. The Subordinate Judge of Patna, [236] Baboo Troylokya Nath Mitter, who heard that appeal, was of opinion that the contention of the respondents was right, and he dismissed the appeal, not on the ground that upon the evidence the plaintiffs' allegation of co-partnership was not made out, but on the ground that the matter as contended for by the pleader for the respondents was *res judicata* between the parties. On second appeal this question was raised, viz., whether the view taken by the Lower Appellate Court was correct or not, and the record was sent back to the Lower Appellate Court to decide this issue, viz., whether the appellant was a partner or not upon the evidence, reserving the question of *res judicata* on that occasion. If the decision of the Appellate Court upon the evidence had been in favour of the defendants, the question of law, viz., whether the decision in the rent suit upon the question of partnership was *res judicata* or not, would not have arisen; but on remand the Lower Appellate Court has found upon the evidence on the record, that the allegation of the appellant, that he was a partner in the *ticca* transaction with the defendants, was established. We have, therefore, now to decide the question of *res judicata* in this case.

We are of opinion that the Subordinate Judge, Babu Troylokya Nath Mitter, was not right in dismissing the appeal, and the appellant's suit upon the ground that it was barred by s. 13 of the Civil Procedure Code. Section 13 says that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they claim. Now the suit for an account was not brought on the same cause of action as the suit for rent. What was contended for was that the issue as to partnership could not be decided on the evidence by the Appellate Court because that issue had been decided against the appellant in the Munsif's Court in the rent suit, and no appeal had been preferred against the

decision of the Munsif in that suit. Now s. 13 says that no Court shall try any issue which has been directly and substantially in issue in a former suit between the same parties. I omit the word "suit," because the question whether the present suit could be decided does not arise. Now in this case we know that **[237]** that issue was tried by the Court of First Instance. There was no bar at the time under s. 13, because at that time that issue had not been tried and decided, and therefore could be no bar under s. 13 when the trial was held in the Court of First Instance. That being so, and the first Court having decided the case on the evidence, we are of opinion that the Appellate Court was bound to decide the appeal also upon the evidence. That Court was not holding a trial of the issue, and therefore s. 13 could not apply. The Subordinate Judge was deciding the suit in appeal, the issue having been already tried in the Court of First Instance; and therefore the words of s. 13 do not warrant the decision of the first Appellate Court to the effect that in that Court the matter was not open between the parties. Nor on general principles do we think that the view taken by the lower Appellate Court can be supported. The Court of First Instance tried the two suits together, and upon the evidence taken in both, the evidence taken in the one suit being considered as evidence taken in the other by consent of the parties, came to a certain conclusion. The appellant before us, who was plaintiff in one of the suits and defendant in the other, did not think it worth his while to appeal in one of these suits, but he did appeal against the conclusion at which the lower Court had arrived in the other suit, and we do not see any valid reason why the appellant should be deprived of his right to have the opinion of the Appellate Court on a question which had been considered and decided by the Court of First Instance. We are, therefore, of opinion that s. 13 was not a bar to the Appellate Court's deciding the point on the evidence, and as that Court has decided in favour of the appellant, that he was a partner in the *ticca* transaction, the case will now go back to the Munsif to dispose of it and try all the remaining issues arising in the case. The costs of this appeal will be costs in the cause, and will abide the final result.

H. T. H.

Appeal allowed and case remanded.

NOTES.

[In (1905) 29 Mad. 333 F. B. it was held that the doctrine of *res judicata* did not apply when the very object of the appeal, in substance, if not in form, was to get rid of the adjudication which was said to render the question which the Appellate Court was to decide *res judicata*.

This case was followed, in (1905) P.R., 85; *see* also (1906) 33 Cal., 1101 : 4 C.L.J., 149; 1898 P.R., 31; (1902) 5 O.C., 384.]

[238] ORIGINAL CRIMINAL.

The 7th February, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE WILSON AND MR. JUSTICE NORRIS.

Queen-Empress
versus
Barton.*

Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104), s. 267.—Trial of British Seamen for offences committed on British ship on the High Seas—Procedure at such trial—Murder—Admiralty Courts—British Seamen on British ship—Letters Patent, High Court, 1865, cl. 26—Case certified by Advocate-General.

A British seaman, who stood charged with the murder of a fellow sailor on board a British ship on the high seas, was tried by a Judge of the High Court, under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the Captain and Second Officer of the ship, taken on commission; this evidence was admitted in evidence and the prisoner was convicted and sentenced.

It was objected, that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect, as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England. *Held*, on a case certified by the Advocate-General under cl. 26 of the Letters Patent, that the prisoner had been properly tried according to the ordinary practice of the High Court, and that the evidence was admissible against him.

CASE certified by the Advocate-General (Sir Charles Paul) under cl. 26 of the Letters Patent of 1865.

"William Barton was indicted before Mr. Justice NORRIS at the 6th Criminal Sessions of 1888, for the murder of one William Malone on board the British ship *Desdemona* on the high seas on the 2nd July 1888.

"The indictment, as originally framed, was to the following effect:—

"'That the said William Barton on or about the 2nd July 1888, upon the high seas and within the Admiralty jurisdiction of this Court, on board the British ship *Desdemona*, feloniously, wilfully and of malice aforethought, did kill and murder one William Malone, a seaman of the said ship, against the form of the statute [239] in such case made and provided and against the peace of our Lady the Queen, Her Crown and Dignity'.

"An objection was taken at the trial that the indictment ought to be amended by inserting the words 'being then a British seaman on board a British ship, to wit, the *Desdemona*' after the words 'William Barton' in the said indictment. The amendment was acceded to by the Crown, and the indictment altered accordingly.

* Original Criminal Case, No. 2 of the 6th Criminal Sessions of 1888.

"The Counsel for the prosecution having opened the case proposed to put in evidence,—

(1) "The return of a Commission directed to the Chief Presidency Magistrate for the examination of the Captain, Chief and Second Officers of the said ship who were not present in this country.

(2) "The deposition taken at the Police Court of one Benjamin Moram, sail-maker on board the said ship, who had been permitted by the Crown to leave with the said vessel.

"Such Commission had been directed by Mr. Justice TREVELYAN to issue under s. 503 of the Code of Criminal Procedure.

"It was objected by the Counsel for the prisoner that, under s. 267 of the Merchant Shipping Act of 1854, he ought to be tried in every respect as if he was being tried at the Central Criminal Court in London, and more especially that the law of evidence to be applied to this case was that prevailing in England. Under the law prevailing in England, both these pieces of evidence would have been inadmissible against the prisoner.

"The 267th section of the Merchant Shipping Act of 1854 is as follows: 'All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice who, at the time when the offence is committed, is, or, within three months previously, has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged, in the same manner, and by the same Courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England, [240] and the cost and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

"The learned Judge admitted the evidence subject to further discussion, and such evidence was read on behalf of the prosecution accordingly.

"The prisoner was found guilty of manslaughter by the jury, and was sentenced by the Court to penal servitude for life; the learned Judge refused to reserve the point, but referred Counsel for the prisoner to myself under the 26th clause of the Letters Patent.

"The Counsel for the prisoner has appeared before me, and represented the above facts, and upon them I am of opinion that the question, whether the prisoner should have been tried under the provisions of s. 267 of the Merchant Shipping Act of 1854 (17 and 18 Vic., c. 104) according to the English law, and whether the evidence so given was admissible against him, is a doubtful one and one that should be further considered by the High Court, and I do certify.

(Sd.) G. C. PAUL,

Advocate-General."

At the hearing

Mr. *Graham* appeared for the Prisoner.

The Standing Counsel (Mr. *Phillips*) for the Crown.

Mr. *Graham.*—Under s. 267 of the Merchant Shipping Act 1854, the prisoner should have been tried as he would have been tried had the trial been held at the Central Criminal Court in London. That section has never been amended in any way, and is still in force. There has never been a case of a seaman having been tried by a High Court in India for an offence committed on the

high seas, and I submit he should have been tried as though the trial were being held at the Old Bailey.

[NORRIS, J.—No objection was taken to any part of the proceedings save the reading of the Commission and the deposition put in by the Crown.]

[WILSON, J.—Jurisdiction is not affected by procedure.]

Then I say that there was jurisdiction, but the prisoner was not [241] tried according to s. 267 of the Merchant Shipping Act. The words "heard and determined" mean "heard and determined according to the common law of England." *Bacon's Abridgment, Tit. Statute.*

In *Queen* v. *Thompson* (1 B. L. R., O. Cr., 1) the majority of the Court held that in prosecuting a British subject for an offence committed on board a British ship upon the high seas, the procedure must be that of the local Court trying the case; but PHEAR, J., stated that s. 267 of the Merchant Shipping Act, 1854, did not apply to the case, but agreed that s. 21 of 18 and 19 Vic., c. 91 did apply, and that under that Act the procedure referred to therein meant the procedure of the ordinary original criminal jurisdiction of the Court. But it seems that s. 21 does not apply to "master, seaman or apprentices," as that section uses the words "any person" instead. In the case of *Queen* v. *Thompson* (1 B. L. R., O. Cr., 1) he was not described as a master, seaman or apprentice. The case of *Reg.* v. *Elmstone* (7 Bom., Cr., 89) follows PHEAR, J.'s decision, and lays down that s 267 applies only to seamen of British ships.

[NORRIS, J.—Neither of these sections says that when a British seaman is in Calcutta and when the Legislature say, that he shall be tried by nine jurymen, that the Court shall break the law and try him by twelve jurymen as in England.]

Where there are general and particular statutes, the general statute cannot derogate from the particular.—*Hawkins* v. *Gathercole* (24 L. J., Ch., 332), *Garnett* v. *Bradley* (L. R., 3 App. Cas., 952). Section 267 has been on the Statute book since 1844, being substantially s. 58 of 7 and 8 Vic., c. 112, the preamble of which states its object, viz., to afford merchant seamen all due encouragement and protection. This is an Act passed for the benefit of a particular class.

[PETHERAM, C.J.—The only question is how to construe the words "in the same manner," in s. 267. Do they not mean in the same manner as if the offence had been committed within the jurisdiction of the Court of Admiralty in England?] Section 267 controls the act of this Court.

[WILSON, J.—Does not 12 and 13 Vic., c. 96, affect the section?] That is a general statute and meets the case of persons who [242] are not provided for by any other statute. In *Queen* v. *Anderson* (L. R., 2 Cr. Cas. Res., 161) the whole argument was an endeavour to show that s. 267 did not apply to an American seaman on a British ship, and the offence was committed 70 miles up the Garonne. Section 21 of 18 and 19 Vic., c. 91, s. 11 of 30 and 31 Vic., c. 124, must be read together; they were all discussed in *Reg.* v. *Elmstone* (7 Bom. Cr., 89), and WESTROPP, J., held that the effect of the Act of 1855 was to provide for British subjects other than seamen committing crimes on British ships, and that the Act of 1867 was to provide for British subjects committing offences on board foreign ships to which they did not belong.

The Standing Counsel (Mr. *Phillips*), for the Crown, was not called upon.

The following **Opinions** were delivered by the Court (PETHERAM, C. J., WILSON, J., and NORRIS, J:—

Petheram, C. J.—The facts are stated in the case certified by the Advocate-General, and it is not necessary to re-state them here.

It was argued before us, that, under the provisions of the Merchant Shipping Act, 1854, s. 267, the prisoner should have been tried in every respect as if he had been tried at the Central Criminal Court in London, and the cases of *Queen* v. *Thompson* (1 B. L. R., O. Cr., 1) and *Reg.* v. *Elmstone* (7 Bom., Cr., 89) were cited and relied on on behalf of the prisoner. As to those cases, I think it enough to say that the words relied on were *obiter dicta* only, and that in the result the Court held in each case that the prisoners were properly tried according to the procedure of the Court before which the trial took place, so that both cases are authorities against the view which was pressed upon us.

The question, however, depends upon the true construction of the statutory law. The Merchant Shipping Act, 1854, by no means contains the whole of the legislation on the subject, and when the whole of the enactments are considered, I think the matter is free from doubt.

The first statute in point of time which it is necessary to notice is 12 and 13 Vic., c. 96, s. 1. That Act provides that if [243] any person is charged in any colony with an offence committed on the seas, he shall be dealt with there, as if the offence had been committed within the limits of the local jurisdiction of the Courts of Criminal Justice of such colony.

Next in order of time comes the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, s. 267. That section, so far as it is material to the present question, provides that all offences committed afloat against a person, by any seaman employed in any British ship, shall be inquired of, heard, and tried *in the same manner* as if such offences had been committed within the jurisdiction of the Admiralty of England.

The next statute on the subject is the Merchant Shipping Amendment Act, 1855, 18 and 19 Vic., c. 91. Section 21 provides that if any British subject charged with having committed any crime or offence on board any British ship on the high seas is found within the jurisdiction of any Court of Justice within Her Majesty's dominions, which would have had jurisdiction to try the case if the offence had been committed within its jurisdiction, shall have jurisdiction to try the case as if the offence had been committed within its jurisdiction.

The next enactment is 23 and 24 Vic., c. 88. It extends the provisions of 12 and 13 Vic., c. 96, to India.

The last enactment on the subject is contained in the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124. Section 11 of this Act provides that, if any British subject commits any offence on board any British ship or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's dominions, which would have had cognizance of such offence, if committed on board a British ship within the limits of its ordinary jurisdiction, shall have jurisdiction to hear and determine the case.

If the whole of these enactments apply to the case of an offence committed by a British seaman on board a British ship on the high seas, it is clear that the case must be tried by the Court before which the trial takes place according to its own procedure, as both the 12 and 13 Vic., c. 96, and the Merchant Shipping Amendment Act, 1855, expressly provide that the Court to which the jurisdiction to try the case is given, shall have the same jurisdiction as if [244] the offence had been committed within the limits of its local jurisdiction. And it has not been argued before us that this would not be the case, but it has been contended that as s. 267 of the Act of 1854 is for the benefit of, or at least has reference to, a particular class, the general legislation contained in the other statutes cannot operate to control the effect of that section. I cannót accede to this argument, because I think that the section is only a part of the

legislation intended to give various Courts in Her Majesty's dominions jurisdiction to try offences committed on the high seas, and is not for the benefit of any particular class. I think, however, that even if. s. 267 is read alone, it does not bear the construction sought to be placed upon it by Mr. *Graham.* If the section is read without any portion of it, except those which relate to the expression *in the same manner*, it will read that offences committed by seamen employed in a British ship afloat, out of Her Majesty's dominions, shall be tried *in the same manner* as if the offence had been committed within the jurisdiction of the Admiralty of England. This in my opinion must mean, shall be tried by the same Court which would have tried the case if the offence had been committed within the jurisdiction of the Admiralty of England, but does not in any way affect the practice of the Court to which the jurisdiction is given. For these reasons I think that the prisoner was properly tried according to the ordinary practice of this Court, and that the evidence was properly admitted.

Wilson, J. –I am of the same opinion, and I think that, when the statutes are looked at in their natural connection, there cannot be any doubt about the matter.

The question before us is, whether the prisoner ought to have been tried, not according to the course of procedure followed by our own Court, but by such a course of procedure as would have been followed by the Courts which ordinarily exercise criminal jurisdiction in England in cases within the jurisdiction of the Admiralty.

There are two Acts which deal with the general question as to how criminal offences, committed within the jurisdiction of the Admiralty, are to be tried here and elsewhere. The first is **[243]** 12 and 13 Vic , c. 96, which, in its first section, provides in substance that criminal offences committed within the jurisdiction of the Admiralty are to be tried in any Colonial Court, in the same manner as if the offence had been committed within the ordinary jurisdiction of such Court. Then there is Act 23 and 24 Vict., c. 88, which extends this provision to India, declaring that India is to be regarded as a colony within the meaning of the earlier Act.

These Acts have been construed both by this Court in *Queen* v. *Thompson* (1 B. L. R., O. Cr., 1) and by the Bombay High Court in *Reg.* v. *Elmstone* (7 Bom., Cr., 89), and it seems to me that the effect of these cases, so far as procedure is concerned, is to say that offences committed within the jurisdiction of the Admiralty are to be tried by the Indian Courts according to the course of their own procedure.

Having thus ascertained the general rule for the trial of offences committed within the jurisdiction of the Admiralty, we come next to the particular provisions in the several Merchant Shipping Acts which deal with cases which either do not or may not fall within the ancient jurisdiction of the Admiralty.

The first of those is the section of the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, upon which reliance has been placed, namely, s. 267. This section deals with cases which might or might not fall within the Admiralty jurisdiction. It deals with offences committed by British seamen either ashore or afloat out of Her Majesty's dominions. The next Act is the Merchant Shipping Act, 1855, 18 and 19 Vic., c. 91, s. 21, which goes a step further and deals with offences committed by any British subject on board a British ship on the high seas or in a foreign port, or by a foreigner on board a British ship on the high seas. And s. 11 of the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124, goes on to create a further extension because it includes cases not only of offences committed on board British ships but offences committed by British

subjects on board foreign ships to which they do not belong. It seems to me that the real intention of these sections is not to interfere with the course of procedure laid down in the General Act, 23 [246] and 24 Vic., c. 88, but to secure that, in cases analogous to those of offences committed within the jurisdiction of the Admiralty, though not strictly within it, the same rules of procedure shall apply.

Norris, J.—I am of the same opinion and substantially for the reasons given by my brother WILSON.

T. A. P.

NOTES.

[The Criminal Procedure Code as the Law of the place of trial was held to govern such cases, 21 Cal., 782 ; 25 Bom., 636.

As regards the issue of commission for examination of witnesses, *see* also 5 All., 92 ; 15 Cal., 775 ; 12 All., 69 ; 24 Cal., 551.]

[16 Cal. 246]

APPELLATE CIVIL.

The 8th February, 1889.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

Poresh Nath Mojumdar............Defendant

versus

Ramjodu Mojumdar and another............Plaintiffs.*

Redemption, Right of—Foreclosure decree—Order absolute—Redemption of mortgage before order absolute—Transfer of Property Act (IV of 1882), s. 87.

In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, 1882.

ON the 4th January 1886 Ramjodu Mojumdar and another (mortgagees) obtained an *ex parte* decree for foreclosure under s. 86 of the Transfer of Property Act, 1882, against Poresh Nath Mojumdar (the mortgagor), six months' time being allowed for the payment of the mortgage debt. The six months provided in the decree expired on the 4th July 1886, and the mortgage debt was not repaid. The mortgagees, without having previously obtained an order under s. 87 of the Transfer of Property Act, 1882, making the foreclosure decree absolute, obtained an order for possession of the mortgaged property in December 1886, and got possession accordingly on the 14th January 1887.

In May 1887 the mortgagor Poresh Nath Mojumdar made an application to the Munsif of Jhenidah to be allowed to redeem the mortgaged property, having paid the amount of the mortgage debt and costs into Court. The Munsif was of opinion that the order of December 1886, giving possession to the mortgagees, was illegal, according to the provisions of s. 87 of the [247] Transfer of Property Act; and, as no order making the foreclosure decree absolute had been obtained under that section, the mortgagor was entitled to redeem. Accordingly, on the 5th May, he made an order for redemption. From this order the mortgagees appealed to the District Judge of Jessore, who reversed the order of the Munsif for the following reasons: " Section 86 expressly states that if payment is not made within the fixed time, the defend-

* Appeal from Order No. 380 of 1888, against the order of F. E. Pargiter, Esq., Judge of Jessore, dated the 28th of June 1888, reversing an order of Baboo Bunwari Lal Bannerjee, Munsif of Jhenidah, dated the 5th of May 1888.

ant shall be absolutely debarred of all right to redeem the property. Section 87 gives the Court power to enlarge the time, but, in the absence of this extension, there appears to be no liberty allowed the debtor to redeem after time. The wording of the section is noteworthy. It declares that the decree *shall* debar the debtor of all right to redeem after the fixed time, whereas it only says that on the lapse of that time the decree-holder *may* apply for the decree absolute, and again if he does apply the Court *shall* grant it."

Poresh Nath Mojumdar appealed to the High Court.

Mr. *B. Chakravarti* and Baboo *Jadub Chunder Seal* for the Appellant.

Baboo *Srinath Das* for the Respondents.

Mr. *Chakravarti.*—The judgment of the lower Court is wrong. As to the nature of a mortgage decree, see Seton on Decrees, 4th Ed., pp. 1035, 1039. The form of decree in a mortgage suit under s. 86 of the Transfer of Property Act, 1882, has been taken from the common form in use in England—Macpherson on Mortgages, 7th Ed., pp. 692-4. The Courts of Equity in England can re-open a foreclosure even after the final order—Coote on Mortgages, 4th Ed., pp. 1021, 1026, and cases cited there. *Campbell* v. *Holyland* (L.R., 7 Ch. D., 166) shows that in a foreclosure suit a mortgagor can redeem even after the order for foreclosure absolute. At all events there is no doubt that he can redeem before the order absolute has been made under s. 87 of the Transfer of Property Act, 1882. See *Thompson* v. *Grant* (4 Mad., 438) and *Senhouse* v. *Earl* (2 Ves. Sen., 450).

It is always a matter of discretion whether time ought to be extended to allow the mortgagor to redeem under s. 87. The Judge here has ignored s. 87 altogether.

[248] Baboo *Srinath Das* for the respondents.—Section 86 says that the defendant in a foreclosure suit shall be absolutely debarred of all right to redeem after the lapse of six months from the date fixed by the Court for payment of principal and interest secured by the mortgage. It is not open to the mortgagor after the lapse of this fixed period to come in and offer to redeem. Mere effluxion of time extinguishes his right to do so.

There is no obligation on the mortgagee to make the application for order absolute contemplated by s. 87. The Legislature uses the word "may" in this section, whereas it uses "shall" in s. 86. Effluxion of time makes the decree absolute.

The **Judgment** of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

In this case a decree for foreclosure was made in the ordinary form under s. 86 of the Transfer of Property Act. Subsequently the plaintiff, without taking any proceedings under s. 87, obtained an order for possession of the property and got possession accordingly. There were then some proceedings with reference to setting aside the decree which are not material to the present purpose.

Subsequently the appellant before us, the mortgagor, made an application to be allowed to redeem this property. The application was allowed by the Munsif on the ground that no order had been obtained under provisions of s. 87 of the Transfer of Property Act, but the District Judge on appeal set aside that order and dismissed the application for redemption.

We think the Judge was wrong in the order that he made, and that the Munsif was right. The terms of s. 86 have been taken apparently from the terms of the decree which was formerly made in the Court of Chancery in England, and there is no doubt that, under the procedure of that Court, the mortgagor was entitled to redeem, at any rate, up to the final order of foreclosure. There is authority showing that, even when that final order was made, the mortgagor

could redeem ; but for the present purpose it is not necessary to consider those cases. Apart, however, from the English cases, it is quite clear that the Legislature in enacting s. 87 intended to give *some* effect to it, but if the respondents' contention were right, this section would be of no effect, and s. 86 **[249]** plus non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act provides that if the payment be not made within the time fixed in the decree, "the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property." That means that without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order, shows that, without that order, the right to redeem would not be taken away. Section 87 goes on to say: "and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff." If the property be not redeemed, the Court would have to pass an order absolute. It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property. It was always the procedure, both in England and here, that, until there was an order that absolutely debarred the mortgagor from his rights, he could redeem. Of course the Court might put him on terms if there had been any delay, but there is no doubt that until there is an order taking away his right, he is entitled at any time to redeem.

As to interest, it seems that the mortgagee obtained possession on the 14th January 1887. The six months provided in the decree expired on the 4th July 1886, and the applicant, appellant, had paid into Court the principal, interest and costs.

We think, that the respondent is entitled to interest on the whole amount due on the mortgage for principal and interest at the end of the six months from decree, at six per cent. per annum from 4th July 1886 to 14th January 1887, when he took possession. He is clearly not entitled to any interest after the 14th January 1887.

The appellant does not ask for any account of mesne profits, so there will be no account of mesne profits from that date till now. The applicant will have one month from the date this order reaches the Court of the Munsif to pay the interest which he **[250]** has not paid. If he does pay he will be entitled to possession of the property, and if he does not pay, it will be open to the other side to proceed in accordance with the law and to apply for an order under s. 87 of the Transfer of Property Act.

The appellant is entitled to his costs in all the Courts.

C. D. P. — *Appeal allowed.*

NOTES.

[Dr. Rash Behari Ghosh in his Mortgages IV Edn. (1911) Vol. I, pp. 599, 600 observes, "The Court may also from time to time postpone the day fixed for payment and thus enlarge the time for redemption at its discretion (C. P. C., 1908, O. 34, r. 3), even though the day appointed for payment has been suffered to pass (22 Bom., 771) and good cause for the delay is shown only at the hearing of a special application by the mortgagee to make the foreclosure absolute. But the mortgagor will not be entitled to redeem as of course, simply because no decree absolute has been actually made before the money is tendered. This seems to be established practice in England and was reproduced in the Transfer of Property Act, 1882, sec. 87, C. P. C., 1908, O. 34, r. 3. But the High Courts in India are divided in opinion on the question, and the Allahabad Court is divided against itself (Cf. 13 Mad., 267 ; 19 Mad., 40 ; 19 All., 180 ; with 16 Cal., 246; 21 Cal., 818 ; 22 Cal., 931 ; 23 Cal., 682 ; 20 All., 375 ; 20 All., 446 ; 7 A. L. J., 953 distinguishing 22 Mad., 133 where the order absolute was made without notice to the mortgagor."

See also 1 O. C., 91; 27 Cal., 705; 3 C. L. J., 583; 25 Mad., 244; 16 Bom., 243; 22 Bom., 771; 27 All., 501; 36 Cal., 122; 25 Mad., 300; where similar views were taken.]

[16 Cal. 250]

APPELLATE CIVIL.

The 4th December, 1888.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

Akshoy Kumar Nundi............Plaintiff

versus

Chunder Mohun Chathati and others............Defendants.*

Limitation Act (XV of 1877), Art. 179, cl. 2 — " Appeal presented "—" Where there has been an appeal."—Civil Procedure Code, (Act XIV of 1882), s. 541—Execution of decree.

The words "*appeal presented*" in the Limitation Act 1877, mean an appeal presented in the manner prescribed in s. 541 † of the Code of Civil Procedure.

The words "*where there has been an appeal,*" in art. 179, cl. 2 ‡ of sch. II, of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court.

In the execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court.

APPEAL from the order of the District Judge of Dacca, affirming the order of the 25th February 1888, of the First Munsif of Munshigunge, refusing an application for the execution of a decree as time-barred.

On 31st December 1884, the plaintiff Akshoy Kumar Nundi obtained a decree against the defendants Chunder Mohun Chathati and others. From this decree the defendants appealed to the Judge. The appeal was presented

* Appeal from Order No. 293 of 1888, against the Order of T. D. Beighton, Esq., Judge of Dacca, dated the 3rd of May 1888, affirming the order of Baboo Jadub Chunder Sen Munsif of Munshigunge, dated the 25th of February 1888.

† [Sec. 541:—The appeal shall be made in the form of a memorandum in writing presented by the appellant, and shall be accompanied by a copy of the decree appealed against and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded:

Form of appeal. What to accompany memorandum.

Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed against, without any argument or narrative; and such grounds shall be numbered consecutively.]

Contents of memorandum.

‡ [Art. 179:—

Description of Application	Period of limitation.	Time from which period begins to run.
*		* * *
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.	Three years or where a certified copy of the decree or order has been registered, six years.	(2) (Where there has been an appeal) the date of the final decree or order of the Appellate Court, or * * *]

after time, and on this ground was rejected on the 10th February 1885. The defendants then filed a second appeal in the High Court, which was dismissed with costs on the 16th February 1886.

On 4th January 1888, more than three years from the date of the decree of the Court of First Instance, the plaintiff applied for the execution of his decree. The First Munsif of Munshigunge [251] held that the application was barred by three years' limitation under Art. 179, Sch. II of the Limitation Act: that time began to run from the date of the decree of the Court of First Instance, the appeal to the District Judge being in fact no appeal since it had been dismissed as out of time; and, accordingly, he dismissed the application on the 25th February 1888.

On appeal the Judge upheld the order of the Munsif; and the plaintiff appealed to the High Court.

Baboo *Hari Mohun Chuckerbutty* for the Appellant.

Baboo *Srinath Das* and *Baikant Nath Das* for the Respondents.

The **Judgment** of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows: —

This appeal arises out of an application for execution of a decree. Previously in a litigation between the two parties, the defendants appealed from the decree of the first Court. That appeal was rejected on the ground that it was presented after time, and defendants then filed a second appeal to this Court which was dismissed with costs. On plaintiff seeking to take out execution of the decree, it was objected that the time ran from the date of the decree of the first Court, and that the application was barred. We do not think that that contention is correct. Section 4 of the Limitation Act says: * * * " Every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." Section 5* says: "If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens." That shows that what is meant by the words "appeal presented" in the Limitation Act is an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure, that is to say, presented by a proper person to the proper Court.

Article 179 of the second schedule of the Limitation Act says: "Where there has been an appeal, limitation begins to run from the date of the final decree or order of the Appellate Court." In [252] this appeal it has been contended, on behalf of the respondent, that the words "Where there has been an appeal," mean, where there has been an appeal presented and admitted, and in support of that he refers us to a case of *Dianatullah Beg* v. *Wajid Ali Shah* (I. L. R., 6 All., 438). There are no such words in ss. 4 and 5 as "appeal admitted," and there is nothing in those articles of the Limitation Act, or in s. 541 of the Code of Civil Procedure, that would admit of such a construction.

*[Sec. 5:—If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens: — Proviso where Court is closed when period expires.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.] — Proviso as to appeals and applications for review.

We are, therefore, of opinion that the words, " where there has been an appeal," mean where there has been an appeal in the ordinary sense and in the sense in which it is used in the other portions of the same Act, viz., when a memorandum of appeal has been presented in Court. We think that the lower Courts are wrong in saying that execution is barred. We, accordingly, set aside the orders of the lower Courts with costs.

C. D. P. *Appeal allowed.*

NOTES.

[See (1907) 6 C.L.J., where this case is explained on the question of limitation. *See* also 30 All., 290 as regards what is the final decree of the Court.]

[16 Cal. 252]

ORIGINAL CIVIL.

The 14th February, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE WILSON.

Benode Coomaree Dossee............Defendant

versus

Soudaminey Dossee............Plaintiff.*

Injunction —Mandatory injunction—Damages—Light and air—Ancient lights.

Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted although there might be cases where it would be granted.

Mere notice not to continue building, so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief.

Jamnadas Shankarlal v. *Atmaram Harjivan* (I. L. R., 2 Bom., 138) referred to.

The law regarding relief by mandatory injunction explained.

[253] THIS was a suit brought by one Soudaminey Dossee, the widow and executrix of one Gopal Lall Mittor (who had died in the month of May 1886), against one Benode Coomaree Dossee for a declaration that she was entitled to the free and uninterrupted enjoyment of light and air through certain windows on the south side of her house, No. 1, Mitter's Lane, and for an order directing the defendant to remove so much of a new house belonging to the defendant as interfered with or obstructed the said right to light and air, or, in the alternative, for Rs. 10,000 as damages.

The plaintiff claimed title through one Ramsoonder Mitter who had died intestate in 1818, possessed of, amongst other properties, a family dwelling-house and premises formerly known as 21, Mooktaram Baboo's Street, but subsequently subdivided into, amongst other premises, the premises known as Nos. 1 and 2, Mitter's Lane. Ram Coondu left six sons, two of whom died intestate leaving widows only, who subsequently died, the property then being

* Appeal No. 25 of 1888 against the decree of Mr. Justice TREVELYAN, dated the 26th July, 1888.

held jointly by the four surviving brothers, amongst whom was Gopal Lall Mitter.

Gopal Lall Mitter, in September 1863, brought a suit for partition of the joint family property left by Ramsoonder Mitter, and, on the 8th July 1865, obtained a decree therein directing a partition; the Commissioners of Partition on the 1st February 1868 completed their return. and thereby (amongst other properties) allotted to the said Gopal Lall Mitter, in respect of his share, that portion of the said family dwelling-house, No. 21, Mooktaram Baboo's Lane, which was, prior to the time of suit, separately assessed and numbered 1, Mitter's Lane. The Commissioners also allotted to one Russick Lall Mitter, a nephew of Gopal Lall's, that portion of No. 21, Mooktaram Baboo's Lane, to the south of the wall of No. 1, Mitter's Lane, which was, prior to the time of suit, separately assessed and numbered 2, in Mitter's Lane. and which consisted of a piece of land unoccupied by any buildings, save huts.

On the 2nd March 1869, the members of the joint family executed mutual conveyances of the different allotments made to them. The conveyance to Gopal Lall Mitter granting the allotment made in his favour "with the benefit and advantage of [254] ancient and other lights, easements, appendages and appurtenances, etc."

On the 1st July 1884, Russick Lall sold to the defendant Benode Coomaree Dossee the property known as No. 2, Mitter's Lane, and, in November 1884, she commenced to build on this land the foundation of the first storey of a new building, and subsequently continued the same to a second and third storey, the said first and second stories of the defendant's house being higher than the first and second stories of the plaintiff's house.

This new building was built at a distance of 5 feet from the wall of the plaintiff's house, which distance was still further reduced by the projecting cornices of the new building, which left only a clear space of three feet between the two houses; and from the centre of the wall of the new building a balcony, about 14 feet in length, had been built out, the outer side of which was only 20 inches from the upper floor wall of the plaintiff's house. At the time the said building had been commenced Gopal Lall Mitter, who was then in ill-health, had both personally and through his agents warned the defendant's agents that they were building too near to his house, and the defendants promised not to do anything to obstruct the light and air to the plaintiff's house which was one of two stories only.

In the month of May 1886, on which date the plaintiff alleged the second and third stories had not been completed, Gopal Lall Mitter died leaving a widow and an only son, a minor, appointing, by his will, his widow, the plaintiff, as his executrix. The widow took out probate, and, on the 8th July 1887, through her attorney, wrote to the defendant pointing out that the new building materially affected the access of light and air to No. 1, Mitter's Lane, and calling upon the defendant to remove the obstruction within five days. Receiving no reply to this letter, she, on the 19th August 1887, brought the present suit for the purposes above mentioned, alleging that the windows on the south wall of No. 1, Mitter's Lane, were ancient lights which had been enjoyed as of right and uninterruptedly for more than twenty years, and claiming the benefit of such light and air as was previously had and enjoyed by the owners [255] of the house prior to the partition, and also under and by virtue of the conveyance of the 2nd March 1869 to Gopal Lall Mitter.

The defendant contended that the plaintiff's husband and the plaintiff herself had acquiesced in the erection of the new building, and that knowing

their rights they had not objected till after its completion, which they alleged had taken place before the death of Gopal Lall.

Mr. *Pugh*, Mr. *Stokoe*, and Mr. *Allen* for the Plaintiff.

Mr. *Gasper* and Mr. *Garth* for the Defendant.

Trevelyan, J.—The plaintiff is the executrix of the will of her deceased husband Gopal Lall Mitter, who died in the month of May 1886.

She claims relief against the defendant on the ground of the defendant having obstructed her light and air by a new house which the defendant has caused to be built to the south of the house No. 1, Mitter's lane, which belonged to the plaintiff's husband and now belongs to his estate. Gopal Lall Mitter acquired this house by a conveyance, dated 2nd of March 1869, and made in pursuance of a partition between Gopal Lall Mitter and his co-sharers. The south wall of the present land was the south wall of the old family dwelling-house which was partitioned. There is no question and it has been proved that the windows in the south wall of the plaintiff's house existed at the time of the partition and for some time before it. The defendant's house has been built upon land which has heretofore been unoccupied by any buildings except huts, and which formed a portion of the property partitioned. There are really four questions in this case:—

Firstly.—To what easements of light and air (if any) over the defendant's premises is the plaintiff entitled?

Secondly.—Has there been any material and actionable interference with such easements (if any)?

Thirdly.—To what relief (if any) is the plaintiff entitled?

Fourthly.—Has the wall built by the defendant at the east end of the passage separating the plaintiff's premises from the defendant's premises encroached on the land of the defendant?

[256] The plaintiff puts her right upon the conveyance, to which I have referred, and upon the partition.

By this conveyance the other co-sharers, including defendant's predecessor in title, conveyed to Gopal Lall Mitter the premises No. 1, Mitter's Lane, "with all and singular the benefit and advantages of ancient and other lights easements appendages and appurtenances whatsoever to the messuages lands hereditaments and premises thereby conveyed or any part thereof respectively belonging or in any wise appertaining or reputed deemed taken or known as part parcel or member thereof or any part thereof respectively then or at any time or times theretofore held used, occupied, possessed or enjoyed."

I think that these words are wide enough to give a right to the light and air which before the time of the partition came into the south windows of the family house, which are the same as the south windows of the plaintiff's house. There is no doubt that light and air came into these windows. It is true they have wooden shutters, but these are capable of being opened and are not fixed. I have no doubt upon the evidence—and there is really no attempt to deny it—that, before the partition, light and air came into the windows on the south side of the house, which is now the plaintiff's, over the land, which is now the defendant's.

There was then on that land no obstruction to the light and air; there were some tiled huts on the land, but until late in the hearing it was not suggested that these huts interfered with the light and air. As far as the upper storey of the plaintiff's house is concerned, it is clear that there can have been no such interference, and as far as the lower storey is concerned, there was not,

until the late stage I have mentioned, any suggestion that these huts blocked out light and air.

Apart from the terms of this conveyance, I think that the plaintiff acquired easements of light and air in accordance with the cases which are to be found in my judgment in the case of the *Delhi and London Bank* v. *Hem Lal Dutt* (I. L. R., 14 Cal., 839). I must find that the plaintiff is entitled to so much of the use and access of light over the defendant's premises as is reason-[257] ably necessary for the comfortable habitation of her premises, and that she is entitled to so much of the use and access of air over the defendant's premises as may be necessary to prevent her premises being rendered unfit for habitation or business.

The next question is, whether there has been any material and actionable interference with the plaintiff's rights?

The plaintiff's house is two storied. The defendant has built a three-storied house at a distance of about 5 feet from the plaintiff's building. The first and second stories of the defendant's house are higher than the first and second stories of the plaintiff's house, respectively. The defendant is building a verandah on a level with the floor of her second storey along a portion of her building. This and some projecting cornices are said still further to obstruct the light and air.

Several witnesses speak as to the effect of this building.

Dr. Macleod's evidence shows that the ground-floor of the old building has been practically rendered uninhabitable, and I have no reason for distrusting Nobinkishen Mitter, when he says that he was obliged to remove to the upper-floor. I think that, even without this evidence, it would be obvious that a building of the height of the defendant's premises, built at such a short distance, would have the effect described. It seems to me clear that the lower storey of the plaintiff's house does not obtain from over the defendant's land so much light and air as is reasonably necessary for its comfortable habitation; and furthermore, I think that the lower storey has been rendered unfit for habitation and business so far as air is concerned. The defendant tries to make out a case that the plaintiff gets enough light and air from her inner courtyard, but I do not think that this has got anything to do with the case She is entitled to get her light and air from over the defendant's premises.

The plaintiff has objected to the balcony which has been erected upon the south of the defendant's premises on a suggestion that it is to be used as a privy. This is a mere suggestion, and without entering into any question as to what right (if any) the plaintiff would have to prevent the erection of a privy near her premises, I am not satisfied that the defendant contemplates [258] using this balcony as a privy. I find as a fact that there has been a material and actionable interference with the light and air to which the plaintiff is entitled. With regard to this question the defendant sought to give evidence as to the distance between other houses in the same neighbourhood.

This evidence was, I think, clearly irrelevant, and those distances could not be of the slightest use in this case without a consideration of the rights (if any) by prescription, grant or otherwise of the owners of those houses, and it would involve my trying a separate suit with regard to each of those houses.

I now come to the third question, which is, I think, the most difficult question in the case.

The defendant contends that the plaintiff's husband and the plaintiff have acquiesced in the erection of the defendant's building; that although knowing their right, they did not object until it was completed; and that this suit has

been fomented and fostered by one Omirto Nath Mitter, in order to embarrass the defendant in a litigation which was pending between him and the defendant. As far as the balcony, which has not been completed, is concerned, there can, of course, be no question of acquiescence.

There is no doubt, I think, that this litigation is in a great measure owing to Omirto Nath Mitter. He has been pulling the strings throughout; several witnesses speak to the part which he has taken, and there is no doubt that he has managed this case from behind the scenes, whether to assist his relatives or solely to advance his own ends is not so clear. I think the only effect which I can give to the fact that the suit has been to some extent promoted by Omirto Nath Mitter, is, that I must examine with greater care the evidence, and especially that portion of it which bears upon the second question. In short, I must be satisfied that there is a real and not mere fanciful injury. As to that, as I have said before, I am fully satisfied. A great deal of evidence has been given on the question of acquiescence. The plaintiff gives evidence to show that before the lowest storey was completed objection was made by Gopal Lall Mitter personally and by persons sent by him. The defendant seeks to show that before Gopal died, her third storey was completed, and denies that any objection was made [259] until a very late date after the building was concluded. I think that the onus of proof on any question of acquiescence as either destroying or limiting the plaintiff's rights, lies upon the defendant. She must satisfy me that the plaintiff, or her husband, have delayed unreasonably to assert their rights, or have expressly or tacitly assented to what has been done by the defendants.

After a careful consideration of the evidence I am bound to say that I am not satisfied that there has been any acquiescence by either the plaintiff or her husband. There is a certain amount of conflict of testimony as to when the defendant's north wall was completed and whether she, or rather her agents, received any warning from the defendant. [plaintiff ?] I think the probability is in favour of the plaintiff's case. I do not think a man would, without complaint or objection of any kind, allow his light and air to be diminished to the extent that has taken place in the present case. If the plaintiff's husband was well enough to send the messages, which it is said he did, it is likely that he would have sent such messages. If he were too ill to send them, then there would be no question of acquiescence. I do not think that, under the circumstances, the plaintiff herself has delayed at all in putting forward her rights.

The defendant has sought to show by books kept by her brother-in-law the date when the northern portion of her house was completed, but those books on the face of them prove nothing. It is only by an explanation, which may or may not be correct, given by a person who is more or less interested, that any meaning can be attached to those books. They have not the weight of business books, and in fact, on this question, there is nothing more than oral testimony of a not very satisfactory description.

It seems to me that the plaintiff has in no way forfeited her right to have the offending buildings removed. She does not claim to interfere with the ground-floor. The buildings above must be pulled down to such an extent as is necessary for her to obtain from over the defendant's land the light and air to which I have found her to be entitled.

With regard to the fourth question, I am not satisfied on the evidence that there has been any encroachment, and must find as a fact that there has been none.

[260] The defendant must pay the plaintiff's costs.

From this decision the defendant appealed.

The Advocate-General (Sir *Charles Paul*), Mr. *Evans* and Mr. *Garth* for the Appellant.

Mr. *Woodroffe* and Mr. *Pugh* for the Respondent.

The *Advocate-General.*—The decree should have been one for damages (if any), and not one granting a mandatory injunction. Damages cannot be granted in India on the same principle as they are granted in England, as the mode of living in this country is so different from the mode of living at home; the measure of damages hinges on whether any damage has been suffered. In this case there was no complaint for two years; a mandatory injunction at all events should not have been granted; such an injunction is in the discretion of the Court to allow or not to allow. *Yates* v. *Jack* (L. R., 1 Ch. D., 295) does not apply to this case. The principles on which summary injunctions are granted are to be found in Kerr on Injunctions, p. 16, and Mandatory Injunctions, pp. 43, 48, 49. See also the cases of *Isenberg* v. *East Indian House Estate Company* (3 De G. J. & S., 263; 33 L. J., N. S. 392); *The Curriers Company* v. *Corbett* (2 Dr. & Sm., 355); *Durell* v. *Pritchard* (L. R., 1 Ch. App., 244); *Lady Stanley of Alderley* v, *Earl of Shrewsbury* (L. R., 19 Eq., 616); *Viscountess Gort* v. *Clark* (18 L. J., N. S., 343); *Senior* v. *Pawson* (L. R., 3 Eq., 330); and Joyce on Injunctions, p. 1034. Even where the injury amounts to waste, a mandatory injunction is a matter of discretion—*Doherty* v. *Allman* (L.R., 3 App. Cas., 709). A mere notice about carrying the building higher is not a sufficient notice—see Kerr on Injunctions, p. 18. Here there was no real injury in the true sense of this word; there is no right to south breeze—*Delhi and London Bank* v. *Hem Lall Dutt* (I. L. R., 14 Cal., 839); *City of London Brewery Company* v. *Tennant* [L. R., 9 Ch., 212 (220)]. [261] The shutting out of air must involve some danger to health; this is not so in the present case. As to the question of light, the injunction is only against the second and third floors, so the light to the ground-floor is not in question; the evidence as to the loss of light is of no value as there is nothing to show whether the doors were open or shut at the time of Mr. Clarke's visit. Then is this an actionable wrong for which an action can be brought at all? The Court below has treated this point in a wrong manner; it should have been treated similarly to the case of *Sreemanchunder Dey* v. *Gopaul Chunder Chuckerbutty* (11 Moore's I. A., 28). If it had not been for Omirto Nath, no suit would have been brought; it is, therefore, a fanciful claim. As to what are actionable wrongs, see Goddard on Easements, 3rd Ed., p. 1138. Loss of privacy gives no cause of action. As to acquiescence, see what Lord WESTBURY says in *Sreemânchunder Dey* v. *Gopaul Chunder Chuckerbutty* (11 Moore's I. A., 28). There should be more than cessation of action for acquiescence.

[PETHERAM, C.J.—I think inaction is evidence of acquiescence.]

The case of *Archbold* v. *Scully* (9 H. L. C., 360) limits this. I, therefore, submit there is no case for a mandatory injunction, and no actionable wrong, but if the plaintiff has any right it is one for damages, and there is no finding as to damage.

Mr. *Evans* on the same side.—Preventive relief is in the discretion of the Court (see Chapters IX and X of the Specific Relief Act). Here there was no case for a mandatory injunction—*Durell* v. *Pritchard* (L. R., 1 Ch. App., 244); *Holland* v. *Worley* (L. R., 26 Ch. D., 578); *Greenwood* v. *Hornsey* (L. R., 33 Ch. D., 471).

Mr. *Woodroffe* for the respondent.—I contend the north wall of my client's house was finished in August 1886; the time from the death of Gopal, until the time that a representative could be found, should be deducted from the computation for the purpose of seeing if there was delay; at all events after probate there was no delay in bringing this suit. I submit that the suit

was brought within a year from the completion of the building. I admit that I consented to the defendant building up to my first floor. It [262] was no part of the defendant's case in the Court below that damages should be given and not a mandatory injunction; they argued in the Court below that there was such complete acquiescence that there was no damage. A deprivation of privacy is an actionable wrong. [PETHERAM, C.J.—Is a right of privacy a right to prevent building so as to overlook your neighbour?] Yes. [WILSON, J.—In a town, that would mean that you may not have windows except looking into the street.] No, for the zenana is only on one side.

As to such a right, see *Gokal Prasad* v. *Radho* (I. L. R., 10 All., 358). [PETHERAM, C.J.—We have no doubt as to your having a cause of action; the only question is whether you have a right to a mandatory injunction? You need not trouble yourself about the question of damages, that cannot be decided here, the best way would be for the parties to agree on the question of damages].

On the question as to when a Court of Equity will give relief by way of injunction or by way of damages, see *Aynsley* v. *Glover* (L. R., 18 Eq., 544). A Court will not give damages unless the injury is one which can be adequately compensated by money, and which is not grave and serious; a man is not to be allowed to make himself a judge in his own case as to whether damages or an injunction should be the remedy. There is a great difference between coming to a Court of Equity to enforce an equitable claim, and to a Court of Common Law for a legal right. In India we are not trammelled with the distinction. At home Lord Cairn's Act practically put the Court of Chancery, which before was the only Court to grant injunctions, into the position of the Courts out here, *i.e.*, giving it power to award damages in some cases instead of granting an injunction. Now what is the nature of the injury caused to this property? Until this is discovered, the Court cannot determine whether the plaintiff ought to have the full measure of relief or something else. Regard being had to s. 562 of the Code, the case cannot be sent back on the question of damages. [WILSON, J.—The Court can remand the case under s. 566 for the trial of an issue as to damages] We have shown what was the nature of our damages.

[263] The principle on which the Courts act is that an injunction will proceed unless the injury be not of a grave and serious character—*Durell* v. *Pritchard* (L. R., 1 Ch. App., 250). There must be a substantial interference with a right as is laid down in *Aynsley* v. *Glover* [L. R., 18 Eq., 544 (552)]. At page 555 Sir G. JESSEL shows that the word "substantial" is not used in the sense of "enormous." Quiescence is not acquiescence. The Judge in the Court below found that a protest had been made; there is, therefore, no question of acquiescence. Whether anything in the nature of mere delay, such delay not being acquiescence, constitutes an abandonment of a plaintiff's rights is discussed in *Jamnadas Sankarlal* v. *Atmaram Harjivan* (I.L.R., 2 Bom., 133); that case also shows that where the injury is of a continuing nature, damages cannot be given as relief, as it is impossible to assess damages from year to year, and that in such cases an injunction is granted. It must also be shown that if there was delay such delay has acted prejudicially to the other side. See also *Bennison* v. *Cartwright* (33 L. J., Q.B., 137) where there was delay of more than a year in bringing the action. The case of the *Land Mortgage Bank of India* v. *Ahmedbhoy Habibhoy* [I. L. R., 8 Bom., 35 (67)] points out when an injunction and not damages will be granted, and English cases are there cited as authority for the point—*Kino* v. *Rudkin* (L. R., 6 Ch. D., 160), *Dent* v. *The Auction Mart Company* (3 De G. & J., 275). I gather from the English cases that where property is seriously or materially lessened in value by a cause

permanent in its character, there the Court will grant an injunction and not damages. *Senior* v. *Pawson* (L. R., 3 Eq., 330) was a case in which there were special circumstances, and on that account damages were given.

Baxter v. *Bowen* [23 W. R., (Eng)., 805] was another special case and has been explained in *Gaskin* v. *Ball* (L.R., 13 Ch. D., 329). As to where a mandatory injunction will be granted, see *Aynsley* v. *Glover* [L.R., 18 Eq., 544 (552)] and *Krehl* v. *Burrell* (L.R., 7 Ch. D., 551) where a mandatory injunction was granted.

[264] Mr. *Evans*, in reply, referred to the cases of *Gaskin* v. *Ball* (L. R., 13 Ch. D., 329) as explaining that *Baxter* v. *Bowen* [23 W. R., (Eng), 805] is an exception to the rule and is not the rule, and on acquiescence, to *Sayers* v. *Collyer* (L. R., 28 Ch. D., 110).

[On the conclusion of the arguments a certain sum, at the suggestion of the Court during the course of the arguments, was agreed upon by Counsel for both parties as satisfying the claim to which the plaintiff was entitled to as damages, no issue on this question having been framed or tried by the Court below: leaving the decision of the Court to deal with the question as to whether a mandatory injunction should or should not be granted under the circumstances of the case.]

The **Judgment** of the Court (PETHERAM, C.J., and WILSON, J.) was delivered by

Wilson, J.—This case, so far as it relates to the granting of a mandatory injunction, is of undoubted importance to suitors in this Court, and it seems to me that the law on the point has been somewhat misapprehended in the Court below. It rather seems to have been assumed that if the cause of action which undoubtedly existed was established, a mandatory injunction to pull down the defendant's building or so much of it as might be necessary, would follow as a matter of course. The principal authorities on the subject have been cited and their effect I think is plain.

The cases have all fallen under one or other of two classes. The first kind of case is that of a man who has a right to light and air which is obstructed by his neighbour's building, and who brings his suit and applies for an injunction as soon as he can after the commencement of the building, or after it has become apparent that the intended building will interfere with his light and air; a number of cases under that head have been cited. A leading case is that of *Dent* v. *The Auction Mart Company* (L.R., 2 Eq., 238). To the same class belong *Aynsley* v. *Glover* (L.R., 18 Eq., 544); *Smith* v. *Smith* (L.R., 20 Eq., 500); *Krehl* v. *Burrell* (L. R., 7 Ch. D., 551); *Greenwoood* v. *Hornsey* (L. R., 33 Ch. D., 471). Those cases all **[265]** establish that although the remedy by mandatory injunction is always in the judicial discretion of the Court, and the circumstances of each case may be taken into consideration still as the general rule, and in the absence of special circumstances, if the injured man comes to Court on the first opportunity after the buildings have been commenced, or on the first opportunity after he has seen that they will interfere with his rights, an injunction being necessary, a mandatory injunction is granted. On the other hand, however, there may be circumstances which will lead the Court to refuse the injunction, as has certainly been done in two cases—*Senior* v. *Pawson* (L. R., 3 Eq., 330) and *Holland* v. *Worley* (L. R., 26 Ch. D., 578).

The other class of cases comes under a different principle. When a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, though there might be cases where it would be.

This is shown by the case of *Isenberg* v. *The East Indian House Estate Company* (3 De. G. J. & S., 263); *Curriers Company* v. *Corbett* (2 Dr. & Sm., 355); *Durell* v. *Pritchard* (L. R., 1 Ch. App., 244). The latter case came before the Lords Justices from a decision of the Master of the Rolls, and L.J. TURNER lays down that it is within the jurisdiction of the Court to grant a mandatory injunction, but it ordinarily abstains from granting one unless under very special circumstances. The next case I would refer to—*City of London Brewery Company* v. *Tennant* (L. R., 9 Ch. App., 212)—where the jurisdiction of the Court to grant a mandatory injunction is reaffirmed, but it is added in the Judgment of Lord SELBORNE: "We know, of course, that the Court is not in the habit of doing so except under special circumstances, but those circumstances may exist." The same law is followed in *Stanley of Alderley* v. *Shrewsbury* (L. R., 9 Eq., 616). There have been cases where mandatory injunctions have been granted. In *Baxter* v. *Bowen* [23 W. R. (Eng.), 334] a mandatory injunction was granted by Vice-Chancellor BACON, and his judgment **[266]** was affirmed on appeal [23 W. R. (Eng.), 805]. But in that case the circumstances were peculiar. The thing removed was a mere shed, and there was something like an agreement between the parties that no objection should be taken on the ground of complainants having delayed in bringing their action. That case has been explained as a very special case in *Gaskin* v. *Ball* (L.R., 13 Ch. D., 329), where it is said: "The Court will rarely interfere to pull down a building which has been erected without complaint. *Baxter* v. *Bowen* [23 W. R. (Eng.), 805] was a very special case, just one of those exceptions which prove the rule." Certain circumstances have been relied on in this case as making it a special one, particularly the notice which the plaintiff's witnesses say they gave to the defendants not to continue the building so as to obstruct the plaintiff's rights. The learned Judge in the Court below has believed these witnesses, and I accept his finding; but the authorities show that mere notice, not followed by legal proceedings, is not sufficient

That is how matters stand, so the English authorities, and, I think, the Indian authorities are, to the same effect. I had occasion to refer to the authorities in the case of the *Shamnugger Jute Factory* v. *Ram Narain Chatterjee* (I. L. R., 14 Cal., 189). I only refer to that case because on pages 200-201 a good many of the authorities are collected. A Bombay case was cited, which, it was contended, is inconsistent with this view of the law, *Jamnadas Shankarlal* v. *Atmaram Harjivan* (I. L. R., 2 Bom., 138). There, under the circumstances of the case, a mandatory injunction was granted; but we cannot, I think, regard that case as laying down any broad rule that mandatory injunctions are to be granted as a matter of course; but it appears to me the law on this point is well settled.

T. A. P. *Appeal allowed.*

Attorneys for the Appellant: Messrs. *Orr and Johnson.*
Attorney for the Respondent: Baboo *Aushutosh Dhur.*

NOTES.

[Prompt action is necessary **(1894) 18 Bom., 474; (1893) 16 All., 69; (1898) 20 All., 345; (1895) 20 Bom., 788**; *see* also (1891) 16 Bom., 533; **(1907) 9 Bom., L.R., 1117; (1906) 29 Mad., 497.**

As regards the refusal of injunction based on **the extent of damage,** *see* **also (1911) 12 I.C., 635 (Mad.).]**

---

[267] FULL BENCH.

The 9th February, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE WILSON, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY AND MR. JUSTICE MACPHERSON.

Deb Narain Dutt............Claimant

versus

Narendra Krishna, Decree-holder and another............Judgment-Debtor.*

Bengal Tenancy Act (VIII of 1885), s. 170—Decree for rent under Bengal Act VIII of 1869—Attachment under decree obtained under Rent Law of 1869, subsequently to the passing of Act VIII of 1885—General Clauses Consolidation Act (I of 1868), s. 6.

Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy, in respect of which the rent had become due, was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by s. 170 of the Bengal Tenancy Act of 1885 :

Held, that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution, the term "proceedings" in s. 6 of Act I of 1868 not including proceedings in execution after decree.

REFERENCE to a Full Bench made by Mr. Justice PIGOT and Mr. Justice RAMPINI ; the referring ORDER was as follows :—

This is an application made by Deb Narain Dutt, claimant and petitioner, to set aside an order of the First Munsiff of Baruipur, made on the 18th June 1887.

The order was made in execution proceedings in Suit No. 871 of 1886—*Moharaja Narendro Krishna* v. *Russick Chunder Chumputti*. In that suit a decree for arrears of rent was made on the 29th April 1885 under the provisions of Bengal Act VIII of 1869. On 29th December 1886, after the Bengal Tenancy Act of 1885 came into operation, the decree-holder applied for execution, and the tenure in respect of which the decree for arrears of rent had been made, was attached. Notice to stay the sale of the tenure by depositing the decretal amount was served upon the applicant in the present case by the decree-holder: but this circumstance has, in our opinion, no bearing upon the question which arises in the case. The tenure was put up for sale, and the applicant then preferred a claim objecting to the execution proceeding, [268] which was numbered as a claim case, No. 22 of 1887, under s. 63 of Bengal Act VIII of 1869.

By the order of the 18th June 1887, which it is now sought to set aside, the Munsif rejected the claim without enquiring into it, on the ground that, under the provisions of s. 170 of the Bengal Tenancy Act, no such claim could be preferred.

* Full Bench on Civil Rule, No. 1118 of 1887, obtained against the order of Baboo D. N. Sarkar, Munsif of Baruipur, dated 18th June 1887.

This order was made upon the authority of a decision of this Court of the 27th May 1886, in Rule No. 798 of 1886. That decision is not reported. The terms of it are as follows :—

"Execution of the decree for arrears of rent obtained by the petitioner was taken out on the 6th of January last. The proceedings, therefore, in our opinion, would be regulated by the Bengal Tenancy Act of 1885. The tenure of the debtor was attached and advertised for sale. A claim was made by a third party to have two-thirds of this tenure exempted from sale as having been purchased by him. The Munsif found that the claimant had purchased one-third, and accordingly exempted that one-third share from sale. An objection has been raised under s. 170 of the Bengal Tenancy Act to the effect that the Munsif acted without jurisdiction. That section provides that the sections of the Code of Civil Procedure, under which such an order could be passed, shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon. Under such circumstances we set aside the Munsif's order as without jurisdiction. We make the rule absolute with costs."

We are unable to concur with the above decision. We are of opinion that, under s. 6 of Act I of 1868, the provisions of the Bengal Tenancy Act do not apply to this case.

The decree in the present case was made before the Bengal Tenancy Act came into force. But it appears to us that this circumstance would not affect the question whether the provisions of the Act applied, inasmuch as the suit was instituted before the Act came into operation. In our opinion, "proceedings" in the 6th section of Act I of 1868 include all proceedings from the institution of the suit to the final step taken in execution of decree.

We think it better to submit to the Full Bench a specific question as to the correctness of this reason for the opinion at which we have arrived, because as to this, the cases are not uniform, there being a decision of the High Court of Bombay which treats proceedings in execution as a new set of proceedings.

[269] The questions we refer to the Full Bench are :—

1. Whether, in the present case, the provisions of the Bengal Tenancy Act were applicable to proceedings in execution?

2. Whether the term "proceedings" in s. 6 of Act I of 1868 does or does not include proceedings in execution after decree?

The cases to which we would refer are the following :—

Ratanchand Shrichand v. *Hanmantrao Shivbakas* (6 Bom., H. C., A. C. 166); *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (B. L. R., Sup. Vol., 985 : 9 W. R., 402), *Kudajit Singh* v. *Meherban Koer* (I. L. R. 3 Cal., 663), *Mahomed Hossein* v. *Hadji Abdulla* (I. L. R., 3 Cal., 727). *In re Ratansi Kalianji* (I. L. R., 2 Bom., 148); *Thakur Prosad* v. *Ahsan Ali* (I. L. R., 1 All., 668); *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (I. L. R., 8 Cal., 51) ; *Behary Lall* v. *Goberdhun Lall* (I. L. R., 9 Cal., 446); *Jugmohun Mahto* v. *Luchmeshur Singh* (I. L. R., 10 Cal., 748); *Becharam Dutta* v. *Abdul Wahed* (I. L. R., 11 Cal., 55); *Hurrosundari Debi* v. *Bhajohari Das Manji* (I. L. R., 13 Cal. 86); *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (I. L. R., 7 Bom., 159); *Satghuri* v. *Mujidan* (I. L. R. 15 Cal., 107).

Baboo *Troilokyanath Mitra* for the Claimant.

Under the old law a claimant had a right to have his claim investigated, it cannot have been the intention of the Legislature to deprive him of that right by the new law. The old Act was saved by s. 6 of the General Clauses Act of 1868. Proceedings in execution must be taken to be part of the suit itself, and that being so, under s. 6 of General Clauses Act, these proceedings could not be affected by the new Act. I submit the provisions of the Bengal Tenancy

Act do not apply to a decree passed before that Act came into force. An application for execution is an application in the suit--*Mungul Pershad Dichit* v. *Grija Kant Lahiri* (I. L. R., 8 Cal., 51) and, if so, s. 170 of Bengal Tenancy Act does not apply, the same principle is enunciated in *Runjit Singh* v. *Maherban Koer* (I. L R., 3 Cal., 663).

The case of *Ratanchand Shrichand* v. *Hanmantrao Shivbakas* (6 Bom., H. C., A. C., 166) lays down that "any proceedings" includes all proceedings in any **[270]** suit from its institution to its "final disposal"; and I take it execution proceedings fall within the term "final disposal." I rely on *Thakur Prasad* v. *Ahsan Ali* [I. L. R., 1 All, 668 (671)]; *Mahomed Hossein* v. *Hadji Abdullah* (I. L. R., 3 Cal., 727); and *In re Ratansi Kalianji* (I. L. R., 2 Bom. 148); *Harrosundari Debi* v. *Bhojohari Das Manji* (I. L. R., 13 Cal., 86) *Satghuri* v. *Mujidan* (I. L R., 15 Cal., 107).

[WILSON, J.—The case of *In re Ratansi Kalianji* is not of much use to you in the present case, but you may take it that all the Judges who decided it on the construction of the General Clauses Act took the same view that has been taken by this Court.]

Baboo *Rash Behari Ghose* for the opposite parties.

It is suggested by the other side that because the decree was outstanding there is a pending proceeding within the meaning of s. 6 of the General Clauses Act; and also that "proceedings" is identical with "suit." The distinction for which I contend, however, is pointed out in *Jugmohun Mahto* v. *Luchmeshur Singh* (I. L. R., 10 Cal., 748), where it is said that "although an application for execution is an application in the suit resulting in a decree, it may not be an application in a pending proceeding; the suit having matured into a decree it could not properly be said to be pending thereafter."

If the application had been pending thus, the old procedure could have been used, but not so if no step had been taken in execution. The definition of the word "decree" in the Civil Procedure Code show that there is a distinction between "suit" and "decree." Section 3 of the Code shows a distinction between proceedings before and after decree. Section 25 of the Code does not sanction transfer of "execution proceedings," but of "suits". Under s. 64 it has been held that execution proceedings are not proceedings in a suit.

[WILSON, J.--There is no use in citing one Act for the purpose of construing another.]

The case of *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* [I.L.R., 7 Bom. 459, (463)], is especially in point, and upholds my contention as to pending proceedings, and *Shivaram Udaram* v. *Kondiba Maktaji* (I. L. R., 8 Bom., 340,) carries **[271]** this principle still further. See also *Rustomji Burjorji v. Kessowji Naik* [I. L. R., 8 Bom, 287 (293)], also *Chinto Joshi* v. *Krishnaji Narayan* (I. L. R., 3 Bom., 214); in none of these cases has execution been regarded as an integral part of a suit.

The **Judgment** of the Full Bench (PETHERAM, C.J., WILSON, PIGOT, O'KINEALY and MACPHERSON, JJ.) was delivered by

Wilson, J.—Section 170 of the Bengal Tenancy Act VIII of 1885 enacts that "ss. 278--283 (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon." This Act became law on the 1st November 1885. Among the sections of the Code thus excluded are those under which claims to property attached in execution are made. Before the Bengal Tenancy Act came into operation, a decree for rent was obtained under the Rent Act then in force (Bengal Act VIII of 1869), which Act embodied the provisions of the Code of Civil Procedure.

After the Bengal Tenancy Act became law, the tenancy in respect of which the rent decreed had become due was attached in execution of the decree. The present applicant filed a claim to the property attached, but the Munsif, in whose Court the proceedings took place, rejected the claim as being forbidden by s. 170 of the Bengal Tenancy Act. The question that we have to consider is, whether s. 170 of that Act applies to the present case, and the answer depends upon s. 6 of the General Clauses Act I of 1868, by which "the repeal of any Statute, Act, or Regulation shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation."

The Courts of this country have frequently had to consider the effect of legislative change in the law upon proceedings instituted before the change was made, and the cases in which they have had to do so, fall, I think, under one or other of three classes.

The first class of cases consists of those in which the Courts have had to construe enactments which have altered the law, not by the mere repeal of earlier enactments, so as to bring the [272] case under s. 6 of the General Clauses Act, but by new affirmative provisions, and in which the new enactments contain in themselves no special rule for their own interpretation. In such cases the Courts have applied the settled rule of construction ordinarily acted upon in the absence of any statutory rule inconsistent with it; and that rule is, that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights but that provisions affecting mere procedure are applied to pending proceedings. To this class belong such cases as *Framji Bomanji* v. *Hosmasji Barjorji* (3 Bom., H. C., O. C., 49); *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (I. L. R., 14 Cal., 636); *Uzir Ali* v. *Ramkomal Shaha* (I. L. R., 16 Cal., 383).

The second class of cases comprises those in which the enactment to be construed provides its own rule of construction by expressly or impliedly declaring that it is or is not to have retrospective operation, or the extent to which it is to affect pending proceedings. To this class belong *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (I. L. R., 8 Cal., 51), in which the Privy Council construed the Limitation Act, 1871; *Tupsee Singh* v. *Ram Sarun Koeri* (I. L. R., 15 Cal., 376), in which a Full Bench of this Court placed a construction upon s. 21 of the Bengal Tenancy Act; and several cases which will be considered later in which the Courts have construed s. 3 coupled with other sections of the Civil Procedure Code.

The third class of cases consists of those in which the law is changed by a mere repeal of a previously existing law, and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by s. 6 of the General Clauses Act.

The case now before us belongs to the third class, and, for the purpose of deciding it, we have to construe the words in s. 6, which say that the repeal of a Statute "shall not affect any proceedings commenced" before the repeal takes effect.

The word "proceedings" is a very general one, it is not limited to proceedings connected with civil suits; but includes, [273] I suppose, proceedings other than civil proceedings, and civil proceedings other than suits When applied to suits, it may be used to mean the suit as a whole, or it may be used, and often is used, to express the separate steps taken in the course of a suit the aggregate of which makes up the suit.

I propose first to consider the decisions affecting the question before us, and, in doing so, I shall have to notice some which did not depend upon the

construction of the General Clauses Act, but which have a more or less close bearing upon the question before us.

In *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (I. L. R., 8 Cal., 51), the question was whether an application for execution was governed, in respect of limitation, by the Limitation Act of 1859, or that of 1871, and the Privy Council held that an application for execution is an application in the suit, and that, therefore, a provision in the later Act excepting from its operation "suits" commenced before a certain date, applied to proceedings in execution in such suits.

The remaining cases which have to be considered may be conveniently divided into three groups. The first consists of cases relating to appeals under various acts, and were all decided simply upon the construction of the General Clauses Act. Of these cases the earliest in date is *Ratanchand Srichand* v. *Hanmantrao Shivbakas* (6 Bom. H. C., A. C., 166) before COUCH, C.J., and three other Judges of the Bombay Court. It was held by them that the repeal of an Act, under which an appeal lay against a decree, did not bar the appeal in a case in which the decree was passed before, but the appeal presented after the repealing Act. The ground of the decision is thus stated at page 169: "A suit is a judicial proceeding, and the word 'proceeding' must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and, therefore, to include proceedings in appeal."

The case of *Thakur Prasad* v. *Ahsan Ali* (I. L. R., 1 All., 668) before the Full Bench of the Allahabad High Court only bears upon the question before us, in that it is an authority for the proposition that, [274] under s. 6 of the General Clauses Act, an appeal is a part of the same proceedings as the thing appealed against.

In *Syed Mahomed Hossein* v. *Hadji Abdullah* (I. L. R., 3 Cal., 727), a case decided on the Registration Acts, 1871 and 1877, it was held that the repeal of an Act which forbade an appeal did not give an appeal against an order made before the repeal.

Similarly in *Hurrosundari Dabi* v. *Bhojohari Das Manji* (I. L. R., 13 Cal., 86) it was held that "proceedings" in s. 6 of the General Clauses Act include an appeal against a decree, and that, therefore, the repeal of a section forbidding an appeal did not give an appeal against a decree in a suit brought before the repealing Act came into operation, and the same thing was held in *Satghuri* v. *Mujidan* (I. L. R., 15 Cal., 107).

The second group of cases relate to execution, and most of them were decided on the construction of the General Clauses Act.

In the case of *Shumbhochunder Holder* (Bourke, O. C., 59), the decision turned upon the construction of s. 12 of the High Court's Act, 24 and 25 Vict., cap. 104. That section runs: "From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings, and all previous proceedings in the said last-mentioned Courts, shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued as nearly as circumstances permit under and according to the practice of the abolished Courts respectively." This provision so far as it keeps alive the practice of the abolished Courts in pending cases, is exactly analogous in character to the enactment that we have to construe, and the expression "pending proceedings" cannot, I think, be distinguished in meaning from "proceedings commenced."

The matter came before the Court, consisting of PEACOCK, C.J., and MORGAN and PHEAR, J.J., in this way: Three persons had been arrested in execution

under writs issued from the [275] High Court similar in form to the writs of *Ca. Sa.* in use in the Supreme Court, and they were brought up by *habeas corpus* and claimed to be discharged on the ground that their detention was illegal. It turned out according to the view that ultimately prevailed that the legality or illegality of the custody of each man depended upon whether the procedure in force in the Supreme Court or that of the High Court was to be followed. It is only necessary to notice the case of one of the prisoners—Shumbhoochunder Holder. With regard to him, all the Judges agreed, though not without some doubt on the part of PHEAR, J., that his case was governed by the old law, on the ground that the decree against him had been obtained and execution proceedings instituted against him in the Supreme Court before its abolition, and that the proceedings then before the Court were under the circumstances a continuation of those earlier execution proceedings. A series of cases have arisen upon the Limitation Act, 1877. In *Behary Lall* v. *Goberdhun Lall* (I. L. R., 9 Cal., 446), MITTER and NORRIS, JJ., dealing with the effect of that Act upon the execution of decrees passed before it came into operation, held that by reason of s. 6 of the General Clauses Act, the provisions of the previous law remained unaffected In *Gurupadapa Basapa* v. *Virbhadrapa Irsangappa* (I. L. R., 7 Bom., 459), the plaintiff obtained a decree before the Limitation Act of 1877 was passed. After the passing of that Act, he made an application, which, under the former law, would have had the effect of keeping the decree in force for the purpose of execution, but which, under the latter Act, had not that effect. It was held that a subsequent application for execution was barred. WEST, J., in delivering judgment, said: "In the case quoted—*Behary Lall* v. *Goberdhun Lall*—'proceedings' are identified with suit; but we think that where a decree has been obtained, the application for execution initiates a new set of proceedings -see *Andrews* v. *Marris* (1 Q. B., 3) and that, therefore, the rule of the General Clauses Act (I of 1868) is not to be held to govern all the remotest ministerial consequences of a suit arising on applications made years afterwards according to the [276] procedure in force at its institution, but only to bring under the same law such series of proceedings as group themselves naturally together, as *e.g.*, those on a particular application for execution." The same question again came before MITTER and NORRIS, JJ., in *Jugmohun Mahto* v. *Luchmeshur Singh* (I. L. R., 10 Cal., 748), and the learned Judges differed from their previous opinion. MITTER, J., said: "As to 'proceedings' being identical with 'suit,' it seems to me that we held that proposition to be correct on the authority of the Privy Council decision in *Mungul Pershad Dichit's* case; and after hearing arguments in this case, and after considering the judgment quoted, I still adhere to that opinion, viz., that an application for execution of a decree is an application in the suit which resulted in the decree That was distinctly held in *Mungul Pershad Dichit's* case, and we are bound by that decision. But at the same time it seems to me that, although it is an application in that suit, it may not be an application in a pending proceeding. The suit having matured into a decree could not properly be said to be pending thereafter. A proceeding to be a pending proceeding after a decree must be initiated by an application for execution. But after a suit terminates in a decree, if nothing further is done, it cannot be said to be a pending proceeding It is on that ground that I think we were not right in the decision in *Behary Lall* v. *Goberdhun Lall* (I. L. R., 9 Cal, 446)." A similar view was taken by PRINSEP and MACPHERSON, JJ., in *Becharam Dutta* v. *Abdul Wahed* (I. L. R., 11 Cal., 55).

In a case cited in the order of reference, it was held that s. 170 of the Bengal Tenancy Act applies so as to exclude a claim in an execution after the Act came into operation, though I presume the decree was before that date.

In *Shivram Udram* v. *Kondiba Muktaji* (I. L. R., 8 Bom., 340), WEST and HARIDAS, JJ., held, if the case is to be regarded as a decision on the General Clauses Act, that where property has been attached in execution, an application by the attaching creditor for sale of the property is a new proceeding. Perhaps, however, this case ought rather to be regarded as having been decided on the other grounds pointed out in the judgment.

[277] The third group consists of cases decided with respect to the Civil Procedure Code, and almost all of them were expressly decided, not upon the General Clauses Act, but upon that Act together with and modified by the special rules of construction laid down in the Civil Procedure Code. The first of these is *In re Ratansi Kalianji* (I.L.R., 2 Bom., 148) before WESTROPP, C.J., and four other Judges. The point decided was that a judgment-debtor imprisoned in execution under the Civil Procedure Code of 1859, and who had been in prison for six months, was not entitled to be released on the passing of the Code of 1877, which reduced the period of imprisonment for debt to six months. The decision turns upon the construction of the Procedure Code itself, which contained rules of construction different from those of the General Clauses Act, and I do not find that any of the learned Judges expressed an opinion as to what the effect of the General Clauses Act upon the case would have been if the special rules of the Procedure Code had not been present to control it, except GREEN, J., who cites *Ratanchand Shrichand* v. *Hanmantrao Shivbakas* (6 Bom. H.C., A.C., 166) and is disposed to regard proceedings as applying to suits "including execution and appeal."

In *Chinto Joshi* v. *Krishnaji Narayan* (I.L.R., 3 Bom., 214), an application made after the repeal of the Procedure Code of 1859 to set aside a sale made in execution proceedings commenced under that Act was held to be governed by the repealed Act. The question whether execution is a part of the same proceedings as the suit within the meaning of s. 6 of the General Clauses Act, did not arise; and if I rightly follow the judgment of WEST, J., he intentionally guarded himself against expressing an opinion upon any question of so general a character; but he suggested a test when he said that the proceeding before the Court was "so intimately connected with the proceedings in execution that it ought properly to be regarded as a part of those proceedings." In suggesting that test, I think it is only reasonable to suppose that the learned Judge had in view, not merely the General Clauses Act, but the General Clauses Act modified by s. 3 and other sections of the Procedure Code, in the manner which had been explained in *In re Ratansi Kalianji* (I. L. R., 2 Bom., 148).

[278] In *Runjit Singh* v. *Meherban Koer* (I.L.R., 3 Cal., 663) the question for consideration related to cases in which, under the Procedure Code of 1859, an appeal to this Court was allowed, but in which the Act of 1877, if applicable, did not allow them, and in which the suits were instituted before the change in the law, but the appeals were presented after it. The Judges were unanimous in holding that the appeals lay. GARTH, C.J., accepted to the full the ruling of the Bombay Court in *Ratanchand Srichand* v. *Hanmantrao Shivbakas* (6 Bom., H.C., A.C., 166) that the word "proceedings" in s. 6 of the General Clauses Act includes the whole of a suit; and expressed the opinion that there was nothing in the Code itself to exclude that view. I think JACKSON, J.'s view is the same. The other learned Judges—MARKBY, MITTER and AINSLIE—decided the case on other grounds and guarded against expressing an opinion on this point.

In *Rustomji Burjorji* v. *Virbhadrapa Irsangapa* [*Kessowji Naik ?*] (I.L.R., 8 Bom., 287), a casedepending, not upon the General Clauses Act, but upon s. 3 and other sectionsof the Civil Procedure Code, SARGENT, C.J., and

HARIDAS, J., accepted the test suggested by WEST, J., in *Chinto Joshi* v. *Krishnaji Narayan* already cited, for determining the identity of proceedings.

As to the first of the groups of cases just treated of, those relating to appeals, there is, I think, a completely uniform course of decision to the effect that an appeal is a part of the same proceedings within the meaning of s. 6 of the General Clauses Act, as the thing appealed against, and that therefore if the thing appealed against is a decree in a suit, the appeal is a part of the same proceeding as the earlier steps in the suit. These decisions are, I think, too numerous, passed by too many Courts, and spread over too long a time for us to be justified in questioning them. And I do not see how they can be logically supported upon any ground narrower than that assigned in the first case in the series, namely, that "proceedings" in s. 6 of the General Clauses Act. when applied to a suit, means the whole suit; and it would seem to follow that the proceedings, in the sense of the suit, must include execution, which is undoubtedly a step in the suit.

[279] On the other hand, it is always dangerous in matters like that before us to reason too confidently from general propositions. There can be no doubt that a thing may be a step in the suit, and may yet well be regarded as a proceeding separate from the other steps in the suit. And in enquiring whether execution should be so regarded, we may, I think, be justified in looking outside the General Clauses Act. It is not an Act regulating procedure; that is the object of another class of Acts. In this Act, therefore, we may well understand "proceedings" in the sense of proceedings as defined and regulated by the law for the time being in force governing procedure with regard to any given subject-matter. As to suits under the Bengal Tenancy Act, the Civil Procedure Code generally applies; and the Civil Procedure Code has to some extent divided the whole proceedings in a suit into separate proceedings. There is nothing in itself unreasonable in holding that execution is such a separate proceeding, and there is this distinction between appeals and executions; that an appeal is of necessity a proceeding between the same parties as the matter appealed against; whereas, proceedings arising in execution may be, and in the case before us are, between one of those parties and a stranger to the suit.

The second group of cases, those relating to execution, are all to the effect that execution is to be regarded as a separate proceeding from the previous steps in the suit. With regard to the cases in Bombay and in this Court, upon the Limitation Act as affecting execution proceedings, *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (I. L. R., 7 Bom., 489), and *Jugmohun Mahto* v. *Luchmeshur Singh* (I. L. R., 10 Cal., 748), I have no doubt (if I may say so with due deference) that upon any view of the present question they were rightly decided on the ground that the General Clauses Act, s 6, did not apply. If the true view be that the word "proceedings" in that section does not embrace the whole suit so as to include execution, then it is clear that the result was right. If the other view of the meaning of "proceedings" should prevail, I still think that s. 6 would not apply to the cases in question, because I think the operation of the section ought to be limited to the cases in which a change in the law is strictly the result of the **[280]** repeal of an enactment, not of substantive enactment in the new legislation. And I should be disposed to say that the rules of law to which effect was given in the cases of which I am speaking, became such, not by the repeal of the old law, but by the substantive enactments of the new. The fact, however, remains that the first of these grounds and not the second was the one actually taken by the learned Judges who decided the cases: and they are, therefore, authorities

for the narrower construction of the word "proceedings," and for holding that an application for execution initiates proceedings separate from those which resulted in the decree. The rule upon which *In re Shumbhoo Chunder Holder* (Bourke O. C., 59) was decided lends strong confirmation to this view.

Of the last group of cases, those decided upon the Civil Procedure Code, all but one were distinctly based upon the terms of the Code itself, not merely upon the General Clauses Act. The one exception is *Runjit Singh* v. *Meherban Koer* (I. L. R., 3 Cal., 663), in which GARTH, C.J., considered that there was nothing in the then Code of Civil Procedure to modify the effect of the General Clauses Act. The word upon which he based that view has been changed in the subsequent Acts. But the opinion of GARTH, C.J., remains that the word "proceedings" applies to a suit in its entirety. There is the opinion of GREEN, J., in *In re Ratansi Kalianji* (I. L. R., 2 Bom., 148) to the same effect. On the other hand, there is the view stated by WEST, J., in the cases cited with some support from SARGENT, C.J., in *Rustomji Burjorji* v. *Kessowji Naik* (I. L. R., 3 Bom., 287).

Upon a consideration of the authorities, the result, in my opinion, is that whether the two currents of decision, that relating to appeals and that relating to execution, can or cannot be explained upon grounds logically satisfactory, we must accept them; and I should, therefore, answer the question referred to us,—the first in the affirmative, the second in the negative. The rule will be discharged with costs.

T. A. P. *Rule discharged.*

NOTES.

[I. RETROSPECTIVE STATUTES—

In *Rex* v. *Chandra Dharma* (1905) 2 K.B., 335, Lord ALVERSTONE, C.J., said, "It has been held that a statute shortening the time within which proceedings can be taken is retrospective [*The Ydun* (1899), p. 236], and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear, a statute ought to be construed so as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr. Crompton-Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective."

A mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a '*right accrued*' within the meaning of the usual saving clause:—*Abbott* v. *Minister for Lands* (1895) A.C., 425.

A right of appeal is not a mere matter of procedure. "To deprive a suitor in a pending action to an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure"—*Colonial Sugar Refining Co.* v. *Irving* (1905) A. C., 369.

And an existing right of action is not *primâ facie* taken away by a new statute, *Wright* v. *Hale* (1860) 6 H. & N., 227. But there is no rule that when a person has commenced an action he has a vested right in the then state of the law, *A. G.* v. *Theobald* (1890) 24 Q.B.D., 557.

II. THE GENERAL CLAUSES ACT, SEC. 6—

In 1897 the General Clauses Act, 1868, was repealed and Act X of 1897 was re-enacted in its place and there are some alterations in the wording of clause (*e*) sec. 6 thereof.

In (1914) 27 M.L.J., 578, it was held that the new Act II of 1911 relating to patents did not enlarge the grounds of defence in respect of actions instituted before it under Act V of 1888. And similarly it was held in respect of the English Copyright Act, 1911, whereunder the plaintiffs' remedies for the infringements of copyright under the old Act were preserved by the Interpretation Act 1889, that they were so preserved with the disadvantage that they must prove registration before action brought:—*Evans and another* v. *Morris* (1913) W. N., 58, Div. Ct.

As regards sec. 6 see also (1895) 22 Cal., 767, wherein BANERJEE, J., observed, "No doubt the operation of sec. 6 of Act I of 1868 in making pending proceedings continue to be regulated by the old procedure is limited to cases in which the change in the law is the result of repeal of the old enactment and does not extend where it is due merely to an addition to it; the object of sec. 6 may be simply to leave proceedings commenced under the old Act unaffected by the repealing Act, only so far as they have proceeded, leaving their further progress to be regulated by the procedure in force after the repeal." *See* also 34 Cal., 636.

III. 'PENDING PROCEEDINGS'—

As regards the meaning of '*pending proceedings*' see (1896) 24 Cal., 399; (1897) 21 Bom. 779; 3 Cal., 662. See also per JESSEL, *M. R.* in *In re Clagett's Estate, Fordham* v. *Clagett*, 20 Ch. D., 637, at 653, where he said, "a cause is said to be pending in a Court of Justice when any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending. '*Pending*' does not mean that it has not been tried. It may have been tried years ago. In fact in the days of the old Court of Chancery, we were familiar with cases which had been tried fifty or even one hundred years before, and which were still pending." Similarly a cause is '*pending*' even after final judgment so long as such judgment remains unsatisfied, *Salt* v. *Cooper* 16 Ch. D., 544; *Hart* v. *H.*, 18 Ch. D., 670, *Howell* v. *Bowers*, 2 Cr. M. & R., 621.

In *Redfield* v. *The Corporation of Wickham* (1888) **13 A. C, 467,** sec. 11 of Quebec Act 43 & 44 Vic., c. 49, provided that "nothing in the Act shall affect suits then pending". It was held that this extended to proceedings in execution; and that therefore the property of a railway company governed by that Act was not precluded thereby from being attached in execution of the respondent's judgment against the Company. Lord WATSON said, "the respondents are within the exception, because the action in which their decree was obtained was actually in dependence at the time of its passing. It was argued for the appellants that the exception is limited to suits during their dependence, and does not apply to proceedings taken in execution of a judgment after the suit is at an end. That construction of the clause would deprive it of all meaning."

IV. BENGAL TENANCY ACT, 1885, SEC. 170—

As regards the Bengal Tenancy Act 1885, sec. 170, *see* also 1 C. L. J., 500.]

[281] CRIMINAL REFERENCE.

The 13th February, 1889.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE TREVELYAN.

Jagat Kishore Acharjya Chowdhuri............1st Party

versus

Khajah Ashanullah Khan Bahadur............2nd Party.*

Criminal Procedure Code (Act X of 1882), s. 145--Possession, Inquiry into—Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.

In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest land, the right to possession of which was exercised by cutting and removing timber from time to time, the Magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings and continued to the date of the hearing; and that the men of the second party had been able to bring out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been established, and made an order under the section in their favour:

Held, that having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted;

Held, further, that in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one on which the dispute arose; and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced.

THIS was a reference made by the Sessions Judge of Mymensingh for the purpose of having an order made by the Joint Magistrate of that District, under s. 145 of the Criminal Procedure Code, set aside, the Sessions Judge being of opinion that the order was not justified upon the findings of fact by the Magistrate. The circumstances which gave rise to the proceedings being [282] taken under that section and the order being passed were as follows:—

The subject-matter of the dispute was a tract of forest land claimed by the first party as a part of Rangamatia-gur, and by the second party as a part of Atia-gur.

In the month of March 1888, a number of trees had been cut in the forest by labourers, having authority to do so from one or other of the parties, and a dispute arose between the parties with reference to the right to remove the timber and a Police enquiry was held. On the 3rd April, the head constable submitted a report stating that the dispute was regarding a plot of land extending over two-and-a-half miles and that there was a likelihood of a breach of the peace, as both parties were endeavouring to remove the timber.

On that, proceedings were taken under s. 107 of the Criminal Procedure Code, which resulted in an order being passed on the 7th June, binding down Tarini Prosad Chuckerbuty, who was a lessee of the second party, to keep the peace.

* Criminal Reference No. 17 of 1889, made by H. P. Peterson, Esq., Sessions Judge of Mymensingh, dated the 11th of January 1889, against the order passed by C. W. E. Pittar, Esq., Officiating Joint Magistrate of Mymensingh, dated the 24th of September 1888.

That enquiry and the Police report formed the basis of these proceedings, which were instituted on the 9th June. Both parties appeared, and numerous witnesses were examined on behalf of both sides.

On the 24th September 1888, the Joint Magistrate passed the order complained of. The material portion of his judgment was as follows :—

"The subject-matter of dispute between the two parties to these proceedings is a tract of forest land claimed by the first party as the Rangamatia-gur, and by the second party as part of the Atia-gur. The eastern and western boundaries are in dispute. . . . . . In March last a number of trees were cut in this forest by labourers having authority from one or other of the parties. A dispute arose in consequence of these acts and a Police enquiry was held. A report was submitted by the Head Constable on the 3rd April. On that, proceedings under s. 107, Civil [Criminal ?] Procedure Code, were taken and decided on the 7th June. That enquiry and the report of the Police officer formed the basis of these proceedings, which were initiated on the 9th June. It is necessary to decide which party was in possession on that date. [283] Possession of property of this nature is exercised whether by the landlord or by his lessee by allowing the public to cut the timber, who are assessed proportionately to the amount of timber which they cut. As a rule no written authority is given to individuals to cut timber, in which case the arrangements described are made by the person who acquires such a right. In this case, however, it is asserted that that licences were given on the last and previous occasions of cutting timber. Each party has given evidence of possession having been exercised on previous occasions, and evidence of title has been given as corroboration and explanatory of the evidence of possession. In deciding the fact of actual possession, I dismiss from my mind all considerations of the legal title of either party. In *Ambler* v. *Pushong* (I. L. R., 11 Cal., 365) it has been laid down that the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is enquiring into the matter, which, in the contemplation of the law, is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in possession. It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died. Neither party can bring that timber away now, as the cut timber in the forest is under attachment; but it does not appear that the first party brought away a single tree. It is, therefore, perfectly clear that the second party has retained the possession which it had at the commencement of these proceedings. This being so, it is unnecessary to go into any of the circumstances previous to the institution of this case, and it also becomes unnecessary to deal [284] with the objection raised by the second party as prejudicial to them."

The Joint Magistrate then went into the question as to whether the lessees should have been made parties to the proceeding, and, deciding that question in the negative, declared the second party to be entitled to retain possession until evicted therefrom in due course of law. The first party thereupon petitioned the Sessions Judge, who referred the case to the High Court. In his order of reference, the Judge stated his reasons for disagreeing with the Magistrate's order as follows :—

"In submitting the case for the inspection of the Court, I beg to report that, in my opinion, the order was not justified on the limited finding of the lower Court. The finding on the question of possession, refers to a period commencing with the entry by the men of the second party and forcible exclusion of the first party from the disputed forest. There is no finding regarding any earlier period, and as the Officiating Joint Magistrate, on the commencement of the quarrel, bound down, under s. 107, Criminal Procedure Code, a lessee of the second party, yet on the authority of *Ambler* v. *Pushong* (I. L. R., 11 Cal., 365), he has restricted his enquiry on the point of possession to the interval between the receipt of the Police report regarding a probable breach of the peace, and the proceeding drawn up in June under s. 145, Criminal Procedure Code, on disposal of the inquiry under s. 107, Criminal Procedure Code. It will be further noticed that there is no decision regarding the persons who cut the wood; and this being the initial proceeding in the dispute, the enquiry appears to me defective and judgment thereon incomplete.

An additional enquiry, under the circumstances disclosed of one party cutting the timber, and the second removing it, as to possession *before* the actual cutting of the trees and opposition against entry or re-entry as the case may be, and order thereon, would appear to me more conformable to the law on this section of the Criminal Procedure Code as set forth in rulings subsequent to that relied on by the Joint Magistrate."

The case now came on for hearing before the High Court.

[285] Mr. *Woodroffe*, Mr. *Gasper*, Baboo *Grish Chunder Chowdhry* and Baboo *Pramatha Nath Sen* for the First Party.

Mr. *Garth* and Baboo *Basanta Kumar Ghose* for the Second Party.

The **judgment** of the High Court (MITTER and TREVELYAN, JJ.) was as follows:—

The Magistrate in this case, following the decision in *Ambler* v. *Pushong* (I. L. R., 11 Cal., 365), has maintained the second party in possession of a piece of forest land. It appears not to be disputed that the right of possession upon the forest lands in question is exercised by cutting timber from time to time, and removing that timber, upon a certain price being paid therefor. It further appears that in Falgun last year (or March 1888), a number of trees was cut in the forest by labourers who had authority to do so either from the first party or the second party. It also appears that there was a disturbance of the peace consequent upon attempts being made by the parties respectively to remove the timber. The result was that on the 7th of June last, a lessee of the second party was bound down to keep the peace, and, on the 9th June, the present proceedings were instituted between the parties, the lessee not being made a party to these proceedings. All that the Magistrate finds in this case is this. He says: "It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died." Upon these two facts being found, the Magistrate came to the conclusion that the possession of the second party was established when these proceedings were instituted. Having regard to the nature of the property in dispute, these two facts, found in favour of the second party, could not constitute legal possession of the second party at the time the proceedings were instituted. The first [286] party is entitled to assume that on the occasion preceding the one in which the dispute arose, his

men were allowed to cut and remove timber in the forest without any disturbance of peace. There is evidence adduced by him on this point which has not been disbelieved by the Deputy Magistrate. He is, therefore, entitled to say that for the purposes of the question of law which has been raised before us, and for that purpose only, this fact should be assumed in his favour. If this contention be conceded, it seems to us to follow that what happened in March last could not have the effect of putting the first party out of possession; they would only be acts disturbing the possession of the first party. Having regard to the nature of the property in dispute, and the mode in which possession may be exercised over the property, we think that in order to find which party was in possession when the proceedings were instituted, it is necessary to enquire which party was in the undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one in which the dispute arose; and whichever party be found to have been in possession on that occasion, should be presumed to have possession at the time when the proceedings in this case commenced.

We desire to guard ourselves from being understood to express any opinion on the question of possession—that question is left to be decided by the Joint Magistrate. We simply make the assumption of fact, which the first party contended should be made, in order to decide whether the finding of the Joint Magistrate is sufficient *in law* to dispose of the case.

We set aside the order of the Joint Magistrate, and remit the record of the case to him, in order that it may be decided, on the evidence now on the record, with reference to the observations made above.

H. T. H. *Order set aside and case remanded.*

NOTES.

[The first proviso to sec. 145 of the Criminal Procedure Code, 1898, gives effect to decisions like 16 Cal., 281 ; 22 Cal., 297.]

---

[287] APPELLATE CIVIL.

The 20th February, 1889.

PRESENT:

MR. JUSTICE GHOSE.

In the Matter of the Petition of Ashghar Reza and another.

Ashghar Reza and another (a minor, through his next friend J. H. Lewis)............Plaintiffs

versus

Hyder Reza and others........ ...Defendants.*

Appeal to Privy Council—Concurrence of two Courts on facts—"Affirming" judgment of lower Court—Civil Procedure Code (Act XIV of 1882), s. 596—Substantial questions of law—Case disposed of on facts.

Where the issues in a case involved questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact, sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favour of the plaintiff, but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him on all his findings or in the reasons on which they were based:

Held, on an application for leave to appeal to the Privy Council, that the High Court did not "affirm" the judgment of the lower Court within the meaning of s. 596 of the Civil Procedure Code.

*Application No. 21 of 1888 for leave to appeal to Her Majesty in Council.

Held, also, assuming the judgment of the lower Court was affirmed by the High Court, that there were substantial questions of law in the case which entitled the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case.

THIS was an application for leave to appeal to the Privy Council from a decision of the High Court (NORRIS and BEVERLEY, JJ.) dated 26th May 1888.

The plaintiffs in the suit were Syed Ashghar Reza and Syed Dilawur Reza, two of the sons of one Raja Ahmed Reza by his wife Rani Roushan Jehan, and the suit was brought, to recover possession of a share of certain property, against Syed Hyder Reza and Syed Sufdar Reza, the sons, and Muni Bibi, the daughter, of Raja Syed Ahmed Reza by another wife Rani Afzulunnissa, (who died in 1860), and also against Syed Lutf Ali Khan, to whom the other defendants had tansferred the property claimed.

The subject of the suit was a share of 11 gundas of zemindari Surjapore which was purchased at a sale in execution of a decree [288] in the name of one Kasim Ali in February 1851; and a share of a putni mehal called Bhata Bhaugulpore which was purchased in 1867 in the names of the defendants Hyder Reza and Sufdar Reza. As to those properties the plaintiffs alleged that the 11 gundas share of the zemindari was purchased by and with the money of Ahmed Reza in the name of Kasim Ali, who was a servant of his, and that Kasim Ali subsequently, in 1854 [*sic*], executed an ikrarnama as to his purchase in favour of Ahmed Reza, though in the name of his wife Afzulunnissa; and as to the share of the putni mehal, that it had been similarly purchased by Ahmed Reza with his own money in the names of Hyder Reza and Sufdar Reza. The plaintiffs, therefore, claimed these properties as heirs of Ahmed Reza, who died in May 1870, and also claimed to have set aside certain mortgages and deeds of sale executed by Hyder Reza and Sufdar Reza in favour of the defendant Lutf Ali Khan.

The suit was valued at Rs. 4,70,811-14 annas. The defence (the defendant Lutf Ali Khan alone putting in a written statement and defending the suit) mainly was that the purchase of the 11 gundas share of Surjapore was made by Kasim Ali for Afzulunnissa, in whose favour the ikrarnama was executed by him, in 1852, whereby he acknowledged that he had purchased the share for her and with her money, and that the share of the putni mehal was purchased, not by Ahmed Reza benami, but by the defendants Hyder Reza and Sufdar Reza for themselves and in their own names; and that even if the properties had been acquired by and with the money of Ahmed Reza, he had intended them to be and had given them for the benefit of Afzulunnissa and Hyder Reza and Sufdar Reza, respectively, and the beneficial enjoyment of those properties had been with those persons, and not with Ahmed Reza. Other defences were raised which are shown by the following issues, which were those settled at the hearing before the Subordinate Judge:—

"(1) Whether the claim of the plaintiffs, or any portion of it, is barred by limitation or not?

"(2) Whether Ahmed Reza purchased the disputed 11 gundas of zemindari Surjapore furzi in the name of Kasim Ali and got Kasim to execute an ikrarnama to him in the name of Afzulunnissa, and the disputed 7 annas and 9 gundas share of putni [289] taluk Bhata Bhaugulpore, etc., furzi in the names of Hyder Reza and Sufdar Reza or not?

"(3) If the purchases were benami, whether they were made for, and the properties were gifts to, Afzulunnissa, Hyder Reza and Sufdar Reza or not?

"(4) Whether the defendant Lutf Ali Khan is *boná fide* a mortgagee and purchaser after due enquiry for value or not?

"(5) Whether Ahmed Reza admitted the title of Afzulunnissa, Hyder, and Sufdar, and put in the petition mentioned in paragraph 9 of the written statement, and whether the statements regarding collection of rent in paragraph 10, the admission of Roushan Jehan mentioned in paragraph 15, and the purchases by the plaintiffs spoken of in paragraph 13 are true? If so, under what circumstances were they made, and are the plaintiffs estopped thereby from maintaining the suit?

"(6) Did Roushan Jehan and Hamidunnissa *alias* Muni Bibi relinquish their shares?

"(7) What shares have the plaintiffs received on the death of their father, and to what shares in the properties are they entitled?

"(8) Are the plaintiffs entitled to mesne profits? If so, to what, and for what period, and from whom?

"(9) Whether the suit is maintainable under s. 317 of the Civil Procedure Code."

The Subordinate Judge, after holding that the suit was not barred by lapse of time, found that the 11 gundas share of Surjapore was purchased by and with the money of Ahmed Reza in the name of Kasim Ali, who was his *karpurdaz* and servant; that the transfer by the ikrarnama was intended to be for the benefit of Afzulunnissa, and operated as a gift to her of that property, of which thenceforth she had the beneficial enjoyment; that the purchase of the share of the putni mehal was made by Ahmed Reza with his own money, but with the intention of providing for, and as a gift for, the benefit of Hyder Reza and Sufdar Reza; that that share was not for a period of more than 12 years after Ahmed Reza's death considered by his heirs to be part of his heritage, but was property of which Hyder Reza and Sufdar Reza and not Ahmed Reza were in beneficial enjoyment [290] from the time of the purchase. In consequence of these findings on the 2nd and 3rd issues, the Subordinate Judge considered that the decision of the other issues was unnecessary, and dismissed the suit.

The plaintiffs appealed to the High Court, valuing their appeal at the same amount as the original suit.

The High Court, on appeal, agreed with the Subordinate Judge in finding that the purchase of the 11 gundas of Surjapore was originally a *benami* transaction, that is, a purchase by Ahmed Reza with his own money in the name of Kasim Ali, his servant; but they were of opinion that it was not purchased on behalf of or for the benefit of Afzulunnissa, and that when it was transferred into the name of Afzulunnissa by the ikrarnama, it was simply a transfer from one benamidar to another; but that at some time before her death, probably at the time of his marriage with Roushan Jehan in 1859, Ahmed Reza made a gift of that property to, and afterwards treated it as being the exclusive property of, Afzulunnissa and her sons Hyder Reza and Sufdar Reza, the beneficial enjoyment of it up to that time having continued with Ahmed Reza. With regard to the purchase of the share of the putni mehal, the High Court held that it was made by Ahmed with money borrowed by him for that purpose, and was intended to enure for the exclusive benefit of Hyder and Sufdar Reza. They summed up their conclusion as follows:—

"Our conclusion, therefore, upon the whole case is much the same as that arrived at by the Subordinate Judge, though we may not agree with him upon each and every one of his findings, or in all the reasons upon which they are based. We find, however, that the 11 gundas zemindari, though originally acquired by Ahmed Reza, was given by him to Afzulunnissa or her sons in or

about the year 1859, and was thenceforward acknowledged and dealt with by him as their property. We find further that the putni was acquired by him for Hyder and Sufdar, and was always treated as their exclusive property. That being so, the plaintiffs can have no right or interest in either of these properties as the heirs of Ahmed Reza, and we think that their suit was rightly dismissed.

" Under these circumstances, it seems unnecessary to go into [291] the other questions that were argued before us with great ability and at considerable length. Our finding being that the plaintiffs had no title, it becomes immaterial to consider whether or not the respondent made due enquiry into their claim, or what may be the shares to which they are entitled, or to what extent the respondent is liable for mesne profits.

" It might have been contended that upon our finding that the 11 gundas zemindari was given to Afzulunnissa in 1859 or 1860, the plaintiffs would be entitled to recover in this suit two-thirds of the share in that property (admittedly a one-fourth share) which would have devolved upon her husband Ahmed at the time of her death. We have accordingly heard Counsel upon this point; and on a full consideration of the arguments advanced, we are of opinion that the plaintiffs are not entitled to any relief on this ground. In the first place we think that they ought not to be allowed to take advantage of a new case, which not only was not put forward by them in their plaint, but which is wholly inconsistent with the case therein disclosed. In the case of *Eshan Chunder Singh* v. *Shama Churn Bhutto* (11 Moore's I. A., 7), as well as in many other cases, their Lordships of the Privy Council have pointed out the absolute necessity that 'the determinations in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.' Now the plaintiffs came into Court upon the allegation that the properties claimed were exclusively the properties of their father Ahmed at the time of his death. They distinctly denied that Afzulunnissa or her sons had any beneficiary interest in them during Ahmed's life-time. This title they have failed to prove. The finding of this Court, as of the lower Court, is that the properties in suit were not the properties of Ahmed, but of Afzulunnissa or her sons. This being so, we think they cannot be allowed to turn round now and set up another quite different title, viz., a title through Ahmed as one of Afzulunnissa's heirs. They denied that Afzulunnissa ever had any title to the 11 gundas, and they cannot now take advantage of the finding that the title was in her to set up an entirely new case, and in point of fact, not-[292] withstanding the finding of the lower Court, we do not find that this new case was even foreshadowed in the memorandum of appeal. "

The grounds set forth in the petition for leave to appeal were mainly that the defendants should not have been allowed to set up and to succeed upon a case, viz., the gift by Ahmed Reza to Afzulunnissa, not put forward by them in their written statement, nor made one of the issues in the suit; that the alleged gift, if made, was invalid under the Mahomedan law; that documentary evidence —among other documents a plaint in another suit— had been admitted which was not legally admissible in evidence.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *R. E. Twidale*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Nilakant Sahai*, and Baboo *Saligram Singh* for the Petitioners.

The Advocate-General (Sir *G. C. Paul*), Mr. *C. Gregory*, Mr. *M. L. Sandel*, Munshi *Mahomed Yusoof* and Baboo *Karuna Sindhu Mukerji*, opposed the petition.

The contention on behalf of the petitioners was that, though both Courts had found against the petitioners on certain issues of fact, the Courts did not agree on the facts which they respectively found against the petitioners, and, therefore, though both Courts came to the same conclusion, the High Court could not be said to have affirmed the decree of the Lower Court within the meaning of s. 596 of the Civil Procedure Code. Even, however, if the High Court could be said to have affirmed the decree of the Subordinate Judge, yet there were substantial issues of law raised in the case which would entitle the petitioners to an appeal under that section. The case of *Gopinath Birbar* v. *Goluck Chunder Bose*, decided by GARTH, C.J., and PRINSEP, J., on 9th August 1884 * was referred to in support of the application. The valuation of the appeal was admittedly sufficient.

[293] The petition was opposed mainly on the ground that, inasmuch as the petitioners sued for a share of certain property by inheritance from Ahmed Reza, and both the Subordinate Judge and the High Court had held on the

---

*PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PRINSEP.

Gopinath Birbar......... Appellant

versus

Goluck Chunder Bose and others............Respondents.†

Appeal to Privy Council--Decision of two Courts on facts in case in which are issues of fact and law—Right of appeal—Civil Procedure Code (Act XIV of 1882), s. 596—Review of order granting leave to appeal.

Where the issues in a case involved points both of law and fact, and the first Court having decided these issues against the plaintiff and dismissed the suit, the High Court agreed with the finding of the first Court on the first issue, which was one of fact sufficient for the disposal of the case, and gave no decision on the other issues·

Held, on an application for leave to appeal to the Privy Council, that the plaintiff was, under the last clause of s. 596 of the Civil Procedure Code, entitled to appeal, such an appeal involving questions of law within the meaning of that section, notwithstanding that such questions might be immaterial for the decision of the case.

Per PRINSEP, J.– An order granting leave to appeal to the Privy Council is open to review.

THIS was a re-hearing of an application for leave to appeal to the Privy Council.

The application was originally made to PRINSEP, J., sitting as Judge in the Privy Council Department, and granted by him. An application for review of the order granting leave to appeal was made to PRINSEP, J., and opposed on the ground that such an order was not open to review. On that application PRINSEP, J., said :—

"This is an application for review of my order granting a certificate to the opposite party to appeal to the Privy Council. It is contended that such an order is final, and not open to review. The only reported case on the subject is that of *Ameerunnessa Begum* v. *Inderjeet Koonwar* (5 W. R., Mis. 97), and both parties claim that judgment as a precedent in their favour. The facts are not sufficiently stated in the judgment for me to regard that case as a precedent.

" No sufficient reason occurs to me for refusing to exercise this power of reviewing my previous order. It would seem rather from the position which the Chapter of the Code regarding appeals to the Queen in Council occupies with regard to reviews of judgments that the

† Application for appeal to Privy Council, No. 19 of 1884.

evidence that they could [294] not succeed, because the property in which they sought to share did not belong to Ahmed Reza at his death, that was such a concurrent finding on the facts and affirmance of the Subordinate Judge's

Legislature contemplated that the latter should apply to such appeals. As *prima facie* there are good grounds for re-considering the points involved, I grant the application for review."

The application for leave to appeal was heard by GARTH, C.J., and PRINSEP, J., and in the judgment delivered on that re-hearing by GARTH, C.J., the facts are for this report sufficiently stated.

Mr. *R. E. Twidale* and Baboo *Abinash Chunder Banerjee* for the Appellant.

Baboo *Chunder Madhub Ghose*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Karuna Sindhu Mookerjee* for the Respondents.

GARTH, C. J.--This is a re-hearing of an application made to Mr. Justice PRINSEP in the Privy Council Department.

The suit was brought by the plaintiff, claiming to be the son and heir of Rajah Ram Chunder Munraj Mohapattor. The case was an important one, and the value of the subject-matter of the suit was far beyond Rs. 10,000.

The main issues raised were as follows.—

"Is the plaintiff the son of Rajah Ram Chunder Munraj Mohapatter and by what wife?

"Was there anything in the way that Rajah Ram Chunder Munraj Mohapatter succeeded his predecessor tending to make the Rajgi to be regarded as self-acquired property for the purposes of this litigation?

"Does the Mitakshara law apply, and, if not, what law?

"Does the Pachis Sewal apply, and, if so, how, and to what extent?

"Was the alienation for necessary reasons?

"Were defendants 1 and 2 innocent purchasers as alleged?

"Was the sale valid : can it be set aside?" So that they admittedly involve points of fact and law.

The first Court decided these issues against the plaintiff, and dismissed the suit. On appeal to the High Court the learned Judges of the Division Bench agreed with the first Court on the question raised by the first issue ; namely, whether the plaintiff was really the son of the Rajah? Having decided this question of fact against the plaintiff, they dismissed the appeal, giving no decision upon the other issues.

The plaintiff then applied to Mr. Justice PRINSEP, as the Judge of the Privy Council Department, for leave to appeal to Her Majesty in Council. The application was opposed upon the ground that the decision of both Courts upon the question of fact was fatal to the plaintiff's case ; and that there was, therefore, no appeal to the Privy Council, having regard to the last paragraph of s. 596 of the Code.

My brother PRINSEP however decided that, as the appeal involved questions of law as well as of fact, he ought to allow it ; and he was confirmed in that view by a decision of Mr. Justice PONTIFEX in the case of *Moran* v. *Mittu Bibee* (I. L. R., 2 Cal., 228).

The defendants applied for a review, and simultaneously appealed against this order. Mr. Justice PRINSEP admitted the application for a review, and the defendant having withdrawn his appeal the matter has been re-heard.

Although we are by no means clear what the intention of the Legislature was, we think that, having regard to the language of s. 596, we ought to allow the appeal. It has been contended that the true meaning of the section is, that if the two lower Courts have decided some question of fact against the plaintiff which is essential to his right to maintain the suit, no appeal lies to the Privy Council, although, if the appeal were preferred, it would involve questions of law, besides the question of fact. In other words, that unless in such a case the appeal to the Privy Council *necessarily* depends upon some question of law, it ought not to be admitted.

We think it very possible that this may have been the intention of the Legislature ; and that their Lordships of the Privy Council may put that construction upon the section. But

decision by the High Court, as precluded the petitioners [295] from appealing. With such a final decision on the facts, any question of law became immaterial.

The following judgment was delivered by

Ghose, J.—This is an application for leave to appeal to Her Majesty in Council. The value of the subject-matter of the suit is far above ten thousand rupees, and the case seems to be an important one.

The suit out of which this appeal arises was one brought by Syed Ashghar Reza and Syed Dilawar Reza, as heirs of one Syed [296] Ahmed Reza, to recover possession of their share in two properties, one of the properties being an 11 gundas share of a zamindari, and the other, a certain putni mehal. The claim was made as against Syed Hyder Reza and Syed Sufdar Reza, their step brothers, being the sons of Syed Ahmed Reza by another wife Afzulunnissa, and as against Syed Lutf Ali Khan, who has derived his title under a sale from those two individuals.

As to the first-mentioned property, namely, 11 gundas of the zamindari, it appears that it was purchased at an execution sale in the year 1851, in the name of one Kasim Ali, and this individual subsequently executed an ikrarnama bearing date, the 21st August 1852, in favour of Afzulunnissa, the mother of Hyder and Sufdar, admitting thereby that the purchase had been made from the money of that lady, and that the property belonged to her.

The plaintiffs' case was that the property had been purchased by Ahmed Reza with his money in the benami of Kasim, and that he, Ahmed, caused Kasim to execute the said ikrarnama in the name of his wife for his own benefit, and that he was in possession, and not Afzulunnissa.

The case on the other side was that the purchase in 1851 by Kasim Ali was a purchase for the benefit of Afzulunnissa and with her money; that it was really transferred to her under the ikrarnama, and that since the purchase she, Afzulunnissa, was in possession, and not Ahmed Reza. A further plea was, however, set up by the defendant, that even supposing that the purchase in 1851 was made with the money of Syed Ahmed Reza, it should be taken to have been a purchase made for the benefit of, or a gift made to Afzulunnissa and her sons.

---

we agree with Mr. Justice PONTIFEX that this is not *the necessary intendment of the words* and that, unless it is so, we think we ought not to deprive the plaintiff of an appeal.

The words of the section are, that "where the decree appealed from affirms the decision of the Court below, the appeal must involve some substantial question of law." Now here, if the appeal is allowed, it will involve substantial questions of law. That is to say, questions of law will be raised in the appeal, as well as the question of fact. It is true, that those questions of law may become immaterial, if the question of fact is decided against the plaintiff; but still it seems impossible to say that the appeal does not involve questions of law.

It is argued that, as the High Court have decided the question of fact only, and have declined to decide the questions of law, the latter questions would not be before the Privy Council on appeal. But those questions are raised by the issues: and it is an admitted fact that upon the appeal the Privy Council would have all the materials before them to enable them to decide the whole case.

We have been referred to a case of *Jogmungal Koiri* v. *Mokhun Koiri* (10 C. L. R., 611) decided by the Privy Council as an authority in the defendants' favour. But we find that there the only question raised on appeal was a question of fact. The grounds of appeal involved no question of law at all.

We think, therefore, that the appeal should be allowed, and both parties will then have the opportunity of arguing the point again before their Lordships.

As regards the costs of the application, we think that they should follow the result of the appeal.

In regard to the other property, namely, the putni, it appears that it was purchased in the year 1867 in the names of Syed Hyder Reza and Syed Sufdar Reza. The plaintiffs' case was that it was purchased with the money of Syed Ahmed Reza, and that it belonged to him; whereas the case of the other side was that it was really a purchase made by Syed Sufdar Reza and his brother, through their guardian, but that even if it be the case, that the money with which the purchase was made was money which belonged to [297] Syed Ahmed Reza, it should be taken that Syed Ahmed Reza intended it to be an acquisition for the benefit of, or as a gift to, Syed Hyder Reza and Syed Sufdar Reza.

The Subordinate Judge held, so far as the first-mentioned property is concerned, that the purchase was made by Syed Ahmed Reza with his own money in the name of his mukhtear, Kasim Ali, and that the ikrarnama, bearing date August 1852, operated as a transfer of the property from Syed Ahmed Reza to his wife Afzulunnissa. He seems to have also found that the beneficial enjoyment of the property in question since the execution of the ikrarnama was with Afzulunnissa, and not with Syed Ahmed Reza.

With regard to the putni the Subordinate Judge held that, although it was purchased with money borrowed by Syed Ahmed Reza, still as he had received various sums of money as profit from the 11 gundas share of the zamindari belonging to Syed Hyder Reza and Syed Sufdar Reza, and as he wanted to make a provision for those two young persons, he made the acquisition for their benefit. He also found that the beneficial enjoyment of this property was with them and not with Syed Ahmed Reza.

The result was that the suit was dismissed.

On appeal to this Court, the learned Judges have agreed with the Subordinate Judge in holding that the purchase of the 11 gundas share of the zamindari in the name of Kasim Ali in 1851 was by Syed Ahmed Reza with his own money, and not by Afzulunnissa; but they have come to a very different conclusion as regards the effect of the ikrarnama of the year 1852. They have held that it did not operate as a transfer from Syed Ahmed Reza to Afzulunnissa, as was held by the Subordinate Judge; but that it was really a transfer from the name of one benamidar to that of another. And as far as I can understand the judgment of this Court, the Judges seem to have also held that, notwithstanding this ikrarnama in favour of Afzulunnissa, the beneficial enjoyment of the property continued to be, as it hitherto was, with Syed Ahmed Reza.

The learned Judges, however, have at the same time held that Syed Ahmed Reza some time in July 1859, when he married the plaintiff's mother Roustan Jehan, conceived the idea of [298] making a gift of this property to Afzulunnissa, and this idea was given effect to about that time or shortly before her death, which took place in 1860; and this they have held to be proved by certain transactions of Syed Ahmed Reza in the years 1860, 1863 and 1869.

In regard to the putni the learned Judges seem to have taken pretty nearly the same view as that taken by the lower Court, although they have not expressed any opinion as to whether Ahmed had any money in his hands belonging to Hyder and Sufdar.

In the result this Court has come to the conclusion, as the lower Court did, that the plaintiffs are not entitled to recover any one of the two properties in question, and it has accordingly dismissed the appeal preferred by the plaintiffs.

Against the judgment pronounced by this Court the plaintiffs now ask for leave to appeal to Her Majesty in Council; and the first question that arises for consideration is, whether the decree sought to be appealed from affirms the

decision of the Court below within the meaning of s. 596 of the Code of Civil Procedure.

The word "decree," as defined in s. 594 of the Code, "includes also judgment and order;" so that I may take it for the purposes of the matter before me, that "decree" means judgment. And the question then is, whether the judgment of this Court affirms the decision of the Subordinate Judge. No doubt it may be taken, as it was argued by the learned Advocate-General, that this Court has concurred with the Subordinate Judge in holding that the property at the time of the death of Syed Ahmed Reza did not belong to him, and that, therefore, the plaintiffs are not entitled to recover any share thereof; but it has come to this conclusion for reasons which to my mind are very different from those given by the Subordinate Judge. The learned Judges have held that the ikrarnama had not the effect of transferring the property from Ahmed Reza to Afzulunnissa; that the latter was but the benamidar for Ahmed; and that, notwithstanding the ikrarnama, the property continued to belong to Ahmed Reza.

If the judgment of this Court had stopped with their decision as regards the two questions upon which the Subordi- **[299]** nate Judge decided the case against the plaintiffs, viz., as to the effect of the ikrarnama and as to possession since that document, the plaintiffs would have been, as I understand it, entitled to recover. But then they go on to decide the case against them upon a totally different ground, viz., that some years after the ikrarnama there was a gift by Ahmed to Afzulunnissa.

I therefore take it that the judgment of this Court does not affirm the decision of the Court below so far as regards the 11 gundas share of the zamindari. And if this is a right view of the matter, the petitioners are entitled to a certificate that the case is a fit one for appeal. But I may also say that the appeal which they present involves substantial questions of law. For instance, a question is raised whether the defendant was entitled to set up in appeal, and succeed upon, a case which he did not raise in the Court of First Instance, and which was not involved in the issues raised between the parties. Another question is as regards the validity under Mahomedan law of the gift said to have been made by Syed Ahmed Reza to Afzulunnissa. Then there is the question raised as regards the admissibility of certain important documents, one of these documents being a certified copy of a plaint; and the question in regard to this is whether a plaint is a public document within the meaning of s. 77 of the Evidence Act.

It is not necessary to refer to the other points that are raised in this appeal.

I think upon the whole that the case is a fit one for appeal to Her Majesty in Council, and that it should be certified as such.

Let a certificate be granted accordingly, and the usual notice be issued.

J. V. W. *Application granted.*

NOTES.

[This case, which was among those there cited, was virtually **overruled** by the Privy Council in **(1902) 25 All., 109** where it was observed, "Now, there is no definition of the word '*decision*' in the Civil Procedure Code, but there is a definition of the word '*decree.*' It says '*decree*' means (the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication so far as regards the Court expressing it, decides the suit or appeal.) Then, '*judgment*' is defined as meaning 'the statement given by the judge of the grounds of a decree or order.' Therefore their Lordships have two things, they have a '*decree*' which decides the suit, and they have the word '*judgment*' meaning the statement of the grounds upon which the learned judge or the Court proceeds to make the decree.

"Mr. De Gruyther appears to wish to give the word '*decision*' the same meaning as the word '*judgment*', and he says that it is necessary that the Appellate Court should not only

affirm the decree made by the Court below but should also affirm the grounds of fact upon which that judgment was passed. Their Lordships cannot come to that conclusion. They think that the natural, obvious and *prima facie* meaning of the word '*decision*' is decision of the suit by the Court, and that that meaning should be given to it in the section.

"It was said that there was some practice in India which puts a different meaning on the section; but their Lordships are not satisfied that that is so; they feel themselves free to decide in the way that has been mentioned."

See also (1894) 21 Cal., 523; (1898) 20 All., 367; (1895) 20 Bom., 699; (1910) 13 C.L.J. 501.]

[300] FULL BENCH.

The 27th February, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE MITTER, MR. JUSTICE PRINSEP, MR. JUSTICE WILSON, MR. JUSTICE TOTTENHAM, MR. JUSTICE NORRIS, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE, MR. JUSTICE BEVERLEY, AND MR. JUSTICE BANERJEE.

Modhusudun Shaha Mundul and others............Defendants

versus

Brae............Plaintiff.*

Res Judicata—Evidence—Estoppel—Ex-parte Decree, Effect of—Rate of rent—Rent suit—Civil Procedure Code (Act of 1882), s. 13.

A mere statement of an alleged rate of rent in a plaint in a rent suit in which an *exparte* decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree.

Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.

REFERENCE to a Full Bench made by Mr. Justice PIGOT and Mr. Justice RAMPINI. The following is the ORDER OF REFERENCE:—

"In these appeals the question is raised, as to the effect in a suit for rent, of a previous decree for rent between the same parties, or persons, whom the parties represent in interest.

"In Appeal No. 1966 of 1887 the plaintiff has obtained a decree for rent at the rate of Rs. 113-9-7, the rate claimed in his plaint. The defendant contended that the rent was Rs. 70-8. On behalf of the plaintiff two decrees were put in, made by the Deputy Collector of Magura, one in 1861 and the other in 1863. Those decrees were made *exparte*. Translations are annexed to this reference.

"The first is a decree for Rs. 2-12-1-3 cowries, the rate of rent alleged by the plaintiff being stated in the decree to be Rs. 113-9-7 'more or less.'

[301] "The second is for Rs. 13-10-3-3 cowries, the rate of rent alleged by the plaintiff being stated in the decree to be 'a variable rent' of Rs. 113-9-7. We do not understand that anything turns on the expression 'more or less' or 'variable' in the allegations of the plaintiff so recited.

* Full Bench on Special Appeals Nos. 1960 and 1966 of 1887, against the decrees of the Subordinate Judge of Jessore, dated 13th July 1887, reversing the decrees of the Munsiff of Magura, dated 18th February 1887.

" The plaints in these suits are not in evidence.

" In Appeal No. 1960 of 1887 the plaintiff has obtained a decree at the rate of Rs. 43-15 ; the defendant contended that the rate was Rs. 30 only. On behalf of the plaintiff an *ex parte* decree, made by the Deputy Collector of Magura in 1863, was put in for Rs. 10-7-7-2, arrears of rent, the rate of rent alleged by the plaintiff being stated in the decree to be 'a variable rent' of Rs. 43-15.

" It is not disputed that the parties in each of these appeals represent the parties between whom the above-mentioned *ex parte* decrees, respectively, were passed.

" There is nothing before us to show that any of the *ex parte* decrees were executed.

" The Lower Appellate Court in each case has made a decree in favour of the plaintiff, holding the defendant absolutely estopped, it not being shown that the decree was fraudulently obtained, or that the rate has been changed since the passing of the decree.

" It is contended on the part of the defendants, appellants, that in such a case no estoppel arises ; or that, if any estoppel arises, it is limited to this, that the defendant is by it estopped from denying that the amount of arrears of rent for which the *ex parte* decree was made, was due.

" The cases in this Court seem to us to conflict upon this question.

" We therefore submit the following questions to the Full Bench :—

First.—Whether an *ex parte* decree for arrears of rent operates so as to render the question of the rate of rent *res judicata* between the parties ?

Second.—Whether it so operates, if the rate of rent alleged by the plaintiff is recited in the decree, without any express declaration that the rate of rent so alleged has been proved ?

[302] *Third.*—Whether it so operates, if the rate of rent alleged is expressly declared by the decree to have been proved ?

Fourth.—Whether an *ex parte* decree operates so as to render any question decided by the decree *res judicata*, in the absence of proof that such decree was executed ?

" The third question does not, strictly speaking, arise in the present case ; but it seems to us to be so connected with the general question before us, that we submit it in case the Full Bench should feel at liberty to answer it.

" The cases in this Court to which we refer are the following :—

Ram Sunder Tewari v. *Srimunt Dewasi* (14 B.L.R., 371 ; 10 W.R., 215) ; *Heera Lall Seal* v. *Joheer Mollah* (20 W. R., 273) ; *Beerchunder Manick* v. *Ramkishen Shaw* (14 B. L. R., 370 ; 23 W. R.,128) ; *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (23 W. R., 149) ; *Birchunder Manickya* v. *Hurrish Chunder Dass* (I. L. R., 3 Cal., 383) ; *Nilmoney Singh* v. *Heera Lall Dass* (I. L. R., 7 Cal., 23 ; 8 C. L. R., 257) ; *Bhugirath Potoni* v. *Ram Loochun Deb* (I. L. R., 8 Cal., 275).

Baboo *Rash Behari Ghose* (with him Baboo *Saroda Churn Mitter*) for the Appellant.

Ex parte decrees cannot be used as estoppels. In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (23 W. R., 149), the question was as to the effect of an *ex parte* decree as evidence. The only question decided in *Beerchunder Manick* v. *Ramkishen Shaw* (14 B. L. R., 370 ; 23 W. R., 128) was whether the decree was or was not admissible in evidence, and it was held it was for what it was worth. The judgment in this case is explained in *Birchunder Manickya* v. *Hurrish Chunder Dass* (I. L. R., 3 Cal., 383). *Ex parte* decrees have been

held not to be final decrees and not estoppels, but on a somewhat different ground, viz., under s. 13, cl. 4 of the Civil Procedure Code; the mere statement of an alleged rate of rent in a plaint in a rent suit is not such a material allegation as that without such allegation the plaintiff would be unable to obtain a decree at a different rate from that **[303]** alleged. [See also *Nilmoney Singh* v. *Heera Lall Dass* (I. L. R., 7 Cal., 23; 8 C. L. R., 247); *Bhugirath Patoni* v. *Ram Lochun Deb* (I. L. R., 8 Cal., 275); *Heera Lall Seal* v. *Joheer Mollah* (20 W.R., 273): see also *Goucher* v. *Clayton* (11 Jur. N.S., 107); also the *Duchess of Kingston's case* [2 Sm. L. C., (8th Ed.) 818].

Baboo *Upendro Nath Mitter* for the Respondent.

Ex parte decrees operate so as to render the question of rate of rent *res judicata*.—*Birchunder Manickya* v. *Hurrish Chunder Dass* (I.L.R., 3 Cal., 383) and *Puncharam Mundul* v. *Krishnapria Dasi* [unreported (Special Appeal No. 1271 of 1887, decided on the 22nd March 1888)]. The Court supposes in *ex parte* decrees that the defendant denies the material statements made by the plaintiff.

The **Opinion** of the Full Court was as follows:—

These cases being appeals from appellate decrees, it devolves upon this Bench, according to the practice of the Court in references to a Full Bench, to decide the appeals.

The questions referred to us relate to the effect to be given to the *ex parte* decrees for rent mentioned in the reference, and arise by reason of a conflict in the decisions of this Court as to the effect to be given to such decrees. In the present case the *ex parte* decrees were decrees of a Deputy Collector; but the conflict of cases relates to the effect of decrees of Civil Courts generally, and with this wider question we think it proper to deal.

In *Birchunder Manickya* v. *Hurrish Chunder Dass* (I. L. R., 3 Cal., 383), the plaintiff sued the defendant for rents for the year 1279 at the same rate as had been decreed to the plaintiff for the year 1278 in a suit brought against the defendant with respect to the same property. The plaintiff relied upon an *ex parte* decree obtained by him in that suit as showing the amount of rent due to him. The case came in 1874 before this Court in appeal from the decision of the District Judge of Tipperah, who had held that, inasmuch as no steps had been ever taken to execute the former decree, **[304]** and it had become barred by limitation, it became inoperative and could not be used in evidence.

The case was referred by the Bench before which it came to a Full Bench, to determine the question whether the decree could be used in evidence.

The Full Bench held that the decree was admissible in evidence, the question of its value to be determined by the lower Courts. The case was remanded for a re-hearing. It went back to the District Judge, who found that, having been obtained *ex parte*, the decree was of no value, and ought to be disregarded. He then sent back the case to the Munsif to try the question of amount without reference to the former decree, which was accordingly done.

The case in 1878 again came on second appeal to this Court; it was heard by a single Judge; and from his decision an appeal was preferred under clause 15 of the Letters Patent.

It was held, on this appeal, that the decree was binding on the defendants. The learned Chief Justice said [in *Birchunder Manickya* v. *Hurrish Chunder Dass* (I.L.R., 3 Cal., 383, at p. 388)]:—

"The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendants. In this we consider he was quite wrong; a decree obtained *exparte* is, in the absence of fraud or irregularity, as binding, for all purposes, as a

decree in a contested suit. If it were not so, a defendant in a rent suit might always, by not appearing and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definite judgment as to what is the proper amount of rent due from him to his landlord."

According to this decision, therefore, an *ex-parte* decree in a rent suit is conclusive as to the rate of rent alleged in the proceedings in the suit, the question as to the rate becoming by virtue of the decree *res judicata*.

According to this decision, also, the fact that no execution had ever been taken out by the decree-holder upon his *ex-parte* decree, does not prevent the decree having, against the defendant, the conclusive effect attributed to it.

In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (23 W. R., 149) before PHEAR and MORRIS, JJ., which was a rent suit, the question arose [305] as to the effect to be given to an *ex parte* decree for rent in a former suit between the plaintiff and the predecessor of the defendant. The question, as raised, was as to the effect to be given to such a decree as evidence. The learned Judges say:

"It seems to us, however, that the Munsif was right in the view which he took of the effect of this decree considered as evidence between the parties, namely, that it is only evidence that Rs. 43 odd was, at the time when the decree was passed, due in respect of rent from the defendants to the plaintiff The allegations made in the claim, so far as we can learn, were not converted into issues. the suit was tried *ex parte* by reason of the non-appearance of the defendants; and no issues of fact seem to have been raised beyond the general issue involved in the claim, whether or not the Rs. 43 odd was due from the defendants to the plaintiff in respect of the rent claimed."

In the latter case, that of *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (23 W. R., 149) the decree was considered only with reference to its value as evidence, and the question whether, so far as it was evidence, it operated as conclusive proof under s. 40, was not discussed It is, however, a decision upon the question before us in this reference, inasmuch as it decided that the *ex-parte* decree then under consideration was relevant, not to the question raised as to the rate of rent, but only upon the question whether or not the Rs. 43 odd was, at the time the decree was passed, due in respect of rent from the defendant to the plaintiff.

Upon this question, therefore, the decisions in *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (23 W. R., 149) and *Birchunder Manickya* v. *Hurrish Chunder Dass* (I. L. R., 3 Cal., 383) are in direct conflict.

A later decision in this Court, not reported, and not mentioned in the reference to this Full Bench, was referred to in argument before us. It is the decision in the case of *Puncharam Mundul* v. *Krishna Pria Dasi* (appeal from Appellate decree, No. 1271 of 1887, decided 22nd March 1888).

In that case the learned Judges arrived at the same conclusion as that accepted in the case of *Birchunder Manickya* v. *Hurrish Chunder Dass* (I. L. R., 3 Cal., 383). They say:

"When an undefended suit goes to trial, the plaintiff is put in the same position that he would have been if the defendant had appeared and simply said 'I deny all your allegations,' in which case the plaintiff would have to prove everything which would be necessary for him to prove in order [306] to make out his case, and therefore every material allegation in his plaint may be said to be denied because he has to prove them. When therefore this matter came before the Judge under these circumstances, the plaintiff had to prove that the defendant was his tenant of the tenure in question, and that the rent which the defendant had to pay on account of this tenure was at the rate of Rs. 7 and odd annas a year, and he

also had to prove the amount of the rent in arrear, so that, all these allegations having to be proved, they are within the meaning of s. 13 of the Civil Procedure Code impliedly denied by the defendant."

It was argued before us that the statement in the plaint of an alleged rate of rent, in such a case, would not be an allegation so material that, in the absence of proof of it, the plaintiff could not obtain a decree, even although he were to show conclusively that the amount of rent claimed in the suit was actually due, on the footing of a different rate of rent from that mentioned in the plaint being the true rate.

We think this argument well founded. We think that, if at the hearing of such a suit, the plaintiff were to prove that the amount claimed by him as rent was actually due, although he did not establish the rate named by him in his plaint, he might nevertheless be entitled to a decree. That such a case might possibly arise is obvious. If it might, it follows that the statement of the rate of rent in the plaint is not necessarily an allegation so material that the determination of it in the affirmative is involved in the act of the Court in making a decree.

It follows from this that, in our opinion, the mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex-parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree.

We are of opinion, also, that neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter *res judicata*; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.

[307] On the above assumption our answer, therefore, to the first three questions is in the negative.

As to the fourth question, the matter was not so fully argued before us as to make it desirable that we should come to any decision upon it.

The result is that we allow the appeals, set aside the decrees of the Lower Appellate Courts in both suits, and remand the cases for a decision on the merits. The respondent to pay the costs of the appeal in each case.

T. A. P. *Appeals allowed.*

NOTES.

[See the exhaustive judgment of SUNDARA AYYAR, J., in *Bommadi* v. *Bommadi*, **(1912) 20 M. L. J., 843 F. B.** : 37 Mad., 70 as to when rent suits operate as res judicata.

As regards the *res judicata* of *ex parte* decrees, *see* also **24 I. C.**, **737** (Cal.,); 21 I. C., 931 (Punjab); 12 A. L. J., 1011; (1894) 1 C. W. N., 120 : (1896) 23 Cal., 693; (1911) 12 I. C., 329; (1912) 17 C.W.N., 627.]

[16 Cal. 307]

PRIVY COUNCIL.

The 3rd November, 1888.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE AND SIR R. COUCH

Hewanchal Singh and another............Plaintiffs

versus

Jawahir Singh............Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Redemption, right of—Redemption claimed under terms of mortgage—Insufficient tender of mortgage money—Transfer of Property Act (IV of 1882), ss. 60, 83 and 84.

According to the judgment of the Appellate Court below, a mortgagor, having liberty by the terms of his mortgage to redeem at the end of its second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year, the principal money had been deposited in Court, and that for the interest, for both years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage, an appeal was dismissed.

APPEAL from a decree (9th November 1885) of the Judicial Commissioner, reversing a decree (30th July 1885) of the District Judge of Sitapur. A mortgage, dated 9th February 1883, secured re-payment of Rs. 14,500 with interest, by the appellants to the respondent, and contained the following: "The first condition is that the term of the mortgage has been settled as eight years; within this term the mortgage may be redeemed upon payment of the entire sum, according to the conditions of the mortgage-bond at the close of the second, fourth, or [308] eighth year. The second condition is that interest shall be paid year after year at one per cent. per mensem, and that if the mortgagor fail to pay interest at the end of any year, the mortgagee shall be at liberty to realize the interest and costs by suit." The mortgagors made default in payment of the interest Rs. 1,740, due at the end of the first year, and for this a decree was obtained by the mortgagee on the 2nd May 1884. On the 30th June 1884 (*i.e.*, in the first half of the second year, and before its close) the mortgagors brought into Court the principal amount only, Rs. 14,500, and made an application, purporting to be under the 83rd section of the Transfer of Property Act, IV of 1882, asking to have the mortgagee summoned, and the above sum credited in the deposit account, and paid, in order that the mortgagors might then redeem.

The District Judge, on the ground that the mortgagors had, by the deed, no right of redemption before the end of the second year, dismissed the application on the 23rd September 1884.

On the 14th and 27th January 1885, the mortgagee notified to the mortgagors that he was willing to accept the mortgage-money and reconvey, but that if they did not so redeem, they could not do so till the end of the fourth year.

The appellants did no more, leaving the principal money in Court, and they did not, at the close of the year, renew their application under the 83rd section, or pay into Court, or to the mortgagee, the interest due for the second year. For this the mortgagee sued, and obtained a decree, on the 15th May 1885 n he Court of the Subordinate Judge.

In that suit the mortgagors raised, in effect, a similar question to the present, contending that, as they had previously deposited the principal money, no interest was due for the second year, reference being had to the 84th section of Act IV of 1882; but the Subordinate Judge held the mortgagee entitled to the interest due for the second year. On the day of the date of that decree the mortgagors filed their plaint in the present suit, in which they contended that, as the defendant-mortgagee had obtained a decree for the first year's interest, and had no right to interest for the second year, he having refused to accept the principal amount which was still in [309] deposit, they, the plaintiffs, were entitled to redeem, on payment of the sum deposited, or such amount as might be found due to the mortgagee, on a correct and valid account being made up.

The issues raised questions as to the plaintiffs' right of redemption in the second year, and as to the sufficiency of their tender.

The District Judge held that, as the suit had been instituted after the expiration of the second year of the mortgage, one of the periods at which it was redeemable by its terms, when the principal amount was in deposit in Court, and the mortgagee had obtained a decree for the interest of that year, "the plaintiffs' tender was sufficient on the day of the suit." He stated in his judgment that on the 25th June, 1885, *i.e.*, about six weeks after the institution of the suit, the mortgagee had attached the deposit in Court, in satisfaction of his decree for the second year's interest.

The Judicial Commissioner, on the mortgagee's appeal, reversed this decree, referring to the fact that on the 9th February 1885, interest had not been paid, nor tendered, nor placed at the mortgagee's disposal by deposit in Court. He held that, therefore, the condition relating to redemption had not been fulfilled at the close of the second year, when the suit was brought, and that it ought to have been dismissed.

In this appeal it was alleged that the decrees for interest obtained by the mortgagee, and the deposit of the principal in Court, had left nothing due under the mortgage.

Mr. *J. D. Mayne* appeared for the Appellants.

Mr. *R. V. Doyne*, and Mr. *Theodore Thomas*, for the Respondent, were not called upon.

The appellants' case having been stated, Lord FITZGERALD intimated that the deposit, or tender, at a proper time, of the mortgage money, which included the interest due, had not appeared; and their Lordships dismissed the appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondent: Messrs. *Barrow and Rogers.*

C. B.

NOTES.

[*See* also 32 All., 142; 20 All., 401; 5 O. C., 127.]

[310] CRIMINAL APPEAL.

The 6th November, 1888.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE TREVELYAN.

The Government of Bengal
versus
Umesh Chunder Mitter and others.*

Attempt to commit offence—Attempt to cheat—Currency Office—Application for payment of lost halves of Currency Notes.

A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore not cheated. *R.* v. *Hensler* (11 Cox C. C., 570) referred to.

M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves and that the notes had been withdrawn from circulation and cancelled, sent *M* the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying *M* in respect of the notes. The form was filled up and signed by *M* and returned by him to the Currency Office.

Held, that, although there was no intention on the part of the Currency Office to pay the amount of the notes, *M* was guilty of an attempt to cheat.

THIS was an appeal from an order of acquittal passed on the 7th September 1888 by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta. Umesh Chunder Mitter was charged under s. 511 of the Penal Code with having, in the month of May 1888, at the Government Currency Office in Calcutta, attempted to cheat the Assistant Comptroller-General, in behalf of the Government of India in charge of the Paper Currency Department, by attempting to deceive him, and thereby fraudulently and dishonestly induce him to deliver to him (the said Umesh Chunder Mitter) the sum of Rs. 40, the value of two Government currency notes, Nos. A/73 21687 and A/74 61346 for Rs. 20 each, and Hem Chunder Chatterjee and two others were charged under s. 116 of the Penal Code with having at or about the time and place aforesaid aided and abetted the said [311] Umesh Chunder Mitter in the commission of the offence of cheating.

After the examination of one witness on behalf of the defence the Magistrate stopped the case and acquitted the prisoners.

The Crown appealed to the High Court.

The facts of the case are fully stated in the judgment of the High Court.

The Advocate-General (Sir *G. C. Paul*) and Mr. *Roberts* for the Government of Bengal.

Mr. *Palit* for Umesh Chunder Mitter.

Mr. *M. Ghose* for Hem Chunder Chatterjee and Haran Chunder Chatterjee.

Mr. *Allen* for Jadub Chunder Gangooly.

The **Judgment** of the Court (MACPHERSON and TREVELYAN, JJ.) was as follows: —

This is an appeal from an acquittal. The first accused was charged with attempting to cheat. The other prisoners were charged with aiding and abetting him in the commission of the offence of cheating.

After one witness had been examined for the defence, the Magistrate stopped the case and acquitted the prisoners.

* Criminal Appeal No. 3 of 1888, against the order of acquittal passed by F.J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 7th of September 1888.

When we first heard this appeal the *Advocate-General* appeared for the Crown. At the conclusion of his opening address we held that there was no case against Haran Chunder Chatterjee, and accordingly we discharged him. We then heard Counsel for the other accused and the *Advocate-General* in reply. After consideration we discharged the accused Jaddub Chunder Gangooly, and expressed our opinion that the Magistrate ought not to have stopped the case for the defence so far as the remaining two accused were concerned. We gave them an opportunity of calling evidence before us. We have since heard such evidence as has been produced on behalf of the accused Umesh Chunder Mitter and Hem Chunder Chatterjee, and must now deal with the case as completed.

Although we are told that in dismissing the case the Magistrate made some statement, he did not record his reasons for **[312]** acquitting, and therefore we have not the advantage of knowing the nature of, or the grounds for, his opinion.

There is no serious difficulty about the facts of this case. The chief questions depend upon the effect to be given to those facts, and the inferences to be derived from them.

It is contended that the facts proved do not disclose an offence, and therefore it is desirable to see what are the undoubted facts of this case.

On the 23rd of May last the principal accused Umesh Chunder Mitter sent in to the Currency Office a letter (Exhibit A), enclosing two half currency notes for Rs. 20 each, stating that the other halves were lost from his box where he kept them, and asking what steps should be taken for the recovery of the money.

On receipt of this letter, Mr. Keene, the Assistant Comptroller-General in charge of the Currency Office, caused a search to be made in the Registration Branch of his office to see if there was any other claim against the two notes. On such search it was found that the amount of the notes had been paid to the holder of the other halves.

Mr. Keene then caused a document, which is marked Exhibit D, to be sent to Umesh Chunder Mitter. This was sent on the 28th of May, with a covering letter which treated Umesh Chunder's letter as an application for the payment of the value of the notes, and requested him to answer the questions embodied in the claim.

D is a form of claim with questions to be answered by the claimant.

As to his sending this form Mr. Keene states: "My object in sending out D was, believing these men were attempting to cheat, I wanted them to commit themselves." It is clear that when he sent out D, Mr. Keene did not contemplate paying Umesh Chunder Mitter in respect of the notes. Within Mr. Keene's experience no notes had been paid a second time, and, as he says, it ought not to happen that they are paid a second time. He was examined as to what he would do, in case, after payment to one applicant, a second applicant were to make out his title, but as such an event had not happened within his experience his answer is purely hypothetical.

[313] The questions contained in this form of claim were filled in, signed by Umesh Chunder Mitter, and returned to the Currency Office on the 11th of June. This document, as filled up, is in form and intent an application for the payment of the money.

In answer to the questions contained in this form, Umesh Chunder Mitter stated that he was proprietor of the entire notes, that he received them from Haran Chunder Chatterjee of Gobardangah about October 1887, that he himself divided them in halves for the purpose of forwarding them to his cousin, that in December 1887 he lost the halves from his box, and that the persons

who could give evidence as to his possession of the entire notes or as to the circumstances of the loss were Hem Chunder Chatterjee and Jadub Chunder Gangooly.

The Currency Office had paid in respect of the other halves in 1871. On the 17th of November 1871, those half notes were withdrawn from circulation, and on the 18th of the same month they were cancelled. It follows from this that the statement made by Umesh Chunder that he received the entire notes from Haran Chunder Chatterjee in October 1887 and divided them himself is untrue. On the 13th of June another printed form is sent to Umesh Chunder Mitter. It asks for a certificate from the party from whom the claimant received the whole notes, of his having paid the notes to the claimant, and also for a declaration of the persons named in the form Exhibit D, setting forth what they know as to the whole notes having been the property of the claimant and in his possession, and also as to the subsequent loss of the half notes in question. In answer to this letter Umesh Chunder Mitter sends in the certificate and declaration asked for.

The certificate purports to be signed by Haran Chunder Chatterjee, and is as follows:—

"I do hereby certify that about seven or eight months ago I have sent two full notes of Rs. 20 each to Baboo Umesh Chunder Mitter of Areadah, the numbers of which are stated below $\frac{A}{73}$ 21687 for Rs. (20) twenty, $\frac{A}{74}$ 61346 for Rs. (20) twenty.

GOBARDANGAH : *The 28th June 1888.* HARAN CHUNDER CHATTERJEE."

[314] These numbers correspond with the numbers of the half notes sent in with the first letter. The statements in this certificate were unquestionably untrue to the knowledge of Umesh Chunder Mitter.

The declaration was written out by the accused Hem Chunder Chatterjee and was signed by him and the accused Jadub Chunder Gangooly, and was as follows:—

"We declare to the best of our knowledge that two full notes, viz., $\frac{A}{78}$ 21637 and $\frac{A}{74}$ 61346 of rupees twenty each were handed over to Baboo Umesh Chunder Mitter of Areadah about eight months ago when we were present there.

AREADAH : *The 2nd July 1888.* HEM CHUNDER CHATTERJEE, JADUB CHUNDER GANGOOLY."

The statements in this declaration were unquestionably untrue to the knowledge of Umesh Chunder Mitter and Hem Chunder Chatterjee.

On the 10th of July, Mr. Keene wrote to Umesh Chunder Mitter, asking him to come and see him at the Paper Currency Office on the 12th of that month at 1 P.M. He came at the appointed time. Mr. *Hume*, the Government Prosecutor, then questioned him. He was asked if the answers in D were true. He said they were. He was asked if he filled in the answers personally. He said no, but by his nephew Jagadish Chunder Gangooly. He further said that the answers were filled in under his orders, and in his presence at his dictation, and signed by the witnesses named in the form, which was also signed by himself. He was then specially asked about answer No. 2. He said: "Yes I am the proprietor of the entire notes, and I received them from Haran Chunder Chatterjee of Gobardangah in October 1887." Mr. *Hume* then asked Umesh if he had cut the notes in half. He said: "I think I must have, but am not sure. I have had many notes." Mr. *Hume* then showed him the certificate and declaration. He said that he knew them, and had received the

certificate from Haran Chunder Chatterjee, and the declaration from Hem Chunder Chatterjee and Jadub Chunder Gangooly, and that he had sent the certificate and declaration to the Currency Office through Jadub Chunder [316] Gangooly. Mr. *Hume* then said to him: "Baboo, would you be surprised to hear that the other halves of the notes mentioned in your application were cancelled in the Currency Office in November 1871?" He said nothing then, but began to tremble. Mr. *Hume* said: "Baboo you are in a great mess. This is an attempt to cheat." He said: "I did not intend to cheat." Mr. *Hume* said: "You must explain that before a Magistrate." Mr. *Hume* said: "Why did you tell a lie in your application?" He said: "I did wrong, sir." Mr. *Hume* then went with him into Mr. Keene's room, and in Mr. Keene's presence said: "Baboo, can you explain this matter?" He said: "I am a poor man. I have no money. I received the half notes from Haran Chunder Chatterjee, who told me to try and get the money from the Currency Office." There the interview ended.

On the next day warrants were issued; when arrested Hem Chunder Chatterjee produced a Bengali letter to which we shall hereafter refer.

This is the case for the prosecution.

There was no evidence against Haran Chunder Chatterjee, and the only evidence against Jadub Chunder Gangooly was that he had signed the certificate to which we have referred. His defence was that he signed that document without reading it and at the request of Umesh Chunder Mitter. It appears that he has always borne a good character, and although it rarely happens that a man signs a short document of this description without reading it, it is possible that his story may be true, and therefore we thought we could discharge him. As far as the remaining two accused are concerned, their defence is identical. We have heard a most elaborate argument, consisting of two main contentions. In the first place it is said that the acts committed at the most amount to a preparation to commit an offence, and in the second place it is said that it was the duty of the prosecution to show that the defendants in what they did acted dishonestly and that that has not been proved.

We do not think there can be any doubt that, apart from the second question to which we shall presently refer, the facts here amount to an attempt and not merely to preparation. The letter written on the 23rd of May is merely a letter of enquiry, [316] and does not amount to an attempt. It is only a step in the preparation for the attempt. In sending it the writer did not commit himself. The document D, however, is an application for the payment of the money, and is the usual form in which such applications are made. An application for money is surely an attempt to obtain money. The application for money under a false pretence, as a rule, concludes the acts of the offender; unless anything occurs to prevent the payment he gets the money Whether he gets the money or not does not necessarily depend upon any future act of his.

If authority were necessary for this proposition, the case cited to us of *Reg* v. *Hensler* (11 Cox CC, 570), is only distinguishable by the circumstance that this particular question was not argued in that case. But that case, we think, disposes of another branch of the same contention raised by the respondents. It is said that because Mr. Keene, before the application was made to him, knew that the other halves were in the Currency Office, and knew that the matters stated by the applicant were untrue, and would not have paid the money to the applicant, the offence of cheating could not have been committed, and therefore the attempt to cheat could not have been committed. What Mr. Keene says only shows that the offence of cheating could not have been committed. A man may attempt to cheat, although the person he attempts to

cheat is forewarned, and is therefore not cheated. The case we have cited is on this question undistinguishable from the present case.

There the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. When he paid the money, and apparently when he received the letter, the prosecutor knew its contents to be untrue. In his judgment the Chief Baron says: "This is an attempt by the prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained, because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post, the offence was committed." In the present case the money was withheld because of the information which Mr. Keene obtained in his office.

[317] Mr. Gay, who is Mr. Keene's official superior, says that if the claim, the declaration and the certificate had come to him he would, in the ordinary course, have ordered payment.

In *Reg.* v. *Hensler* (11 Cox C. C., 570), as in the present case, counsel for the prisoner argued that, as the statutable offence could not have been committed, the prisoner could not be convicted of attempting to commit it. This argument was answered by two of the Judges in the following words: "BLACKBURN, J.—You may attempt to steal from a man who is too strong to prevent you. MELLOR, J.—Or an attempt may be made to steal a watch that is too strongly fastened by a guard. Here the prosecutor had the money, and was capable of being deceived, and the prisoner attempted to deceive him."

One more point was raised on this question of attempt. It appears from Mr. Gay's evidence that before money is paid on a currency note it is usual to take a bond of indemnity from the claimant.

It is argued that in this case the attempt was not completed because the bond was not signed. We do not think there is anything in this argument. The application for the money is, we think, the attempt, or at any rate sufficient to constitute an attempt. The execution of the bond of idemnity is not a portion of the application. It is a precaution taken by the person sought to be cheated, and is an act which would ordinarily take place before the offence of cheating could be completed. As far as the applicant is concerned he would be willing to take the money without the indemnity. His offence is making the false pretence and asking for the money.

It seems to us that the execution of the bond of indemnity is not an act of the accused forming any portion of the acts which constitute the commission of the offence. The offence would be just as complete whether an indemnity was or was not insisted upon. The Currency Office authorities may, if they like, dispense with the indemnity. The object of the bond is to secure the re-payment of the money if it has been wrongly paid. The object of it is not to prevent the payment, but [318] to indemnify the Government in case any one else claims the money. We have carefully examined the English cases cited by counsel for the accused, and we do not think that they have any application to the present case. We think it quite clear that an attempt was made.

Before considering the second question it will be desirable to examine the evidence for the defence. It is unquestionably untrue that the whole notes ever belonged to Umesh Chunder Mitter, or that they ever came into his hands. This is the case both for the prosecution and for the defence. According to the evidence for the defence, it is untrue that the halves ever came from the hands of Haran Chunder Chatterjee into his hands. The defence trace the half notes back. They call in the first place a lady named Din Tarini Dabee, who is said to have had them in her possession.

Almost at the beginning of her examination-in-chief, the counsel examining this lady plied her with leading questions and other questions of a nature only allowable in cross-examination. There seems to us to have been no excuse whatever for this course, and the result is that, so far as her examination-in-chief is concerned, it is difficult to use it at all as evidence on behalf of the defendant calling her, though it may be used as evidence against him. It is, however, clear from the other evidence that these half notes, which were afterwards sent to the Currency Office, came from this lady. She says that she found them in her box about a year and a half ago, and we do not think that there is any doubt that she gave them to her niece, the wife of the defendant, Hem Chunder Chatterjee.

There is some conflict of testimony between the aunt and the niece as to what took place when the half notes were handed over. The aunt says: "One day we were seated together, and I told my niece that there was some *goolmal* in respect of the numbers of a 20-rupee note. She asked me if I had shown this note to any one. I said yes, I showed it to a person who had called a few days previously to receive money. My niece said if you give the note to me I will show it to my husband. Five or six days later, when my niece came home, she took the note away from me; nothing further took place.

[319] "One day I met her in Calcutta. She spoke to me about this note and asked me whence I got the note. I said I did not remember, but I believed I got it in the course of my money-lending business."

She is then asked in examination-in-chief some questions, most of which are objectionable in form. They are as follows:—

"Q. What else did your niece say to you or you to her?

A. Nothing.

Q. Did you want to get money on these pieces of note?

A. No mention was made about obtaining money.

Q. Did you wish to get the money?

A. If the note was cashed, and the money paid to me, I would have taken it.

Q. By whom was the note to be cashed?

A. I gave no direction to my niece as to by whom the note was to be cashed. I made the note over to her that she might show it to her husband.

Q. Why did you want the note to be shown?

A. Because my niece said 'give it to me and I will show it to my husband.'

Q. But what did you understand by your niece's wanting to show the note to her husband?

A. I understood that it was taken to be shown to her husband.

Q. For what purpose?

A. Because he is a man of education, and knows how to read and write. I have a sircar in the house; he can read and write Bengali."

The niece has been called before us and she now says—

"When she gave me the notes she said 'these notes have been lying with me; I don't know for how long, and I don't know what has become of the other halves of the notes.' She said 'give these notes to your husband, and ask him to change these notes and send me Rs. 10'"

Of these two statements we have no hesitation in preferring that given by the aunt. The husband of the niece is one of the accused, and she is therefore much interested. The aunt's story was told at the time when the details of the events must have **[320]** been fairly fresh in her memory, and it is pretty clear that her story is substantially accurate.

On getting the notes the niece says that she handed them to her husband, saying: "Your aunt-in-law has asked me to hand over to you these two notes;

you change them and send her 40 rupees." Her husband, addressing Umesh Chunder Mitter, who was then present, said: "I have hardly any leisure to go out of my office. Will you change these notes and send the money to me at my house?" The application seems then to have been made.

It does not appear that the aunt ever said that she had had the corresponding halves in her possession. The niece does not say that she or her husband told Umesh Chunder Mitter that Din Tarini had ever had the whole notes in her possession, or indeed said anything about the whole notes.

In spite of this, Umesh Chunder Mitter, in the letter which he first wrote, said that the other halves were lost from his box where he kept them. This was untrue, as far as he was concerned; and as far as Din Tarini was concerned, it does not appear whether it was true or not. He was apparently aware that he could not recover the money unless he satisfactorily accounted for the loss of the other halves of the notes. It was for this reason that he invented this falsehood.

The inference from this falsehood is that Umesh Chunder Mitter knew that Din Tarini had never had the other halves. If he had known, or learnt of it, there is no real reason why he should not have told the truth. The form D is then sent to Umesh Chunder Mitter, and then occurs an incident which has been much relied upon by the defence. It is said that a letter was written to which the Bengali letter, produced by Hem Chunder, was an answer. The Bengali letter produced appears to have been written in the name of the aunt to her niece in answer to a letter addressed to Din Tarini, and therefore, although the evidence of the sending and of the contents of such letter is of a most suspicious character, we do not think we ought to repudiate such letter, and we accept the story as true.

The witness who speaks to it refers to the contents as follows:—

"The writer of the letter was enquiring in reference to the notes which had been given to her as to how long they were [321] with the person who sent it, and where he or she got it from. I don't remember anything more than this."

In answer to this letter, the following letter was written at Din Tarini's request to her niece:—

"I have received the particulars of your letter. The note (or notes) about which you wrote to me, that note (or those notes) I received in the course of my money-lending business. Who gave it (or them) I don't know. It has (or they have) been with me for many days, that I know."

After the receipt of this letter D was filled up and sent to the Currency Office. There is nothing in the letter which gives the smallest colour for the false statements in the claim, in the certificate and in the declaration. This is the whole of the evidence. It is noticeable that Din Tarini never claimed to have possessed the other halves, and that no one ever told either Hem Chunder Chatterjee or Umesh Chunder Mitter that she possessed them. On the contrary, the falsehood of their statements shows that these persons were aware that Din Tarini never possessed the other halves, and it was necessary for them to tell these untruths in order to account for the other halves.

On this state of facts it was contended that no case has been made out. It was said that, although the false pretence was made out, it was necessary for the prosecution to show that the attempt had been made dishonestly. There is, we think, no doubt that the prosecution must show that the act was done dishonestly. "Dishonestly" is defined in the Penal Code as follows:—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly."

The definitions of "wrongful loss" and "wrongful gain" show that what the prosecution has to prove is that the Government was as against the applicant legally entitled to the 40 rupees, or that the applicant was not entitled. Unquestionably the means used by the applicant were unlawful within the meaning of the Penal Code. If the applicant had any real reason to suppose that he or the person for whom he was acting was legally entitled to the rupees 40, he would not have committed the offence charged. We do not think there can be any doubt that Government is [322] entitled to retain the 40 rupees, that is to say, is entitled in law to the money until it is claimed by a person who has been the holder of the full notes. They are not obliged to pay the money to the holder of the half notes except as being the person entitled to the whole notes. It was contended that the prosecution should show that somebody, other than Din Tarini, was the owner of the full notes. This argument might possibly apply if "dishonestly" only included "wrongful gain," but it includes in the alternative "wrongful loss." Government being entitled to retain the money, in the absence of proof of ownership of the full notes, the definition of "wrongful loss," and consequently the definition of "dishonestly," is here satisfied. In this case the statement that the applicant owned the whole notes is unquestionably false, and false to his knowledge.

The accused have both borne a good character for some time. If they were to profit at all by the offence—and of this there is some doubt—the profit would have been small as far as these notes were concerned. Both these are circumstances which, in criminal cases, have occasionally great weight, but neither of them can dispose of clear and undisputed facts. So far as the evidence of good character is concerned the false statements seem to us to dissipate at once the effect of that evidence, except so far as the question of punishment is concerned. A man who has to his credit an unblemished character may, of course, claim that it be considered on the question of punishment. It is sad to see men who have by honest work earned the respect of their employers, and of those associated with them, inconsiderately bringing themselves within the grasp of the Criminal law, but the record of many of such cases is to be found in Criminal Courts. We do not think that there is any real distinction between the cases of the two accused. Hem Chunder Chatterjee wrote out the certificate, and there is reason to suppose that he induced Umesh Chunder Mitter to make the application.

There is one more contention with which we must deal: It is argued that we ought not in an appeal lightly to set aside the order of the Magistrate. We agree with this contention. We do not think we ought to interfere unless we are fully satisfied from the evidence that the crime has been proved, and are also [323] satisfied that the Magistrate had no reasonable ground for acquitting the prisoners.

Assuming that the reasons which actuated the Magistrate in discharging the prisoners coincide with the arguments which have been addressed to us by counsel for the respondents, we think that the Magistrate had no reasonable ground for acquitting the prisoners, and that the crime was fully proved. We convict the accused Umesh Chunder Mitter under ss. 420 and 511, Indian Penal Code, and convict Hem Chunder Chatterjee of abetting the offence committed by Umesh Chunder Mitter.

As to sentence, we think that, considering all the circumstances of the case, and especially the good character which the accused have heretofore borne, the ends of justice will be satisfied by the infliction of a fine. We sentence each of the accused to pay a fine of Rs. 200; in default to suffer simple imprisonment for the period of two months.

C. D. P. *Order of acquittal set aside.*

NOTES.

[*See* also 15 All., 173; 2 A. L. J., 718; 8 C. W. N., 784.]

[16 Cal. 323]

APPELLATE CIVIL.

The 1st March, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Abdul Wahed and others............Decree-holders

versus

Fareedoonnissa............Judgment-debtor.[1]

Execution of decree—Security for costs—Security bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1888, s. 46—General Clauses Act (I of 1868), s. 6.

On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force: *Held*, on appeal, that the application should have been allowed.

[324] ONE Fareedoonnissa Bibee became surety for the costs of a certain person who was an appellant in an appeal pending in the High Court against Abdul Wahed and others at a time previous to the passing of Act VII of 1888 This appeal was dismissed with costs, and Abdul Wahed and his co-respondents in that appeal thereupon sought to recover such costs from Fareedoonnissa, and with that object, on the 9th June 1888, applied for execution of their decree against Fareedoonnissa. This application was dismissed, on the ground that, as the law then stood, the decree-holder's only remedy was to bring a regular suit upon the security bond. On the 1st July 1888, subsequently to this order, which was not appealed against, Act VII of 1888 came into force; and the decree-holders on the 28th July made a fresh application under s. 46 of that Act (which added additional matter to s. 549 of the Civil Procedure Code of 1888) for execution of their decree against Fareedoonnissa. The same Sub-Judge who had dismissed the former application refused to allow the second application, on the ground that Act VII of 1888 did not affect the case, section 6 of the General Clauses Act of 1868 being sufficient to save all proceedings commenced before the amending Act came into operation.

The decree-holders appealed to the High Court.

Moulvi *Mahomed Yusuf* and Baboo *Saligram Singh* for the Appellants.

Mr. *R. E. Twidale* for the Respondent.

The **Judgment** of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

The question in this appeal is purely one of law, and that law relates, we think, simply to procedure.

[1] Appeal from Order No. 468 of 1888, against the order of Baboo Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 24th of November 1888.

We think that the Court below has made a mistake in dealing with that question. The appellants before us were in a former suit respondents in this Court in an appeal from an original decree. In that appeal the appellant was required by this Court to furnish security for costs. The present respondent became surety. That appeal was ultimately dismissed with costs; and the respondents, who are now before us as appellants, seek to recover their costs from the surety. They applied to the lower Court for [325] execution of the decree for costs against the surety. On the 9th June last the lower Court rejected their application, holding that, under the law as then laid down by the Civil Procedure Code, the security bond could not be enforced by means of execution of the decree, and that the judgment-creditors must have recourse to a fresh suit against the surety. The judgment-creditors did not appeal against that decision, nor have they brought a fresh suit to recover the amount of the security. In the meantime, on the 1st July 1888, Act VII of 1888 came into force. By s. 46 of that Act, s. 549 of the Code received the following addition: "If such security be furnished, any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the Appellate Court in the same manner as if he were the appellant." The judgment-creditors, taking advantage of this provision of the new Act, made a fresh application on the 28th July for execution against the surety. On the 24th November last this application was likewise rejected by the lower Court. The lower Court referred to s. 6 of the General Clauses Act which enacts: "The repeal of any Statute, Act or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or any proceedings commenced, before the repealing Act shall have come into operation." And the Subordinate Judge goes on to say that "the question whether the decree-holders can enforce the security bond was raised and decided before the amending Act came into operation, and the proceedings against the surety had been commenced before that time."

It seems to us that the lower Court was mistaken in its application of this section of the General Clauses Act. By Act VII of 1888 the previous Statute was not repealed, and we think that the decision of the lower Court of the 9th June decided no more than that the existing law did not permit the decree-holders to recover from the surety in execution of the decree. The amending Act, which came into force a few days afterwards, expressly provides for such recovery from the surety in execution. The lower Court did not, on the 9th June, decide any question of right between the parties. It merely decided that, by the law as it stood then, the decree-holders must have recourse to a separate [326] suit. The new provision of Act VII of 1888 is one of procedure, and not one which deals with any right. The right of the decree-holders to recover their money is not affected, nor is the liability of the surety to pay the money. The only alteration is as to the mode in which to recover.

We think, therefore, that the judgment-creditors were entitled to bring this fresh application under the new Act, and the Court below ought to have granted it. That being so, we decree this appeal with costs.

T. A. P. *Appeal allowed.*

NOTES.

[See now the C.P.C., 1908 sec. 145 which makes express provision for the enforcement of the liability of surety.]

[16 Cal. 326]

APPELLATE CIVIL.

The 24th January, 1889.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE O'KINEALY.

Bhaba Nath Roy Chowdhry and others............Plaintiffs

versus

Durga Prosunno Ghose and others..............Defendants.*

Co-sharer—Fractional shareholders in joint undivided estate—Lien on tenure for share of rent—Sale of tenure in satisfaction of decree.

The owner of a fractional share in a joint undivided estate has no lien on the tenure itself for his share of the rent, although such share is collected separately, and, therefore, cannot cause the tenure to be sold in satisfaction of a decree for his share of the rent.

SUIT by fractional shareholders in an undivided zemindari for the sale of a tenure for arrears of rent.

The plaintiffs Prosunno Chunder Roy Chowdhry and six others were the owners of fractional shares in the mouzahs Shibpur and Hosnabad, in the District of the 24-Pergunnahs. Defendants Nos. 2, 3 and 4 had a jama in these mouzahs for which they paid rent to the plaintiffs and their co-sharers. The plaintiffs' share of the rents was paid to them separately. In 1881 the plaintiffs obtained a decree for rent of 1286-1288 (1879-1881) in respect of this jama against defendants Nos. 2, 3 and 4. In execution of this decree the jama was attached, and the 3rd March 1884 was fixed for the sale. Durga Prosunno Ghose, defendant No. 1, thereupon preferred a claim, [327] alleging that he had purchased the jama at an auction sale, and that he was in possession. His claim was allowed and the property released from attachment on the 14th June 1884.

The plaintiffs thereupon brought this suit for a declaration that the jama was liable for the amount of their decree and that it should be sold in satisfaction of the same.

The plaintiffs alleged that the rent payable to them in respect of the jama had been separately settled with defendants Nos. 2, 3 and 4 ; that the defendant No. 1 did not purchase the jama ; that the jama was not transferable ; and that, therefore, even if defendant No. 1 had purchased it, the purchase was invalid ; and that, supposing the sale to defendant No. 1 was valid, the jama was liable for the amount of the plaintiffs' decree.

The defendant No. 1 alleged that the jama was a mourasi mokurari ganti, bearing a rental of about Rs. 298, of which the plaintiffs were entitled to Rs. 25-8 a year ; that he had purchased the jama at an auction sale on the 6th March 1883, and obtained his sale certificate on the 26th July 1883 ; and that he was put into possession on the 26th February 1884. He also alleged that the arrears, if any, fell due before he had acquired a right in the property. He contended, *inter alia*, that the plaintiffs, as owners of fractional shares in an undivided zemindari, could not sell the tenure itself in execution of their decree for rent.

The other defendants did not appear.

The Munsif found that defendant No. 1 had purchased the jama at an auction sale on the 6th March 1883, and that he had been put into possession ; that the jama was a mokurari or kayemi jama, and, therefore, transferable by

* Appeal from Appellate Decree, No. 2337 of 1887, against the decree of H. Beveridge, Esq., Judge of the 24-Pergunnahs, dated the 30th of June, 1887, affirming the decree of Baboo Binode Behari Mittra, Munsif of Bashirhat, dated the 13th September, 1886.

sale. He held that the sale to defendant No. 1 was valid, and that the plaintiffs had failed to prove that defendants Nos. 2, 3 and 4 held the jama under them under a distinct and separate settlement; and that the land of the jama was the *ijmali* land of all the proprietors, although the rent was paid separately to each proprietor or sets of proprietors.

He further held that, in accordance with the provisions of s. 64 of Bengal Act VIII of 1869, and upon the authority of the case of *Grish Chunder Mitter* v. *Sheik Jakhu* (17 W. R., 352; 12 B. L. R., 488, note) and that [328] of *Nund Lall Roy* v. *Gooroo Churn Bose* (15 W. R., 6), the plaintiffs, as co-sharers in a joint undivided estate, could not cause the tenure itself to be sold in execution of a decree for the share of the rent, but could only sell the right, title and interest of the judgment-debtors under the Code of Civil Procedure; and that, consequently, they could not follow the tenure in the hands of defendant No. 1, in satisfaction of their decree. The Munsif accordingly dismissed the suit.

The plaintiffs appealed to the District Judge of the 24-Pergunnahs, who upheld the judgment of the Munsif and dismissed the appeal with costs.

The plaintiffs, with the exception of Prosunno Chunder Roy Chowdhry preferred a second appeal to the High Court.

Mr. *Woodroffe* and Baboo *Jogesh Chunder Roy* for the Appellants.

Mr. *Evans*, Baboo *Jogendra Nath Bose* and Baboo *Kali Charan Banerjee* for the Respondents.

The **Judgment** of the Court (TOTTENHAM and O'KINEALY, JJ.) was as follows:—

This was a suit to have it declared that a certain tenure was liable to be sold in execution of a decree for arrears of rent, the decree having been obtained against the former owner of the tenure.

It appears that before the decree was passed, the appellant's right and interest had been sold in execution of a money decree, and purchased by the principal defendant in the present suit. The landlord was only a co-sharer. He applied for the sale of the tenure under the provisions of s. 64, Bengal Act VIII of 1869, and the procedure governing that application was that laid down in the Code of Civil Procedure. A claim was put in by the purchaser of the tenants' right and interest, who was not registered as transferee in the zemindar's sherishta, under s. 278; and that claim was allowed, and the attachment was withdrawn.

The present suit was brought to establish the decree-holder's right to sell the property in the hands of the alienee. Both the Courts below dismissed the suit. This second appeal was preferred by the plaintiff, and it has been argued on his behalf that the landlord, although only a co-sharer to a certain extent, [329] was entitled to sell the tenure in whosesoever hands it might be, because his rent suit was brought and a decree obtained against the recorded tenant.

It appears to us that the appellant was entitled to alienate his tenure, unless and until it was attached in execution. The case was governed by the ordinary Procedure Code, and, in that Code, there is no bar to alienation of property by the judgment-debtor, so long as that property has not been attached; unless, of course, it was shown that the alienation was intended to defraud creditors. But there is nothing in the procedure, and there is nothing in the decree obtained by the plaintiff giving him any lien upon the land in question, and we are not aware of any statutory lien existing in favour of the plaintiff as a co-sharer. The decree was obtained in May 1883. The purchase by the defendant was in March 1883, and the sale was confirmed and certificate granted on the 26th July 1883, and the attachment and execution proceedings had not apparently then been commenced.

We find that the property having been attached, the day fixed for sale was 5th March 1884; but, in the meantime, a claim was preferred upon which the property was ultimately released. So far, therefore, as we are aware, the alienation by the original tenant was effected before any execution proceedings were taken by the plaintiff. Had the plaintiff been a sixteen-anna proprietor, there is no doubt that he could, under s. 59 of the then Rent Act, have attached and sold the tenure itself upon the decree obtained against the recorded tenant.

But in the present case it appears to us that his position was different, he being only a fractional co-sharer; and, so far from having any lien upon the land by the Rent Act, he is expressly precluded by s. 64 from proceeding against the tenure, until he has first of all proceeded against all the moveable property of the defaulter. If the plaintiff had no lien upon the tenure in satisfaction of his decree, he cannot succeed in the present suit; and, as I have said, we think that he had no lien either by the decree or by any statute. That being so, we must hold that the decision of the lower Court was correct, and this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

[330] ORIGINAL CIVIL.

The 14th January, 1889.
PRESENT:
MR. JUSTICE NORRIS.

Ram Chunder Dutt
versus
Dwarkanath Bysack and others.*

Registrar of High Court, Authority of—Power to execute conveyance and enter into covenants on behalf of infants and persons refusing to execute—Defects of title known to purchaser at time of sale—Covenants for title and quiet enjoyment—Purda-nashin, when not bound by conveyance executed by her containing covenants for title and quiet enjoyment—Civil Procedure Code (Act XIV of 1882), ss. 261, 262—Rules of Court (Belchamber's Rules and Orders), Nos. 341 and 436.

The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any covenants on his behalf.

The power of the Registrar to execute such a conveyance rests upon statutory authority.

General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of the sale, unless the intention of the parties that they should not do so is clearly expressed in the covenants themselves.

* Original Civil Suit No. 150 of 1888.

"Conveyance," as used in Rule 436 (Belchambers' Rules and Orders), means such an instrument as may be necessary to transfer the estate, if he has any, belonging to the person on behalf of whom the Registrar executes the transfer to the purchaser.

Circumstances under which a *purda-nashin* lady will be relieved from liability under covenants contained in a conveyance executed by her.

D, an heir of one *X*, a deceased Hindu lady, sold and conveyed to *M*, in March 1878, a moiety in certain premises belonging to the estate of *X*. Subsequently a decree was made for partition of the estate left by *X* in a suit to which *D*, *A*, *R*, *G* and *S* were parties, and an order was made in that suit directing the premises, of which *D* had so sold a moiety, to be sold by the Registrar, and the parties were directed to join in the conveyance, the Registrar being directed to approve and execute the same on behalf of *G* who was an infant. At the sale, the plaintiff purchased the premises, and thereafter *D* refused to execute the conveyance, which included the usual covenants for title and quiet enjoyment. A summons was thereupon taken out against him, and an order was made directing the Registrar to execute the conveyance on his behalf. The conveyance was then executed in September 1885 by *A*, *S* and *R*, and by the Registrar on behalf of *D* and the minor **[331]** *G*. In a suit instituted by *M*, under the conveyance of 1878, the Court held that he was entitled to possession, as against the plaintiff, of the moiety of the premises covered by his conveyance. The plaintiff, therefore, brought a suit against *D*, *A*, *R*, *G* and *S* to recover damages for breach of the covenants for title and quiet enjoyment. It was not found that *R* had any good independent advice in the matter, or that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

Held that, although the Registrar had authority to execute the conveyance on behalf of *D* and *G*, he had no authority to enter into the covenants on their behalf, and that the suit should be dismissed as against them.

Held, also, that having regard to the position of *R*, the suit should also be dismissed as against her.

THIS was a suit to recover damages for breach of covenants for title and for quiet enjoyment, and the circumstances under which it came to be instituted were as follows :—

Anundmoye Dassee, who was the widow of one Joykishen Bysack, died on the 30th of April 1871, leaving a son, Dwarkanath ; four grandsons by a son, Gopal Lal Bysack, who had predeceased her, viz., Amrita Lal Bysack, Surendra Lal Bysack, Monohur Lal Bysack, and Girendra Lal Bysack ; a grandson, Juggutdoollub Sett, and a grand-daughter, Panna Dassee, children of a daughter, Shamsoondery Dassee, who had also predeceased her.

Anundmoye left a will, dated the 10th of February 1871, of which she appointed Dwarkanath and Amrita Lal executors.

Monohur Lal died unmarried and without issue in July 1876, leaving his mother Rajluckhee Dassee, his heiress.

Probate of Anundmoye's will was granted to Amrita Lal on the 1st of August 1881, and to Dwarkanath on the 13th of August 1881.

Amongst other property possessed by Anundmoye, purchased out of her stridhan and purporting to be disposed of by her will, was a piece of garden land known as No. 22, Machooa Bazar Street, in the town of Calcutta.

On the 28th of March 1878, Dwarkanath sold and conveyed to one Obhoy Churn Mullick a moiety of No. 22, Machooa Bazar Street, for Rs. 3,000.

On the 21st of August 1882, Amrita Lal instituted a suit in the High Court (being suit No. 470 of 1882) against Dwarkanath, charging him with various acts of misfeasance, particularly with **[332]** the fraudulent conveyance of the 28th of March 1878, and asking for an injunction restraining him from

interfering with Anundmoye's estate, for the appointment of a receiver, and for the administration of the estate by the Court. Surendra Lal, Girendra Lal, Rajluckhee Dassee, Juggutdoollub Sett and Panna Dassee were made defendants in that suit.

Anundmoye's will directed, *inter alia*, that the balance of the income of the estate, after deducting certain payments and expenses, "should be applied to the expenses of the family; but that if any of her sons and grandsons should become separate in food, the sons and grandsons should divide, take, and enjoy the balance of such income according to the shastras."

The parties seemed to have agreed as to what were their respective rights under the will, and, on the 17th of April 1883, Amrita Lal applied to the Court, on petition, that a decree should be made in the suit declaring that under Anundmoye's will Amrita Lal, Surendra Lal and Girendra Lal, were each entitled to a one-eighth share of her estate absolutely; Rajluckhee Dassee, as the heiress of Monohur Lal, to a one-eighth share for the estate of a Hindu widow; and Dwarkanath to the remaining half; and that certain arbitrators should be appointed to take the accounts and partition the estate.

All the defendants acquiesced in the prayer of that petition, and the Court ordered a reference to the Registrar to enquire and report whether the terms of the proposed settlement were for the benefit of such of the defendants as were infants.

On the 18th of July 1883, the Registrar reported that the terms of the proposed settlement were for the benefit of the infant defendants.

On the 30th of August 1883, on the cause coming on for further directions on the report of the Registrar, a decree was made according to the terms of the petition. The arbitrators made their award on 9th February 1885.

The award directed, *inter alia*, that a sufficient portion of the immoveable property, mentioned in a schedule thereto annexed, should be sold by the Registrar of the Court by public auction for the payment of the debts thereinbefore mentioned and for the costs of the suit.

[333] Amongst the immoveable properties mentioned in the schedule was "a portion" (*i.e.*, Anundmoye's divided portion) "of the premises No. 22, Machooa Bazar Street, containing by estimation 16 cottas 9 chittacks and 35 square feet."

The cause came on for judgment on the award on the 2nd of March 1885, when it was, amongst other things, "ordered and decreed by consent that the divided share of Sreemutty Anundmoye Dossee, deceased, the testatrix in the pleadings mentioned, in the premises No. 22, Machooa Bazar Street, be sold by the Registrar of the Court to the best purchaser that he can get for the same;" and it was further "ordered and decreed with the like consent that all proper parties do join in the conveyance of the said premises, as the said Registrar shall direct, if the parties differ about the same;" and it was further "ordered and decreed with the like consent that the Registrar of this Court do approve of and execute the conveyances of the properties to be sold by him as aforesaid for and on behalf of the infant defendants Surendra Lal Bysack and Girendra Lal Bysack."

The Registrar duly advertised the premises No. 22, Machooa Bazar Street, for sale, and, on the 4th of July 1885, they were sold by him, under certain conditions of sale then produced, and were purchased by the plaintiff for Rs. 7,000.

The sale was confirmed by an order of Court, dated the 17th of July 1885. A draft conveyance of the premises, No. 22, Machooa Bazar Street, was

prepared by the plaintiff's attorney and forwarded to Dwarkanath Bysack's attorney, Baboo *Moraley Dhur Sen*, for approval on his (Dwarkanath's) behalf. On the 5th of August 1885, Baboo *Moraley Dhur Sen* returned the draft to the plaintiff's attorney "approved as altered."

The proposed parties to the conveyance were Dwarkanath Bysack and Amrita Lal Bysack, as executors of Anundmoye's will of the first part, Dwarkanath, Amrita Lal, Surendra Lal, Girendra Lal, as heirs and legal representatives of Anundmoye, and Rajluckee Dossee as heiress and legal representative of the estate of Monohur of the second part, and the plaintiff of the third part.

The draft conveyance contained the following covenants: "And the said parties hereto of the first and second parts do and each [334] of them doth hereby for themselves, himself and herself their, his and her heirs, executors, administrators and assigns covenant, declare and agree with the said purchaser" (that is the plaintiff) "his heirs, executors, administrators and assigns in manner following that is to say that for and notwithstanding any act, deed, matter or thing by the said parties hereto of the first and second parts or any or either of them or their, her and his ancestors made, done and performed, they the said parties hereto of the first and second parts or some or one of them now have or hath in themselves, himself and herself good right, full power and lawful and absolute authority to grant, release, and convey the said piece or parcel of land hereditaments and premises with the appurtenances unto and to the use of the said purchaser, his heirs, representatives and assigns for ever in manner aforesaid and according to the true intent and meaning of these presents and that it shall and may be lawful for the said purchaser his heirs, executors, administrators and assigns from time to time and at all times hereafter peaceably and quietly to enter into and have, hold, occupy, possess and enjoy the said piece or parcel of land, hereditaments and premises hereby released or intended so to be with their appurtenances and to receive and take the rents, issues and profits thereof and every part thereof without any let, suit, trouble, eviction, claim or demand whatsoever of or by the said parties hereto of the first and second parts or any person or persons lawfully claiming or to claim by, from, under or in trust for her, him and them and free and clear and freely and clearly discharged and exonerated or otherwise by the said parties hereto of the first and second parts, their heirs, executors, administrators, representatives and assigns well and sufficiently saved and kept harmless of, from and against all former and other gifts grants, bargains, uses trusts, judgments, execution, sums of money and all other estates, titles, troubles, charges and incumbrances whatsoever had, made, executed or knowingly or willingly suffered by the said parties hereto of the first and second parts or any person or persons lawfully claiming or to claim from, under or in trust for them."

This covenant was approved by Baboo *Moraley Dhur Sen* on behalf of Dwarkanath. On the 29th of August 1885, Baboo [335] *Moraley Dhur Sen*, on behalf of Dwarkanath, wrote as follows to the plaintiff's attorney:—

"7, CHURCH LANE, CALCUTTA,

29th August 1885.

AMRITA LAL BYSACK *v.* DWARKANATH BYSACK.

BABOO PREONATH GHOSE.

DEAR SIR,

I FIND that from an oversight I approved of your client's conveyance of Lot No. 1 on behalf of my client. He cannot execute it, and I fancy you must obtain an order authorising the Registrar to approve of and execute the conveyance on behalf of my client.

Yours faithfully,
MORALEY DHUR SEN."

On the 4th of September 1885, the plaintiff's attorney took out a summons as follows :—

"SUIT No. 470 OF 1882.

In the High Court of Judicature at Fort William in Bengal.

ORDINARY ORIGINAL CIVIL JURISDICTION.

AMRITA LAL BYSACK *v.* DWARKANATH BYSACK.

LET all parties concerned attend before the Sitting Judge in Chambers in the Court-house, on Tuesday, the 8th day of September instant, at the hour of 10 o'clock in the forenoon, on the hearing of an application on the part of Ram Chunder Dutt, the purchaser of the property consisting of Lot No. 1, at a sale held herein by the Registrar of this Honourable Court for an order that the said Registrar do sign and execute the conveyance of the said property, being Lot No. 1, as aforesaid for and in the name of the defendant Dwarkanath Bysack, as one of the executors to the estate of Sreemutty Anundmoye Dossee, deceased, and also as one of her heirs and legal representatives, and that the said defendant, Dwarkanath Bysack, do pay personally the costs of and incidental to this application to be taxed by the taxing officer of this Honourable Court.

Dated this 4th September 1885.

[336] This summons was taken out by *Preonath Ghose*, applicant's attorney, against Baboo *Moraley Dhur Sen*, attorney for the defendant Dwarkanath Bysack. } J. PIGOT.

GROUND—*Affidavit of Ram Chunder Dutt.*"

This summons was duly served on Baboo *Moraley Dhur Sen* on the 5th and was heard by PIGOT, J., on the 8th of September 1885. At the hearing an affidavit of the plaintiff's, containing the following paragraphs, was filed in support :—

"That on the 27th day of July last, my attorney, Baboo *Preonath Ghose*, sent a draft conveyance of the said Lot No. 1 for the approval of Baboo *Moraley Dhur Sen*, attorney for the said defendant Dwarkanath Bysack."

"That on the 5th day of August last, my said attorney received a letter from the said Baboo *Moraley Dhur Sen*, enclosing the said draft conveyance duly approved as altered on behalf of his client, the said defendant Dwarkanath Bysack."

"That since the said 5th day of August last, my said attorney received the said draft conveyance duly approved by the attorneys for the plaintiff, and the said defendants Sreemutty Rajluckhee Dossee and Surendra Lal Bysack, and also by the said Registrar of this Honourable Court on behalf of the said infant defendant, Girendra Lal Bysack."

"That on the 29th day of August last, my said attorney received a letter from the said Baboo *Moraley Dhur Sen*, a copy of which is as follows :—

[The letter referred to is the one already set out (*Ante*, p. 335).]

Dwarkanath did not appear either in person or by counsel or attorney on the hearing of the summons, and the order asked for therein was made.

On the 10th of September 1885, the conveyance containing the covenants mentioned above was executed by Amrita Lal, as one of the executors of Anundmoye's will, and also as one of her heirs and legal representatives; by Surendra Lal, as an heir and legal representative; by Rajluckhee Dossee, as heiress and legal representative of Monohur; by the Registrar of the Court [337] on behalf of Girendra Lal. as an heir and legal representative of Anundmoye, in pursuance of the order of the 2nd of March 1885; and by the Registrar of the Court on behalf of Dwarkanath as one of the executors of

Anundmoye's will, and also as one of her heirs and legal representatives, in pursuance of the order of the 8th of September 1885.

On the 4th of July 1883, Obhoy Churn Mullick instituted a suit in the High Court (being Suit No. 288 of 1883) against Dwarkanath for possession of the premises conveyed to him (Obhoy Churn) by the Indenture of the 28th of March 1878, and for damages for breach of covenant. Dwarkanath, by his written statement, admitted the Indenture, and alleged that, in consequence of a letter he had furnished to the plaintiff, the tenants on the land had attorned to him and had paid him rent.

Obhoy Churn died intestate on the 24th of November 1883, and by an order of the 22nd of January 1884, the suit was revived in the names of his three sons— Rajendro, Debendro, and Opendro.

The suit came on for hearing on the 14th of August 1884, when it was adjourned for the amendment of the plaint in certain particulars which it is not necessary to mention.

The amendments did not appear to have been made, and on the 4th of June 1885, the suit was dismissed for default of the plaintiff's appearance. On the 26th of June 1885, Obhoy Churn's sons instituted a suit in the High Court (being Suit No. 291 of 1885) against Amrita Lal, Surendra Lal, Girendra Lal, Rajluckhee Dassee, Juggutdoollub Sett, Panna Dassee, and Dwarkanath.

The plaint recited the conveyance by Dwarkanath to Obhoy Churn of the 28th of March 1878--the proceedings in the Administration Suit No. 470 of 1882, the proceedings in Obhoy Churn's suit against Dwarkanath, No. 288 of 1883—and alleged that they were in no way bound by the proceedings in the administration suit, and that it was not competent to the defendants to cause the share in No. 22, Machooa Bazar Street, purporting to have been conveyed to Obhoy Churn by the Indenture of the 28th of March 1878, to be sold, and asked for a declaration that they were not so bound, for a stay of the sale, advertised by the Registrar, until the determination of the suit for possession of the said divided half share, and for various other reliefs.

[338] Notice of motion for an injunction to stay the sale was duly given; the motion was heard on the 2nd of July 1885, and was dismissed with costs.

By an order of the 3rd of August 1885, the plaint was amended by adding the plaintiff in the present suit as a party-defendant, and by alleging that he had purchased the premises No. 22, Machooa Bazar Street, on the 4th of July 1885, with full knowledge of the plaintiff's claim.

The suit was tried by TREVELYAN, J., who dismissed it with costs on the 20th of February 1886.

The learned Judge held that under Anundmoye's will there was a good gift of the premises No. 22, Machooa Bazar Street, to the family as it existed at the time of her death, and that Dwarkanath had no authority to sell to Obhoy Churn, who, consequently, took nothing under the conveyance of the 28th of March 1878.

The Mullicks appealed against TREVELYAN, J.'s decree, and the Court of Appeal (PETHERAM, C.J., WILSON and NORRIS, JJ.) reversed it, holding that the premises did not pass under the will, but that Dwarkanath took them as heir to his mother's stridhan.

The decree directed possession of a divided half share of the premises to be given to the Mullicks, and directed the present plaintiff to pay them certain mesne profits.

The only remaining facts, which it is material to mention, are that the plaintiff was uncle to Rajluckhee Dassee, and had been her manager for some

seven or eight years; that on the 21st of August 1882, the date of the plaint in the Administration Suit No. 470 of 1882, if not before, he became aware of the conveyance of the 28th of March 1878; that he was aware of all the proceedings taken in that suit, and also in Obhoy Churn's Suit No. 288 of 1883, and of the application for the injunction; and that at the sale on the 4th of July 1885, he heard Baboo Gonesh Chunder Chunder, the Mullicks' attorney, state that his clients claimed a divided half share of the premises No. 22, Machooa Bazar Street.

The plaint in this suit was filed on 21st April 1888.

The defendants were Dwarkanath Bysack, Surendra Lal Bysack, Girendra Lal Bysack, Rajluckhee Dassee and Amrita Lal Bysack; of these, only Dwarkanath appeared to contest the suit at the hearing.

[339] Mr. *Bonnerjee* and Mr. *Sale* for the Plaintiff.

Mr. *Pugh* and Mr. *O'Kinealy* for the Defendant Dwarkanath.

The case was opened by Mr. *Bonnerjee* without any reference to the question as to whether the Registrar had power to bind the defendants on whose behalf he had executed the conveyance, but during the hearing of the evidence, it was stated, in reply to the Court, that the plaintiff relied on s. 261 of the Civil Procedure Code and Rules 341 and 436 of Belchambers' Rules and Orders.

Mr. *Pugh* contended on behalf of Dwarkanath Bysack that the Registrar had no authority under that section or those rules to execute the conveyance on his client's behalf, and that his client was not bound by the covenants.

Mr. *Sale* was heard in reply.

The nature of the arguments appears sufficiently in the judgment of the High Court, but, in addition to the authorities therein referred to, the following were cited:—

By Mr. *Pugh*: *Ogilvie* v. *Foljambe* (3 Mer. 53); Mayne on Damages, pp. 180 and 80.

By Mr. *Sale* (on the question as to Dwarkanath's right to object to the order made on notice to him): *Ex parte Pratt* (L. R., 12 Q. B. Div., 334), and to *Smith* v. *Compton* (3 B. & Ad., 407); Mayne on Damages, p. 179, and Dart's Vendors and Purchasers, pp. 886 and 894.

The **Judgment** of the Court (NORRIS, J.) was as follows: –

This was a suit to recover damages for breach of covenants for title and for quiet enjoyment. The case is one of some importance, and it is desirable to set out the facts in detail (His Lordship then proceeded to state the facts as set out above and continued):

For the plaintiff it was contended that all the defendants were liable on the covenants alluded to—Amrita Lal, Surendra Lal, and Rajluckhee—as having themselves executed the conveyance; Dwarkanath and Girendra Lal, as being bound by the execution thereof by the Registrar in their respective names.

[340] Mr. *Bonnerjee* admitted that the Registrar's authority must rest upon statute, or upon practice or procedure having the force of statute.

The statutory authority relied on was s. 261 of the Code of Civil Procedure; the practice or procedure having the force of statute that was contained in Rules 341 and 436 of Belchambers' Rules and Orders.

It was further contended for the plaintiff that the "conveyance" referred to in s. 261 of the Code of Civil Procedure, and in Rule 436, meant a deed of transfer containing a warranty, such warranty being expressed by such covenants as were necessary to secure to the grantee the estate granted; that the

covenant sued on was such a covenant; and that, therefore, the Registrar had authority so to covenant on behalf of Dwarkanath and Girendra Lal.

Mr. *Pugh*, on the other hand, contended that the Registrar had no authority, either under s. 261* of the Code of Civil Procedure or under the Rules, to execute the conveyance on his client's behalf.

As regards s. 261, he contended that it applied only to cases where a decree had been made for specific performance; he denied that in this case there had been any "decree for the execution of a conveyance"; he denied that his client was a "judgment-debtor" within the meaning of the section, or that the plaintiff was a "decree-holder:" he further contended that if s. 261 was applicable, and if the plaintiff was a "decree-holder" and the defendant a "judgment-debtor" within the meaning of the section, yet the Registrar had no authority to act under the provisions of the section, because the procedure laid down by the section had not been followed.

As regards Rule 436, Mr. *Pugh* contended that it had no statutory authority, and that even if it had, and was applicable to the case, yet, as the procedure there laid down had not been complied with, the Registrar had no authority to execute the conveyance on his client's behalf.

Mr. *Pugh* further argued that even if, under the provisions of s. 261 and Rule 436, or either of them, the Registrar had authority to execute the conveyance on Dwarkanath's behalf, [341] he had only authority to execute such a conveyance as might be necessary to pass Dwarkanath's estate, and could not possibly have any authority to enter into covenants on his behalf.

And, lastly, Mr. *Pugh* contended that general covenants for title and quiet enjoyment did not embrace the case of a defect of title known to the purchaser before or at the date of his purchase.

I think I have correctly stated the views expressed by the respective learned Counsel.

Mr. *Pugh's* arguments upon s. 261 and Rule 436 are applicable to the case as against Girendra Lal as well as to that against his own client; his argument upon the question of a known defect at the date of the purchase is applicable to all of the defendants. I propose to deal in the first place with the argument common to all the defendants.

In support of it, Mr. *Pugh* referred to Coke on Littleton, 384 A, the last page in the note; Platt on Covenants, 387; Sugden's Vendors and Purchasers, 14th Ed., 368; and *Gas Light and Coke Company* v *Towse* (L. R., 35 Ch. Div., 519).

*[Sec. 261:—If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver the same to the Court.

Decree for execution of conveyances, or endorsement of negotiable instruments.

The Court shall thereupon cause the draft to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections, if any, thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for execution, upon the proper stamp paper if a stamp is required by law.

On proof of such service, the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree and execute the duplicate so altered:

Provided that, if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing and argued before the Court, and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.]

The passage from Platt runs as follows: "Where the title is known to be defective, the party will sometimes complete his purchase, relying on the vendor's covenants for indemnity. It must, of course, under these circumstances, be matter of express agreement, whether the vendee will take the conveyance containing covenants, with the usual qualification, or whether the covenants shall be made to extend generally to the acts of all the world. Should the seller agree to covenant against this defect specially and particularly, prudence suggests, with a view to keep the fact of unsoundness of title from the face of the purchase deed, that the indemnity should be contained in a separate instrument. Even in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice."

This is, I think, a meagre authority for Mr. *Pugh's* contention. The case of the *Gas Light and Coke Company* v. *Towse* (L. R., 35 Ch. Div., 519) does not in my opinion assist him.

[342] On the other hand, in the last edition of Dart's Vendors and Purchasers, at page 886, it is said: "Although the fact of the purchaser having notice of a defect cannot prevent the covenants for title from extending to it, since extrinsic evidence of intention is inadmissible for the purpose of construing a deed; yet, in an action to rectify the covenant, that fact may be used as the basis of an inference, that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware. It has accordingly been suggested that, if the purchaser consents to take a defective title, in reliance on the covenant for title, so that the covenant is intended to cover a known defect, this intention should be clearly expressed in the covenant itself." And in the foot-note it is said: "It may be observed that none of the authorities warrant the proposition that it is doubtful whether the covenant would extend to a known defect."

This is, I think, a correct view of the law, and I must, therefore, hold that the covenant extends to the defect in title in consequence of which the plaintiff, though well aware of it, was dispossessed of a moiety of the premises he had purchased.

I now proceed to deal with the case as against Girendra Lal. He is a minor, and no guardian *ad litem* has been appointed, and upon this ground alone I think the suit against him should be dismissed.

But there is also another ground. For reasons which I shall presently explain, I am of opinion that the Registrar had authority to execute the conveyance on Girendra Lal's behalf; but I am clearly of opinion that he had no authority to covenant on his behalf. If authority is wanted for this proposition, it will be found in the case of *Waghela Rajsanji* v. *Shekh Masludin* (L. R., 14 I. A., 89), for a reference to which I am indebted to Mr. *Pugh*. In that case a guardian covenanted on behalf of her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue; the Judicial Committee held that it was beyond the power of the guardian to impose a personal liability on the ward.

[343] The Registrar, in a case such as this, cannot be in a higher position than the guardian of an infant ward.

It is but right to say that the learned Counsel for the plaintiff, after argument, acquiesced in this view.

I have had considerable doubt as to whether there should not be a decree against Rajluckhee; but, upon consideration, I am of opinion that the suit as against her should be dismissed.

Rajluckhee is a *purda-nashin* lady. The only legal advice she had before she executed the conveyance was from Baboo Preo Nath Bose, the attorney of the plaintiff (who, as I have already said, is her uncle, and was for many years her manager). The evidence as to the explanation of the deed to Rajluckhee is that of her son Surendra Lal, who said: "Preo Nath Bose explained the deed to my mother."

I do not think this is sufficient. Before I can hold a *purda-nashin* lady liable upon a covenant of such unusual stringency as the covenant now sued on, I must be satisfied that she had "good independent advice in the matter," and that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

I now come to the case against Dwarkanath. It appears that rule 436 is based upon Statutory Enactment.

Act XXV of 1841 —"An Act for amending the law concerning imprisonment for contempts of decrees or orders made by Courts of Equity"—an Act containing provisions similar to those to be found in 11 Geo. IV and 1 Wm. IV, c. 36, provided that when any person should have been directed by any decree or order in Equity of Her Majesty's Supreme Courts to execute any deed, and should have refused or neglected so to do, and had been detained in prison for two months for contempt, the Court might appoint the Master or Registrar to execute the deed.

Act V of 1855—" An Act to assimilate the process of execution on all sides of Her Majesty's Supreme Courts, and to extend and amend the provisions of Act XXV of 1841 "—provided that "whenever any person has been directed by any judgment, decree, sentence, or order of any of the said Courts to execute any conveyance, and such person has refused or neglected to obey such direction, or has evaded compliance therewith either by absenting [344] himself in order to avoid service of the judgment, decree, sentence or order wherein such direction is contained, or by any other means, it shall be lawful for the Court by which such direction has been given, whether the person disobeying or evading compliance with such direction is in custody or not, upon application made to the said Court for that purpose, and upon proof to its satisfaction of such default or evasion as aforesaid, to order or appoint the Registrar, Master, or other officer of the said Court to execute such conveyance."

Act XXV of 1841, in so far as it had not been repealed, and Act V of 1855, except as to the Straits Settlement, were repealed by Act VIII of 1868; but the repealing Act contained the following saving clause: "Nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised, or derived by, in, or from any enactment hereby repealed."

Act VIII of 1868 was repealed by Act XIV of 1870; Act XIV of 1870 by Act XII of 1873; Act XII of 1873 by Act XVI of 1874; and Act XVI of 1874 by Act XII of 1876; but all these Acts contain the same saving clause as is contained in Act VIII of 1868. The procedure laid down by Act V of 1855 is, therefore, still in force, and is defined in Rule 136 of Belchambers' Rules and Orders.

I am, therefore, of opinion that the order of the 8th of September 1885 was properly made, save as hereinafter mentioned, and that the Registrar had authority to execute the conveyance on behalf of Dwarkanath.

This leads me to the consideration of Mr. Pugh's objection that the form of procedure laid down in Rule 436 was not followed.

Rule 436 runs as follows: "If any person, certified by the Registrar to be a necessary party to a conveyance, be a minor, or otherwise under disability, or, being *sui juris*, shall neglect or refuse to execute the conveyance, an order may be obtained in the case of a person under disability, directing the Registrar to [346] execute the conveyance for him and in his name, and in other cases, directing the person to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name. The application shall be, on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified by the Registrar to be a necessary party, and that the conveyance has been approved of by such party or by the Registrar. Unless otherwise ordered, the costs of such application, in the case of a person under disability, shall be part of the costs of the sale, and, in other cases, shall be borne and paid by the defaulting party."

The order of the 8th of September 1885 was not "an order directing" Dwarkanath "to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name;" it was an order directing "the Registrar of the Court to approve of, and execute for, and in the name of the said defendant Dwarkanath Bysack, as one of the executors of the estate of Sreemutty Anundmoye Dassee, deceased, and also as one of her heirs and legal representatives, the conveyance of the said house and premises No. 22, Machooa Bazaar Street;" nor is there any evidence of the service of the order on Dwarkanath. Mr. Pugh argued that the making of the order in the words of the rule, its service upon the defendant, or his default to obey it, were conditions precedent to the authority of the Registrar to execute the conveyance.

On the other side it was contended that, if these were conditions precedent, which was not admitted, the defendant had waived their performance by his attorney's letter of the 29th August 1885.

I think that the plaintiff's contention must prevail.

I am, therefore, of opinion that the Registrar had authority to execute the conveyance on behalf of Dwarkanath. The next point to be considered is—Had the Registrar authority to covenant on behalf of Dwarkanath?

I am of opinion that he had no such authority. Mr. Sale puts his client's case thus—"The defendant was bound to give a conveyance with the usual covenants. The covenant sued [346] upon is a usual one; and the effect of the order upon the Registrar was to direct him to do what the defendant was bound to do."

No doubt where there is a contract for the sale of immoveable property, an agreement to make a good title is implied.

The Legislature of this country has distinctly recognised this principle in the Transfer of Property Act.

But in this case there was no agreement for sale, and I am unable to construe "conveyance" in Rule 436 as meaning "conveyance executed by virtue of an agreement for sale."

I think "conveyance" in Rule 436 means such an instrument as may be necessary to transfer *A's* estate, if he has any, to *B*.

In the result then, I am of opinon that the suit must be dismissed as against Dwarkanath with costs.

There must be a decree against Amrita Lal and Surendra Lal for Rs. 4,900. I arrive at this sum in this way: the plaintiff gave Rs. 7,000 for the premises, he sold the portion of which he was not dispossessed for Rs. 3,785,

the difference between these two sums is Rs. 3,215; I add to this Rs. 1,188 paid to Baboo Preo Nath Bose for costs in the suit brought by the Mullicks, Rs. 70 paid to Baboo Gonesh Chunder, and Rs. 437 interest on Rs. 3,215 at 6 per cent. from the 24th of September 1886, the date of dispossession, to this date. The Rs. 4,900 plus the costs on scale No. 1 will carry interest at 6 per cent. from date of decree until realization.

Suit decreed in part.

Attorney for the Plaintiff: Baboo *D. N. Dutt.*

Attorney for the Defendant Dwarkanath Bysack: Baboo *N. C. Bose.*

H. T. H.

NOTES.

[*See* C. P. C. 1908, O. 21 R. 34.]

[347] APPELLATE CIVIL.

The 14th February, 1889.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

Umasoondury Dassy............Judgment-debtor

versus

Brojonath Bhuttacharjee, Manager of the Estate of Baroda Prosad Chowdhry...........Decree-holder.*

Execution of decree—Transfer by operation of law—Civil Procedure Code (Act XIV of 1882), s. 232—Right of procedure—Execution under Bengal Act VIII of 1869 and Act VIII of 1885.

Upon the death of the full owner, the mother took out probate of a will in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked: but, while the mother was in possession of the estate as executrix, she sued and obtained a decree for rent under Bengal Act VIII of 1869.

Upon the application of the minor for the execution of the decree: *Held*, that the minor was in a position to execute the decree, his succession to the estate of his father being a succession or *transfer by operation of law* within the meaning of s. 232 of the Code of Civil Procedure.

Held, also, that the mode in which the decree was executed under the old Rent Act, Bengal Act VIII of 1869, was, in so far as it was a right at all that belonged to the judgment-creditor, not a private right, but a mere right of procedure, and the execution was therefore to be governed by Act VIII of 1885.

ON the death of one Horo Prosad Roy Chowdhry, his mother, Radhicaranee Chowdhranee, set up a will appointing her executrix of the properties left by him, and obtained probate thereof from the Court of the District Judge of the 24-Pergunnahs. Subsequently the will was disputed on behalf of Baroda Prosad Chowdhry, the minor son of Horo Prosad, and, on the 22nd December 1886, the High Court revoked probate thereof.

* Appeal from Order No. 462 of 1888, against the order of Baboo Radha Krishna Sein, Subordinate Judge of the 24-Pergunnahs, dated the 19th of September 1888.

On the 8th November 1887, Brojonath Bhuttacharjee was appointed manager of the estate of the minor Baroda Prosad by the Court of Wards.

While she was in possession of the estate as executrix, Radhicaranee Chowdhranee obtained a decree for rent under **[348]** Bengal Act VIII of 1869 against Umasoondury Dassy and others. This decree seems to have been confirmed by the High Court on the 22nd July 1885. On the 17th September 1887, Brojonath Bhuttacharjee applied to the Second Subordinate Judge of the 24-Pergunnahs for the execution of this decree. Two objections were raised to the application on behalf of the judgment-debtors. It was objected, in the *first* place, that the decree did not vest in the minor Baroda Prosad; and, *secondly*, that as the decree was made when Bengal Act VIII of 1869 was in force, execution must be governed by that Act and not by the new Rent Act of 1885. The Subordinate Judge held that under s. 232 of the Civil Procedure Code, the decree had vested in the minor, and that Brojonath Bhuttacharjee, as manager, could execute it. He also held that execution of the decree was governed by the new Rent Act of 1885. Accordingly the Subordinate Judge made an order for execution.

From this order the judgment-debtor, Umasoondury Dassy, appealed to the High Court.

Baboo *Nil Madhub Bose* and Baboo *Mohini Mohun Chuckerbutty* for the Appellant.

Baboo *Dwakar Nath Chuckerbutty* for the Respondent.

The **Judgment** of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

In this appeal two points have been raised and discussed at some length. It appears that, after the death of the full owner of the property, the mother took out probate of a will in which she was appointed executrix; that, no doubt, vested the property in her. Afterwards probate was revoked; and that, no doubt, took the estate out of her, and then the estate went to the minor heir. While she had the estate she sued and obtained a decree; and the minor now seeks to have that decree executed.

Against the execution two objections have been raised. *First*, that the minor can have no interest under the decree. The answer to that, we think, is that the lower Court was correct in holding that he had an interest. Section 232 of the Code of Civil Procedure says: "If a decree be transferred by assignment **[349]** in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it." We think that when the minor succeeds to the estate—which, up to the date it fell into his hands, had been in possession of the executrix—that there was a succession or transfer by operation of law within that section. We therefore think that the minor is in a position to execute the decree.

The next point is that the execution must be governed by Bengal Act VIII of 1869, and not by the present Rent Act, and that raises the question whether the mode, in which the decree was executed under the old Rent Act, was, in so far as it was a right at all that belonged to the judgment-creditor, a private right or a mere right of procedure. It is not contested that if it be a right of procedure and nothing more, the new Act applies. The old law is to be found in ss. 59, 60 and 61 of Bengal Act VIII of 1869. Section 59 lays down the procedure to be followed on sale of an under-tenure, and s. 61 closes that portion of it by stating when and when not the order of sale shall issue.

We think the right contended for by the appellant in this case, even if it existed, which we do not decide, was a mere right of procedure, and that the

Judge in the Court below was right in holding that the present execution proceedings must be governed by the procedure now in force.

The result is that the appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[*See* also (1897) 21 Mad., 356; (1900) 4 C.W.N., 785; (1904) 7 O.C., 78.]

[16 Cal. 349]

CRIMINAL REFERENCE.

The 4th March, 1889.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

The Empress

versus

Baikanta Bauri.*

False Evidence—Alternative Charges—Statement made to Police Officer investigating case—Penal Code (Act XLV of 1860), ss. 191, 193—Criminal Procedure Code (Act X of 1882) s. 161.

An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police officer investigating a case of arson, and the other having been made when he was examined as a **[350]** witness before the Joint Magistrate when the case was being inquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police officer was engaged, was to the effect that an inquiry was being made about the burning of a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge who disagreed with the verdict of acquittal: *Held*, that the verdict was right.

Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161† of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police officer was a statement in answer to questions put to the accused by the investigating police officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained.

Held, further, that in such a case it is also necessary for the prosecution to establish that the police constable was making an investigation under Chapter XIV of the Criminal Procedure Code.

---

* Criminal Reference No. 2 of 1889, made by R. F. Rampini, Esq., Sessions Judge of Burdwan, dated the 26th of January 1889.

†[Sec. 161:—Any police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Examination of witnesses by police.

Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.]

THIS was a reference made by the Sessions Judge of Burdwan under the following circumstances:—

On the 24th November 1888, in the course of a trial before the Joint Magistrate of Ranigunge, in which one Rambandhu Ghose and others were charged with mischievously destroying a house by fire, the accused in this case, Baikanta Bauri, and two other persons, named Dinonath Ojha and Kalpa Bauri, gave evidence, during the course of which they stated that they had not seen the house set fire to. The Sessions Judge, in his letter referring the case, stated that these three witnesses had previously stated to a head constable of police, who had inquired into the case against Rambandhu Ghose and the others charged with him, that they had seen the house set fire to and had given full details of the occurrence which they said they had witnessed.

The Joint Magistrate, having regard to the provisions of s. 161 of the Criminal Procedure Code under which all persons are bound to answer truly all questions put to them by a police officer relating to a case into which he is inquiring, being of opinion that the three witnesses had given false evidence either before the police officer or before him, committed them separately to the Court of the Sessions Judge to be tried on alternative charges of giving false evidence.

[351] Three separate trials were held by the Sessions Judge with the aid of the same jury, which resulted in the jury acquitting Baikanta Bauri and convicting the other two. The Sessions Judge disagreed with the verdict of acquittal, and referred this case to the High Court, giving his reasons for so doing in his letter of reference as follows:—

"I tried the case of Dinonath Ojha on the 24th instant, with the assistance of a jury, and the jury unanimously found the accused guilty of the offence with which he was charged. I proceeded, on the 25th instant, to try the case of Baikanta Bauri with the assistance of the same jury, and though the circumstances of his case were similar to those of Dinonath Ojha, and though the evidence in the two cases were exactly the same, except that in Baikanta Bauri's case one additional witness was examined by the prosecution, and no witness was cited for the defence, whereas one witness was cited on behalf of Dinonath Ojha, the jury acquitted the accused. I at first thought that the jury acquitted Baikanta Bauri, because I had sentenced Dinonath Ojha to six months' rigorous imprisonment, and it occurred to me that this punishment may have seemed to them to be excessive. But on my proceeding, later in the day, to try, with the assistance of the same jury, the case of the third accused person, namely, Kalpa Bauri, they unanimously convicted this man, though the evidence for the prosecution was the same as the evidence for the prosecution in the case of Baikanta Bauri, with the exception that there was one witness for the prosecution less.

"I can see no distinction between the cases of these three accused persons, two of whom the jury have found guilty and one of whom the jury have acquitted. I approve of the unanimous verdict of the jury in the cases of Dinonath Ojha and Kalpa Bauri, and entirely disagree with the verdict of the jury in the case of Baikanta Bauri. I can see no reason for it whatever, and consider it to be illogical and whimsical in the extreme. I submit the records of all three cases for the inspection of the High Court and recommend that the verdict of the jury in the case of Baikanta Bauri be set aside, and that like [352] Dinonath Ojha and Kalpa Bauri, he be convicted of an offence under s. 193, Penal Code."

No one appeared on the reference.

The charge framed against the accused together with the nature of the evidence admitted during the trial before the Sessions Judge, and the charge of the Sessions Judge to the jury, appear sufficiently from the **Judgment** of the High Court (MITTER and MACPHERSON, JJ.) which was as follows :—

The Sessions Judge of Burdwan, dissenting from the verdict of acquittal of the jury, has referred this case under s. 307 of the Code of Criminal Procedure. The charge against the accused was under s. 193 of the Indian Penal Code, of giving false evidence, and is to the following effect: "That he, on or about the 31st day of October 1888, at Purulia, Thannah Ranigunge, in the course of the inquiry into the case of arson of *Empress* v. *Rambandhu Ghose and others*, before Anadinath Bundopadhya, head constable of outpost Faridpore, stated in evidence that he had seen Rambandhu Ghose set fire to the house, and that he, on or about the 23rd day of November 1888, at Bharra, Thannah Assensole, in the course of the inquiry into the case of arson—*Empress* v. *Rambandhu Ghose and others*—before the Sub-Divisional Magistrate of Ranigunge, stated in evidence: 'I did not see anybody set fire to the house. I was a mile off at home,' one of which statements he either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of the Court of Sessions."

The evidence that was given in this case does not show which of these statements is false, but the Sessions Judge is of opinion that the two statements are contradictory, that one of them must be false, and therefore that the accused should be found guilty under s. 193 of the Indian Penal Code. Now the statement made by the accused on the 31st day of October 1888 was made before one Anadinath Bundopadhya, head constable of an outpost called Faridpore. It appears to us that the Sessions Judge, in his charge to the jury, has not at all referred to the question whether, if this statement be false, the accused would be guilty of giving false evidence under s. 193. In his charge to the [353] jury he says: "The jury had therefore to consider (1) whether he had made such a statement before the head constable; (2) whether he had made such a statement before the Joint Magistrate; and (3) whether the two statements were so contradictory as that one or other of them must be false, and both could not be true." Then, in another part of his charge, he says: "I then said on this evidence the jury must make up their minds on the three points previously alluded to. If they believed the witnesses and thought the two statements said to have been made by the accused were directly contradictory, so that both could not be true, the jury would be justified in convicting him under s. 193." It seems to us that the Sessions Judge has overlooked a very important point in the case, viz., accepting that the statement made before the head constable was untrue, whether the accused could be found guilty of giving false evidence under s. 193. Section 193 says: "Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." Now it is evident that the statement before the head constable, if it at all comes within the section, must fall within the last part of it, viz., "whoever intentionally gives or fabricates false evidence *in any other case*, shall be punished with imprisonment of either

description for a term which may extend to three years, and shall also be liable to fine." Section 191 of the Indian Penal Code says: "Whoever, being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence." Now the question is whether in this case the statement before the head constable was such as would bring it within the definition of false evidence [354] given in s. 191 of the Indian Penal Code. The answer to this question will depend upon the construction we put s. 161 of the Code of Criminal Procedure. The second paragraph of that section declares that a person examined by a police officer under the provisions of it "shall be bound to answer truly all questions relating to such case put to him by such officer." Before an accused person can be held guilty under s. 193, it is, therefore, necessary that it should be shown by the evidence that the statement which is set out in the charge was a statement in answer to questions put by the investigating police officer to the accused. That this statement was made in answer to any question put by the investigating police officer is not established by any evidence. The head constable before whom this statement was made only says: "I examined the accused Baikanta Bauri as a witness in that case. He came to the outpost with the complainant. I examined him on the 31st October. I wrote down what he said. I wrote down exactly what he said. I produce the record of his statement, Exhibit C." But he does not say that this statement, viz., Exhibit C, was in answer to any questions put by him to the accused. There is no other witness to establish that fact. That being so we cannot say that the statement in question is covered by paragraph 2 of s. 161 of the Code of Criminal Procedure. It is true that the record of the statement is headed: "On being questioned said;" but that would be no evidence of the fact that the accused was questioned and in answer to a question the statement was made, until that fact was proved by oral evidence. The statement in question is therefore one which upon the evidence we find was made by the accused to the head constable, Anadinath Bundopadhya. Upon the establishment of this fact alone, without any proof that the statement was in answer to questions put by the head constable, we are of opinion that the accused cannot be convicted of giving false evidence under s. 193 even if that statement be proved to be false. This is the main ground upon which we think that the verdict of acquittal is correct, but we desire also to point out that the evidence in this case is very meagre upon another point which it was necessary for the prosecution to establish, viz., that the aforesaid head constable. Anadinath Bundopadhya, was making [355] an investigation under Chapter XIV of the Criminal Procedure Code. The charge, set out above, states that this statement before the head constable was made in the course of an inquiry in a case of arson of *The Empress* v. *Rambandhu Ghose and others*. A case of arson is certainly a cognizable case; but that Anadinath Bundopadhya was making an inquiry under Chapter XIV, when the statement in question was made, and that the case in which that inquiry was being made was a case of arson, is not at all clearly established by the evidence recorded in the case. All that the witnesses who speak upon that point say, is that an inquiry was being made in the case of *Buloram Roy* v. *Rambandhu Ghose* about the burning of a house. This evidence is not in our opinion sufficient to show that the inquiry was being made into a cognizable case, viz., arson. We are, therefore, of opinion that the verdict of the jury was right. We therefore acquit the accused of the charge framed against him and direct his release from custody.

H. T. H. — — *Acquittal upheld.*

NOTES.

[This judgment proceeded on the insertion the word '*truly*' in the Criminal Procedure Code 1882 sec. 161 (2). Similar judgments were given in (1883) 8 Bom., 216; (1884) 10 Cal., 405; (1887) 11 Bom., 659; (1892) 15 All., 11; (1893) 13 A. W. N., 124. But in the Criminal Procedure Code of 1898 this word was omitted, restoring the previous law, see (1907) A.W.N., 24: (1908) 4 A. L. J., 811; (1908) P. R., 27; 23 Mad., 544; 7 Cal., 121 (which was under the Cr. P.C., 1872 where the word '*truly*' did not find place).

As regards liability under I.P.C., ss. 202, 203, see 7 A.L.J., 1150.

As regards the mode of holding inquiry under sec 161, *see* also 33 Cal., 1023]

[16 Cal. 356]

APPELLATE CIVIL.

The 14th January, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE GHOSE.

Gour Sundar Lahiri............Defendant

versus

Hem Chunder Chowdhury............Plaintiff.

Gour Sundar Lahiri............Defendant

versus

Hafiz Mahomed Ali Khan.......... Plaintiff.*

Civil Procedure Code, 1882, s. 244 - Representative of judgment-debtor --Purchaser at execution sale--Private Purchase—Limitation Act, 1877, Art. 179—Application not in accordance with law--Application for execution by Benamidar— Purchase pendente lite.

The defendants Nos. 2, 3 and 4 were, together with one *M*, the owners of certain immoveable property, including two mehals, Olipore and Ekdhala, subject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending one *K D* took out execution of a money decree which he had obtained in 1871, against defendant No. 3, and put up for sale the mehal Olipore which was purchased by the father **[356]** of the plaintiff *A*, who eventually obtained possession of it through the Court. The plaintiff *B* purchased privately the mehal Ekdhala from the mortgagors and from *M*, some time after the date of the decree on the mortgage. That decree was in course of execution when the mortgagee died and his estate came into the hands of the Administrator-General, who, on 13th August 1878, sold the decree to *G*, defendant No. 1. After this sale several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice to the defendants under s. 232 of the Civil Procedure Code, *G*'s name was substituted as decree-holder, and execution was taken out against the mortgaged property including Olipore and Ekdhala. The plaintiffs each claimed the mehal they had respectively purchased, but their claims were disallowed.

In suits brought by the plaintiffs for a declaration of their right to hold the properties free of the mortgage, the Court found that *G* was only a *benamidar* so far as his purchase of the mortgage decree was concerned. *Held*, the plaintiff *A*, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors, the mortgagors, within the meaning of s. 244 of the Civil Procedure Code; but the case was different

* Appeals from Original Decrees, Nos. 103 and 104 of 1887, against the decrees of Baboo Hemango Chunder Bose, Subordinate Judge of Mymensingh, dated the 26th of February 1887.

with respect to plaintiff *B*, who claimed by private purchase, and must be considered the representative of the judgment-debtors within the meaning of that section.

Dinendronath Sannyal v. *Raj Coomar Ghose* (L. R., 8 I. A., 65; I. L. R., 7 Cal., 107), *Anundmoyee Dossee* v. *Dhonendro Chunder Mookerjee* (14 Moore's I. A., 101; 8 B. L. R., 122), and *Lalla Prabhulal* v. *Mylne* (I. L. R., 14 Cal., 401), referred to :

Held, also, that *G* being merely a *benamidar*, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code, were not applications made in accordance with law, within the terms of Art. 179 of the Limitation Act, 1877, so as to prevent the operation of the law of limitation. Execution of the mortgage decree was, therefore, barred.

Abdul Kureen v. *Chukhun* (5 C. L. R., 253), *Denonath Chuckerbutty* v. *Lallit Coomar Gangapadhya* (I. L. R., 9 Cal., 633; 12 C. L. R., 145), and *Mis. Ap.* 453 of 1885 (Unreported) followed.

Purna Chandra Roy v. *Abhaya Chundra Roy* (4 B. L. R., App. 40) and *Nadir Hossein* v. *Pearoo Thovildarinee* (14 B. L. R.. 425), dissented from.

The mortgage decree having become inoperative, the plaintiff *A*, though a purchaser *pendente lite*, was no longer bound by it, and the defendant therefore was not entitled to enforce the mortgage as against him.

[357] *Appeal* 103.—In this case Hem Chunder Chowdhry, the plaintiff, claimed through Kali Chunder Chowdhry, the purchaser at a sale in execution of a decree against Kashi Chunder Bhaduri, defendant No. 3. The defendants Nos. 2 and 3, Juggut Chunder Bhaduri and Kashi Chunder Bhaduri, were brothers, and together with another brother, Mohesh Chunder Bhaduri, not a party to the suit, and defendant No. 4, the widow of another brother, formed a joint family, and Mohesh Chunder acted as their ammooktear or general agent. The Bhaduris owned, among other landed properties, two mehals, called, respectively, Olipore and Ekdhala. On the 25th September 1871, one Kripamoyee Dobia obtained a money decree against Kashi Chunder Bhaduri, defendant No. 3, in execution of which the mehal Olipore was put up for sale on the 21st June 1875, and purchased for Rs. 10,000, by Kali Chunder Chowdhry, the father of the plaintiff, who, on 26th September 1877, obtained possession of the property through the Court.

This purchase was made in the course of a suit in which, on the 30th July 1875, one Manson obtained a decree against the Bhaduris on a mortgage which included the mehals Olipore and Ekdhala. This mortgage decree was in course of execution when Manson died and his estate came into the hands of the Administrator-General, who, on 13th August 1878 (corresponding to the 29th Srabun 1285), sold the decree to Gour Sundar Lahiri, defendant No. 1, who was the brother-in-law of the defendants Nos. 2 to 4 and of Mohesh Chunder Bhaduri. After this sale several applications were made to execute the decree and for substitution of the name of the assignee, Gour Sundar Lahiri, for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of the assignee, until 18th July 1885, when, after notice to the judgment-debtor under s. 232 of the Civil Procedure Code, that substitution was made, and execution was taken out against the mortgaged property including the mehal Olipore. The plaintiff claimed that mehal, but his claim was disallowed, and the property ordered to be sold. The plaintiff, therefore, brought this suit to have declared his right to hold that property free of the mortgage.

[358] *Appeal* 104.—In this case, besides the above facts, it is only necessary to state that the suit related to the mehal Ekdhala which had been purchased by the plaintiff, Hafiz Mahomed Ali Khan, by private sale, from the

Bhaduri defendants, and from Mohesh Chunder Bhaduri, under deeds of sale dated 24th Falgoon 1284 (7th March 1878), and 5th Joisto 1285 (18th May 1878). This property had also been attached by Gour Sundar Lahiri under the mortgage decree, and the suit was brought after rejection of the plaintiffs' claim to that property, to have it declared that it was not liable to sale under that decree.

The issues raised, so far as they are material to this report, were to the following effect: Whether or not the suits will lie; whether or not the mortgage decree sought to be executed was barred by limitation; whether or not the plaintiff in appeal 103 purchased with notice of the mortgage; whether or not the purchase of the mortgage decree by the defendant No. 1 was *benami* for defendants Nos. 2 to 4 and collusive; and whether or not that decree bound the plaintiffs.

The Subordinate Judge gave the plaintiff a decree in each suit.

The defendant appealed to the High Court.

Mr. *H. Bell*, Mr. *B. Chuckerbutty* and Baboo *Grija Sunkur Mozumdar* for the Appellant.

Mr. *Evans*, Baboo *Srinath Das* and Baboo *Joyesh Chunder Roy* for the Respondents.

The cases cited and arguments appear sufficiently in the **judgment** of the Court (PRINSEP and GHOSE, JJ.) which was as follows: -

These two cases were tried together by the lower Court and also by us in appeal by consent of parties, because in some respects the same facts arise in both of them. In both cases the plaintiffs, as purchasers from mortgagors, seek to avoid the effect of the same mortgage decree as affecting their properties. The plaintiffs in each case hold separate properties; but the main points raised in the cases and the circumstances upon which their titles depend are in some respects similar. The mortgage decree was obtained on the 30th July 1875 by one Manson. While that suit was **[359]** pending and before the decree was delivered, the share of one of the three mortgagors in a portion of the mortgaged property was attached in execution of a money decree, and on the 21st July 1875, was, in execution of that decree, sold to Kali Chunder Chowdhry, the father of the plaintiff in Appeal No. 103. Possession was given to that purchaser, on the 26th September 1877, through the Court. The plaintiff, in the other case, bought privately some of the mortgaged properties from the three mortgagors and also from Mohesh, another member of the family, after the mortgage decree had been delivered. The positions of the two purchasers are, therefore, different both in respect to the nature of the purchases and the time during which they were made.

On the 13th August 1878 (that is, 29th Srabun 1285), the mortgagee having died and his estate being in the hands of the Administrator-General, the decree was sold by that officer to Gour Sundar Lahiri, defendant No. 1 in both these cases. Whether Gour Sundar Lahiri was the real purchaser or a purchaser representing others is one of the principal points for our decision in these cases. When the mortgage decree was sold, it would seem that it was then under execution. After this sale, several applications were made to execute this decree after substitution of the name of the assignee for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree or any order made for substitution of the name of the assignee. On the 18th July 1885, after notice to the judgment debtors, the name of Gour Sundar Lahiri was substituted for that of the original decree-holder, and proceedings in execution commenced by attachment

of some of the mortgaged properties. Claims were thereupon made by the two plaintiffs in the suits before us, but their objections were disallowed on the 3rd February 1886, the Subordinate Judge holding that the purchases made conferred titles subject to the mortgage, and were, therefore, inadmissible under s. 278, the claimants having only the right to redeem the mortgage by paying the amount due to the mortgagee. The two suits now before us were accordingly brought by these parties, the plaintiffs asking for decrees declaring their right to hold the properties **[360]** purchased by them free of the mortgage for various reasons, which will be presently considered, or for any other relief which the Court might think proper and just.

The Subordinate Judge has given both plaintiffs a decree.

In appeal, it is first contended that the plaintiffs have no right to sue by reason of s. 244 of the Code of Civil Procedure, inasmuch as they were representatives of the original judgment-debtor. The position of the two plaintiffs is entirely different so far as they are affected by the operation of this section. The plaintiff Hem Chunder Chowdhry (in appeal No. 103) is a purchaser in execution of a money decree against the mortgagors. He is, consequently, not a voluntary purchaser, and, as has been held by their Lordships of the Judicial Committee of the Privy Council, his title is not one of privity with the mortgagors, but in some respects adverse to them. We think, therefore, that he cannot be considered as a representative of the judgment-debtors, mortgagors, within the terms of s. 244. The cases to which we refer are *Dinendronath Sannyal* v. *Raj Coomar Ghose* (L. R., 8 I. A., 65 ; I. L. R., 7 Cal., 107), *Anundmoyee Dossee* v. *Dhonendro Chunder Mookerjee* (14 Moore's I. A., 101 ; 8 B. L. R. 122) ; and we may also refer to the case of *Lalla Prabhulal* v. *Mylne* (I. L. R., 14 Cal., 401). Mr. *Bell*, for the appellants, however, contends that, inasmuch as the plaintiffs purchased *pendente lite*, and are therefore bound by the mortgage decree, they are similarly bound, without being formally placed on the record or receiving any notice of the proceedings taken in execution, in all proceedings up to the satisfaction of the decree. He particularly refers to the order of the 18th July 1885, under which the name of the purchaser of the mortgage decree, Gour Sundar Lahiri, was placed on the record under s. 232 as assignee of the decree. It is contended that a notice under s. 232 to the judgment-debtors is binding on a purchaser *pendente lite*, and that, consequently, the order so passed precludes the plaintiff from bringing a suit to contest the validity of that mortgage. It has already been stated why we consider that in Appeal No. 103 the plaintiff is not the representative **[361]** of the judgment-debtor within the terms of s. 244. In this particular instance, there are, however, other reasons which, in our opinion, prevent us from holding that he as well as the plaintiff in the other case was bound by the terms of that order.

The proceeding in execution then before the Courts cannot, in our opinion, be regarded as a *bona fide* proceeding. Gour Sundar Lahiri was, in our opinion, not the real purchaser of the mortgage decree, but was only a name representing others, viz., the judgment-debtors, and possibly Mohesh Bhaduri, their brother. Whether the transaction was one including only the judgment-debtors or also Mohesh Bhaduri is not material for the purposes of deciding this matter. It is sufficient to say, for reasons which will be presently given, that we consider that the purchase by Gour Sundar Lahiri was not a transaction for his own benefit, but for the benefit of the judgment-debtors. In this view, the application of Gour Sundar Lahiri—that his name should be substituted for that of the decree-holder as assignee of the decree under s. 232, and asking the Court to pass an order for such substitution—was a sham. It

amounted to the judgment-debtors asking the Court for service of a notice on themselves. If the real position of the parties had been made known to the Subordinate Judge, there can be no doubt that he would have refused to recognize such an assignment or to issue the notice required by s. 232. We, accordingly, hold that the plaintiffs are not precluded in these suits from questioning the validity of the order passed under s. 232.

It now becomes necessary to consider, first, the evidence regarding the character of the purchase made by Gour Sundar Lahiri of the mortgage decree, and next, how far the execution of that decree as against the plaintiff is barred by limitation. The evidence of Gour Sunder himself is most important as showing the nature of his purchase. He is, no doubt, a man of insignificant means, but it is not improbable that he had sufficient money, but not much more than sufficient, to have bought this decree. He is a relation of the judgment-debtors, and admits that he is perfectly ignorant of the nature of his purchase; that he has taken no steps to make himself acquainted with what he purchased; that he delayed several years to take any real steps to reap any [362] benefit from his purchase; and, lastly, that even now he is not prepared to execute his decree against the mortgagors. He also admits that he has taken very little interest in defending these suits. All these, we are asked to believe, are the acts of one who, even if he could have found means to purchase a mortgage decree, undoubtedly would have left to himself very little other money after such a purchase. We have next the evidence of mookhtears who were consulted in matters connected with this purchase and with proceedings taken in execution of the decree after the purchase. The principal person employed, Janoki Nath Bose, distinctly declares that he never acted for or was consulted by Gour Sundar Lahiri; that the persons with whom he was in communication throughout were the mortgagors or some one of them, or Mohesh, their brother, acting on their behalf. There has been much argument addressed to us regarding the order of the Subordinate Judge, admitting, as evidence in this case, certain letters purporting to have been written by Mohesh Bhaduri to this witness. Independently of those letters, we think there is ample evidence to show that Gour Sundar Lahiri was not the actual purchaser of the mortgage decree, and that the Bhaduris, either the mortgagors or the mortgagors with Mohesh, their brother, were the actual purchasers and were the only persons interested in the purchase. There is also evidence, independently of these letters, to show that Mohesh, a member of the family of the mortgagors, has acted on behalf of the other members, the mortgagors, in all these transactions. Upon this ground we think that the letters would be admissible as evidence. But independently of the evidence of these letters, as has been already stated, there is ample evidence on the record to show that Mohesh acted on behalf of the mortgagors, and that Gour Sundar was in no way concerned in the purchase except in regard to the use of his name in the proceedings in execution. For these reasons we hold that the purchase by Gour Sundar Lahiri was a matter of fact a *benami* purchase. That being so, the applications made in his name, in August and December 1880, were not applications made in accordance with the law within the terms of Art. 179, Sch. II of the Limitation Act of 1877. We follow the opinion expressed in regard to this section by [363] the learned Judges in the cases of *Abdul Kureem* v. *Chukhun* (5 C. L. R., 253), and *Denonath Chuckerbutty* v. *Lalit Coomar Gangapadhya* (I. L. R., 9 Cal., 633; 12 C. L. R., 145), and also in an unreported case (Mis. App. 453 of 1885) decided by WILSON and PORTER, JJ., on the 20th April 1885. We have been referred to two cases of an earlier date—*Purna Chundra Roy* v. *Abhoya Chunder Roy* (4 B. L. R., App., 40), and *Nadir Hossein* v. *Pearoo Thovildarinee* (14 B. L. R., 415) in which a contrary opinion was expressed. But we prefer

to follow the rule more recently laid down by two Benches of this Court, which is in accordance with the opinion which we ourselves entertain. We, accordingly, hold that a *benami* purchaser is not competent to make an application under s. 232, and that, consequently, the applications made in August and December 1880 were not applications under the Code of Civil Procedure in accordance with law, so as to prevent the operation of the ordinary law of limitation. It is admitted that had it not been for these applications, the subsequent application for execution in 1885 would have been barred. The result, therefore, is that in respect of Appeal No. 103, although the plaintiff bought in execution of a money decree *pendente lite*, while proceedings under the mortgage were being taken, and he is, therefore, bound by the decree subsequently passed, that decree has become inoperative by reason of the law of limitation, and therefore the defendant is not entitled to enforce the mortgage as against the plaintiff. The plaintiff will, consequently, receive a declaratory decree to that effect.

The other case stands on different grounds. The plaintiff purchased from the three mortgagors and Mohesh one of the properties previously mortgaged as mentioned in Sch. II of the mortgage decree, after that decree had been delivered. The conveyances are dated 12th March and 18th May 1878. He also advanced Rs. 10,000, on the 13th June of the same year, to the same four persons upon mortgage of another property comprised in that decree. He is, therefore, not only bound by the mortgage decree, but, by reason of his having purchased privately from the mortgagors, must be regarded as in privity **[364]** with them, and as their representative within the terms of s. 244. He would clearly not be entitled to bring a separate suit, such as he has now done, were there not circumstances in his case which, in our opinion, establish fraud so as to entitle him to relief, and place the case beyond the operation of s. 244.

[Their Lordships then went into the circumstances alluded to, which are not material to this report, and concluded] : –

We agree, therefore, with the Subordinate Judge that the plaintiff is entitled to a decree declaring that the mortgage decree cannot be executed in respect to Ekdhala which has been purchased by him.

The appeals will, therefore, be both dismissed with costs.

J. V. W. *Appeals dismissed.*

NOTES.

[On the point as to whether the purchaser was a representative within sec. 244 C. P. C. 1882 (C. P. C., 1908 sec. 47) this was overruled in (1896) 24 Cal., 62 ; see the notes thereto in the 'Law Reports Reprints.' In (1892) 20 Cal., 388 this case was distinguished and 4 B. L. R., Ap. 40; 14 B. L. R., 425 were followed, as regards benamidar's application.]

[16 Cal. 364]

APPELLATE CIVIL.

The 4th February, 1889.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BANERJEE.

Hari Gobind Adhikari............Plaintiff

versus

Akhoy Kumar Mozumdar and others, minors, by their mother and guardian Chandratara, and others............Some of the Defendants.[1]

Parties—Right of suit—Benamidar—Suit for declaration of title to, and for possession of, immoveable property—Disclaimer of real owner.

In a suit for a declaration of the plaintiff's right by purchase to, and for possession of, certain immoveable property, it was found on the evidence that the plaintiff was merely a *benamidar* for one of the defendants, and had no right to the property. That defendant in his evidence disclaimed any title to the property. *Held*, that the plaintiff had no right to sue, being a mere *benamidar*, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, was sufficient to enable the plaintiff to maintain the suit when instituted, or to entitle him to have the real owner added as a co-plaintiff.

Prosunno Coomar Roy Chowdhry v. *Gooroo Churn Sein* (3 W. R., 159) followed.

THE plaintiff in this case sued to obtain possession of a piece of land, and certain houses, orchards and tanks appertaining to it, to which he alleged he had acquired a title by purchase from one Radha Kanto Bhowmik, defendant No. 13.

[365] The property in suit in 1853 formed part of a revenue-paying estate belonging to one Kristo Churn Mozumdar. That estate was sold for arrears of revenue, and the purchaser granted to Kristo Churn a permanent lease of the portion in dispute, which he held as his *khanabari*. Subsequently, in 1863, Kristo Churn went to live in another district, leaving one Brindabun Mozumdar in charge of the *khanabari*.

The plaintiff's case was that the property was sold in 1877 by Kali Komal Mozumdar, the son of Kristo Churn, to Radha Kanto Bhowmik, who, in his turn, sold it to the plaintiff in 1883, and that the defendants opposed him in obtaining possession of his purchase. According to the defendants Nos. 1 and 2, the property became the ryoti-holding of Brindabun Mozumdar from whom they acquired it under a bill of sale in 1873, and they had since been in possession of it. The defendant No. 11 disclaimed having any interest in, or title to, the property.

The suit was dismissed in the first Court on the ground that the purchases, by both Radha Kanto Bhowmik and by the plaintiff, were *benami* transactions, and that the suit was therefore not maintainable. That Court found that Radha Kanto's purchase was *benami* for his employers Shib Chunder Aich and his brother, and that the plaintiff's purchase was *benami* for Dinobundhu Nundi, defendant No. 11.

An appeal by the plaintiff was dismissed by the Judge, who agreed in the view taken by the first Court.

[1] Appeal from Appellate Decree, No. 73 of 1888, against the decree of D. Cameron, Esq., Judge of Tipperah, dated the 23rd of August, 1887, affirming the decree of Baboo Nil Madhub Bandopadhya, Subordinate Judge of Tipperah, dated the 24th of July, 1886.

The plaintiff appealed to the High Court on the ground (among others) that the finding that his purchase was *benami* for the defendant No. 11, was not sufficient to disentitle him from maintaining the suit, the alleged *benamidar* being a party defendant, and having deposed to the effect that he has no interest in the property in dispute.

Baboo *Hari Mohun Chukrabati* for the Appellant.

Baboo *Baikant Nath Das* for the Respondents.

The cases cited and arguments sufficiently appear in the judgment of the Court (PRINSEP and BANERJEE, JJ.) which was delivered by

Banerjee, J.—This is an appeal by the plaintiff against the judgment of the lower Appellate Court, affirming that of the Court **[366]** of first instance, which dismissed the plaintiff's suit upon the ground that he had no right to maintain it, he being merely a *benamidar* for the real owner, defendant No. 11.

The objection urged in second appeal is that as defendant No. 11 is a party to this suit, and has disclaimed all interest in the subject-matter thereof, the defect in the framing of the suit and in the plaintiff's title is thereby cured. It is also contended upon the authority of the case of *Sitanath Shah* v. *Nobin Chunder Roy* (5 C. L. R., 102) that the Courts below ought, if necessary, to have made the defendant No. 11 a co-plaintiff with the appellant.

We do not think that these contentions are sound. The finding arrived at by the Courts below is that the plaintiff has no right to the property in suit, and is merely a *benamidar* for defendant No. 11. That being so, and his prayer in the plaint being for possession upon declaration of his right by purchase in respect of the property in suit, we do not see how the fact of the real owner having been made a defendant in the case can entitle the plaintiff to maintain this suit. Then as to the real owner's disclaimer in his deposition in this suit, we do not think that that is sufficient to give the plaintiff any right to maintain this suit. Such a right must have come into existence before the date of the institution of this suit. Now, the plaintiff does not allege that either by any bill of sale or by any virtual transfer from the rightful owner, the right to the property in suit has been vested in him. His case from the beginning was that he was the real owner, and that case has been found to be false. A statement by any party to the suit subsequent to the date of its institution cannot give the plaintiff a title. If any authority was needed for such a proposition, we might refer to the observations of the Judicial Committee in the case of *Amurto Lal Bose* v. *Rajonee Kant Mitter* (15 B. L. R., 10; 23 W. R., 214).

Then it has been contended that the case cited is sufficient authority in favor of the plaintiff, appellant. We do not think that that is so. That case is distinguishable from the present. That was a case upon a mortgage deed, and was between one of the parties to that deed, and the assignee of the other. It **[367]** does not appear whether in that case the beneficial owner was made a defendant originally; and this Court, without deciding the question whether the *benamidar* could maintain the suit, simply remanded the case to be decided after making the beneficial owner a co-plaintiff. As pointed out by the Judicial Committee in *Gopeekristo Gossain v. Gungapersaud Gossain* (6 Moore's I. A., 53, at p. 72) a distinction has sometimes been made between suits upon bonds by *benamidars* and suits for recovery of land upon title; and in this latter class of cases, it has always been held that a *benamidar* is not entitled to maintain the suit. To this effect is the authority of the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (3 W. R., 159)—a case which is not dissented from but only distinguished by Sir Richard Couch

in the late case of *Ram Bhurosee Singh* v. *Bissesser Narain Mohata* (18 W. R., 454). And to the same effect is the case of *Fuzeelun Beebee* v. *Omda Beebee* (10 W. R., 469; 11 B. L. R., 60 note). As we are unable to distinguish this case from the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (3 W.R., 159), and as the other cases that are cited by the appellant are clearly distinguishable from the present, we must hold as well upon reason as upon authority that the conclusion arrived at by the Courts below is correct. We therefore think that the judgment of the Lower Appellate Court ought to be affirmed, and this appeal dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[In Calcutta it has been held that a *benamidar* cannot sue for in respect of immoveable property **(1914) 24 I. C., 801 (Cal.)**; (1902) 30 Cal., 265; 7 C. W. N., 229; (1897) **25 Cal., 98**; (1898) 25 Cal., 874; 11 C.L.J., 47; 9 I. C., 487; 7 I. C., 218, except in the case of **mortgages**; **(1913) 19 C. L. J., 193**; 24 Cal., 34; 24 Cal., 644; 11 C. L. J., 47 (contracts); *see* also 12 C. W. N., 409.

In 30 Mad., 245, the question was held to depend on the right of suit under the general law; and that a benamidar *might* but need not be a *trustee*. *See* also 15 Mad., 54; 19 Mad., 154; 20 Mad., 495; 21 Mad., 30; 28 Mad., 505; 30 Mad., 245: 8 M. L. J., 377.

In 18 All., 69, the suit was held maintainable; so also in 22 Bom. 672; 820.]

[16 Cal. 367]

APPELLATE CIVIL.

The 31st January, 1889.

PRESENT.

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Jogdamba Koer............Plaintiff

versus

Secretary of State for India in Council............Defendant.*

Hindu Law, Inheritance—Brother's widow—Survivorship—Benares School of Law.

According to the law and usage of the Benares School of Hindu Law, a brother's widow has no place in the line of heirs; nor is she entitled to succeed by right of survivorship.

[368] *Bhuganee Daiee* v. *Gopaljee* [(1. S. D. A., N.-W. P. (1862), 306)] not followed; *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315) followed in principle.

THIS was a suit instituted by one Jogdamba Koer against the Secretary of State for India in Council to recover possession of certain moveable and immoveable properties which originally formed the joint family property of her husband, Ramlall Singh, and his brother Jankisaran Singh, which, on Ramlall's death, became, by the principle of survivorship, the exclusive property of Jankisaran, and passed, on the death of the latter, to his daughter Sahodra, and which, on Sahodra's death, has been taken possession of by the Secretary of State for India in Council on behalf of the Crown under a claim by escheat. The plaintiff alleged that up to the time of Sahodra's death, in April 1884, she was living as a member of the joint family formerly represented by her husband and his brother, and that on Sahodra's death, as the sole surviving member of that family, she became entitled to the properties in suit by survivorship; and

* Appeal from Original Decree, No. 65 of 1887, against the decree of Baboo Nilmoni Das, Subordinate Judge of Patna, dated the 7th of February 1887.

further that, as a *gotraja sapinda* of Jankisaran Singh, she was also entitled to the same by the ordinary law of inheritance.

The defendant denied the plaintiff's title, disputed the correctness of the list of the moveables claimed, and alleged that the plaintiff was entitled to maintenance only, and that the same was offered to her, but refused.

The Subordinate Judge dismissed the plaintiff's suit, holding that she was not entitled to take the properties claimed, and that the same had escheated to the Crown.

The plaintiff appealed to the High Court.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Saligram Singh* for the Appellant.

The Senior Government Pleader (Baboo *Annoda Persad Bannerjee*) for the Respondent.

Mr. *Evans*.—The plaintiff is not excluded entirely from the line of heirs; the rule excluding females is a rule of partial exclusion only, and postpones merely a female's right in favour of males; she would come in after all male relations, cognates or agnates. The [369] following cases show that her exclusion is only partial: *Kutti Ammal* v. *Radhakristna Aiyan* (8 Mad. H. C., 88) and *Lakshman Ammal* v *Tiruvengada* (I. L R, 5 Mad, 241). The question raised in *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315) and in *Jullesur Kooer* v. *Uggur Roy* (I. L. R., 9 Cal., 725) was one of relative preference and not of total exclusion, and those cases do not, therefore, conclude the matter.

The rule on which total exclusion of females is based is not to be found in the *Mitakshara;* and the doctrine that those only who are named in special texts inherit is incorrect, as a paternal great-grandmother is entitled to inherit as a *gotraja sapinda* under the *Mitakshara*. A son's widow inherits after the grandmother—see *Balambhatta's Commentaries* on the *Mitakshara*. Widows of *gotraja sapindas* are entitled to inherit—see *West and Bühler's Digest of Hindu Law*, 2nd Edition, pp. 77-78. In *Bhugance Daiee* v. *Gopaljee* [(1 S. D. A., N.-W. P. (1862), 306)] the widow of a nearer *gotra sapinda* inherited in preference to a more remote male *gotra sapinda*. The appellant, if not entitled to succeed by right of inheritance, would be entitled to claim the properties by right of survivorship, as she is the last survivor of the family to which the properties belonged. The Hindu Law does not favour escheat, as a " preceptor " and a " pupil " come in between the ordinary heirs and the Crown.

Baboo *Annoda Persad Bannerjee* for the respondent.—Only those females specially mentioned in the texts are entitled to inherit—see *Viramitrodaya*, *G. C. Sarkar's Translation*, p. 244. The exclusion of females is a total exclusion —see *Mandlick's Vyavahara Mayukha*, pp. 360-361; *Sarbadhikari's Tagore Lectures*, p. 440. As to a son's widow inheriting after the grandmother—see *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315). Even a grandmother is excluded from the line of heirs—see *Smriti Chandrika*, ch. XI, vs. 5, s. 3, 6. In *Strange's Hindu Law*, Vol. I, p. 146, inheritance of females is named as exceptional—see also *Strange's Hindu Law*, pp. 235, 240. A widow of a *gotraja* is not named as an heir in Macnaghten's list—see *Macnaghten's Pr. of Hindu Law*, pp. 35, 34; and it is distinctly affirmed that widows of *gotraja sapindas* are not heirs under the [370] Benares School—see *Mandlick's Vyavahara Máyukha*, pp. 357, 377; *Sarbadhikari's Tagore Lectures*, pp. 665, 673. As to the case-law on the subject, the case of *Lallubhai Bapubhai* v. *Cassibai* (I. L. R., 5 Bom., 110) shows that in Bengal and Madras women are incapable of inheriting unless named by special texts. *Soodeso* v. *Bisheshur Singh* [2 S. D. A., N.-W.P. (1864), 375] lays down that a brother's widow is not in the line of heirs—see also *Dibraj Koonwar* v. *Sooltan Koonwar* [1 S. D. A., N.-W. P,

(1862), 240]. Under the Benares School none but female expressely mentioned can inherit—See *Gauri Sahai* v. *Rukho* (I. L. R., 3 All., 45); *Jogat Narain* v. *Sheo Das* (I. L. R., 5 All., 311); *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315); and *Jullessur Kooer* v. *Uggur Roy* (I. L. R., 9 Cal., 725). The case of *Kutti Ammal* v. *Radhakristna Aiyan* (8 Mad. H. C., 88) is based upon a mistake in *Colebrooke's Translation of the Mitakshara*; and the decision of *Lakshman Ammal* v. *Tiruvengada* (I. L. R., 5 Mad., 241) is obiter as to the claim of the sister's sons. The right of inheritance of females entering the *gotra* by marirage, and acquired *sapindaship* through their husbands is denied in *Mari* v. *Chinammal* (I. L. R., 8 Mad., 107). As to the widow's claim to succeed by survivorship—See *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315).

The **Judgment** of the Court (PETHERAM, C. J., and BANERJEE, J.), after stating the facts, as set out above, proceeded as follows:—

The plaintiff (appellant) contends that she is entitled to the properties in dispute as well by inheritance as by right of survivorship, and that, consequently, there can be no escheat. We shall consider these two grounds of the plaintiff's claim separately.

Upon the question of the plaintiff's title by inheritance, the learned counsel for the appellant conceded (and, we think, very properly conceded) that in the face of the decisions of this Court in the cases of *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315) and *Jullessur Kooer* v. *Uggur Roy* (I. L. R., 9 Cal., 725), he could not contend for the broad proposition that the plaintiff, as the widow of a *gotraja sapinda* of Jankisaran, was entitled to a place in the order of succession **[371]** immediately after her husband. What he contended for was that, though the plaintiff may not have such a high place, she was not excluded from the line of heirs altogether; that the rule excluding females from succession was a rule of partial and not total exclusion, and merely postponed their rights in favor of males; that the proper position of the plaintiff was one after all male relations, whether agnates or cognates; and that the two decisions of this Court, referred to above, did not conclude the present question, as they had only to determine whether certain female relatives were entitled to succeed in preference to the male relatives who opposed them. And in support of the theory of partial exclusion or postponement of claims of female relatives, we were referred to two Madras cases: *Kutti Ammal* v. *Radhakristna Aiyan* (8 Mad. H. C., 88) and *Lakshman Ammal* v. *Tiruvengada* (I. L. R., 5 Mad., 241).

Now though the grounds upon which the two decisions of this Court, above referred to, are based, leave no room for the appellant's contention, yet, as the immediate question for decision was one of relative preference, and not of absolute exclusion of certain female heirs, those decisions cannot be held to conclude the present contention.

That being so, and there being the two Madras decisions in favor of that contention, it becomes necessary to examine the authorities bearing on the question now before us.

We shall consider these authorities under three heads: *first*, the original authorities; *second*, the opinions of later writers on Hindu Law; and, *third*, the decisions of Courts of Justice.

Under the first head, if it were necessary to refer to the remoter sources of the Hindu Law, we should find ample authority for the total exclusion of women from inheritance. There is the well-known text of the *Taittiriya Yajur Veda Sanhita* (*Kanda VI, Prapathaka V, and Anuvaka VIII*): "Therefore females are feeble and unworthy of inheritance." Then there is a passage of the *Nirukta* (*Vedic Glossary*) to this effect: "Therefore it is known that a male

is the taker of wealth, and that a female is not a taker of wealth"—(see *Roth's Edition of Yaska*, p. 53 and [372] *Satyavrata, Samasrami's Edition*, Vol. II, p. 259; and there is the *Sutra or Aphorism of Baudhayana* (*Prasna II, Kanda* II, 27): "Nor (ought she) to inherit. For the Veda (says) "women are not considered to have a right to use sacred texts, nor to take the inheritance," which forms the basis of the law on the point. Nor is this exclusion of females a feature peculiar to Hindu Law. The exigencies of primitive society stamped that feature more or less upon ancient law everywhere. In the present instance the text itself contains the reason for the rule it lays down. It says women are feeble; and, therefore, unworthy of inheritance. But we need not go behind works like the *Mitakshara* and the *Viramitrodaya*; our duty being, as the Judicial Committee point out in the case of the *Collector of Madura* v. *Moottoo Ramlinga Sathupathy* (12 Moore' s. I.A., 397), not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which we have to deal, and has there been sanctioned by usage. We shall, accordingly, confine our attention to the consideration of the *Mitakshara*, the *Viramitrodaya*, the *Vaijayanti*, and the *Commentaries* on the *Mitakskara* by *Viseswara* and *Balambhatta*, these being the leading authorities at the present day of the Benares School of Law, which is the law governing this case; and we shall incidentally consider the *Vyavahara Mayukha*, the *Smriti Chandrika* and the *Dayabhaga* and the *Vivada Chintamani*, which supplement the *Mitakshara* in the Maharastra, the Dravida and the Mithila School.

The *Mitakshara* lends no direct support to the appellant's contention. It divides the remoter heirs after the brother's son into three classes (ch. II, s. 1, v. 2, 3): (1) the *gotrajas* (gentiles); (2), the *bandhus* (cognates); (3), certain specified strangers, viz., the preceptor, the pupil, and the fellow-student in the Vedas; these classes come in the order in which they are named above; and, in default of all these, the King takes the property, except in the case of Brahmans [an exception which does not hold good in British India—See *The Collector of Masulipatam* v. *Cavaly* [373] *Vencata Narrainapah* (8 Moore's I. A., 500)]. Now the only class under which the appellant can come, is the first, she being a *gotraja* of her husband's brother in this sense, that she has by her marriage become of the same *gotra* as her husband and his brother; and she is also a *sapinda* of her brother-in-law according to the meaning assigned to that term in the *Mitakshara* (see the *Commentary* on *Yajnavalkya*, I, 52). But neither the brother's widow, nor the widow of any other collateral agnate, is mentioned as an heir. It might be contended that the text of *Baudhayana* cited above, upon which the exclusion of females is based (see *Viramitrodaya*, *G. C. Sirkar's Translation*, p. 198), is not referred to in the *Mitakshara*, and that the doctrine that only those female relatives are heirs who are named in special texts cannot be true, as the paternal great-grandmother, who is not named in any special text, is expressly mentioned as entitled to inherit as a *gotraja sapinda* in the *Mitakshara*. But to this the answer is that *Baudhyana* has been distinctly recognised as an authority by *Vijnaneswara* (see the *Commentary* on *Yajnavalkya*, I, 4, 5), and that though the paternal great-grandmother may not be named in any text, yet her case, and that of other female lineal ancestors, closely follow that of the grandmother, and are, upon reason and common sense, very different from that of the widows of collateral agnates. And it is singular that if *Vijnaneswara* meant to include them, he should not have named any one of them as coming in the line of heirs. The preponderance of reason seems to be in favour of the view that the *Mitakshara* is opposed to the appellant's claim. As the Privy Council observed in the case of *Lallubhai Bapubhai* v. *Cassibai* (I. L. R., 5 Bom., 110),

perhaps the most that can be said is that the *Mitakshara* is not inconsistent with the appellant's claim, if such claim is otherwise made out. One thing, however, is clear: the *Mitakshara* lends no support to the appellant's contention that though, in consequence of texts and decisions adverse to women's heritable rights, the appellant's claim has to be postponed in favour of every male heir, whether a *gotraja* or a *bandhu*, she may yet come in as an heir in default of all male *gotrajas* and [374] *bandhus*. If the appellant can come in as an heir at all under the *Mitakshara*, it must be as a *gotraja sapinda*; and if, therefore, her claim has to be postponed in favour of a *bandhu*, it must, so far as the *Mitakshara* is concerned, be postponed for ever. For it is only upon failure of *gotrajas* that *bandhus* inherit—(*Mitakshara*, ch. II, s. vi, 1).

Turning now to the *Viramitrodya*, which is a work of high authority in the Benares School, and is followed in matters left doubtful by the *Mitakshara* —see *Gridhari Lall Roy* v. *The Government of Bengal* (12 Moore's I. A., 448) —we find that the appellant's claim is distinctly negatived there. The author notices an interpretation of the vedic text cited above, according to which it has nothing to do with inheritance, but he considers that interpretation unsatisfactory, as it contradicts the text of *Baudhayana* " Hence," says he, " it cannot but be held that the text of *Sruti* does prohibit women's right of succession, inasmuch as otherwise the quotation (by *Baudhayana*) of that text as establishing the position would be unreasonable." —(*G. C. Sarkar's Translation*, pp. 198, 199.) And in another place, when speaking of succession to woman's property (with reference to which one would have expected the recognition of woman's heritable right to a larger extent) he says: " But the daughter-in-law, and others (of the sex), are entitled to food and raiment only; for the nearness as a *sapinda* is of no force when it is opposed by express texts. Since a text of the *Sruti* declares: 'Therefore women are devoid of the senses and incompetent to inherit: and a text of *Manu* founded upon it, says: 'Indeed the rule is that, devoid of the senses, and incompetent to inherit, women are useless.' The conclusion arrived at by the author of the *Smriti Chandrika*, *Haradatta* and other southern commentators, as well as by all the oriental commentators, such as *Jimuta Vahana*, is, that those women only are entitled to inherit whose right of succession has been expressly mentioned in the texts, such as—'the wife and the daughters also, etc.—but that others are certainly prohibited from taking heritage by the texts of the *Sruti* and *Manu*."—(*G. C. Sarkar's Translation*, p. 244.)

[375] As to this passage, WEST, J., in *Lallubhai Bapubhai* v. *Mankuvarbai* (I. L. R., 2 Bom., 441), observes that *Manu* has been misquoted here. But as the Judicial Committee pointed out in the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (12 Moore's I. A., 397), the question is not whether the authority of *Manu* has been misquoted, but whether the *Viramitrodaya* itself is an authority for the Benares School; and, as to this latter question, there can be no room for doubt or discussion. The truth is that commentaries and digests, like the *Mitakshara* and *Viramitrodaya*, owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors, and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression. This appears notably from the discussion in the *Mitakshara* in the section on the nature of property, where popular usage is referred to as one of the strongest points in favour of the author's doctrine, that the son's right in the father's property arises by birth (Ch. I, s. i, 23). Upon the present question,

the doctrine stated by *Mitra Misra*, which is supported by the general consensus of opinion of a number of approved commentators named by him, should be accepted as a correct statement of the prevailing law, even though the reasoning in support of the doctrine may be in some respects faulty.

It should be observed that the exclusion of females, that is laid down in the texts of the *Sruti* and of *Baudhayana*, and is affirmed by *Mitra Misra*, is a total exclusion from inheritance, and is not a mere postponement of their claims in favour of male heirs.

Viseswara in his commentary on the *Mitakshara*, the *Subodini* (see *Mandlick's Vyavahara Mayukha*, pp. 360, 361), and in the *Madana Parijuta* (see *Sarbadhikari's Tagore Law Lectuers*, p. 440) clearly excludes the widows of collateral *gotrajas*, when he does not name them in his detailed list.

The *Vaijayanti* places the widowed daughter-in-law immediately after the widow (a position which is directly opposed to [376] the *Mitakshara* itself), but it does not help the appellant very much, for it does not name the widow of any collateral *gotraja sapinda* in its list of *sagotra sapinda* heirs—(see *Sarbadhikari's Tagore Law Lectures*, p. 478).

Balambhatta lends some support to the appellant's claim by assigning to the son's widow a place immediately after the grandmother. But since the decision in *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315) that can no longer be considered good law as was conceded in the argument (see *Sarbadhikari's Tagore Lectures*, p. 481).

The *Vyavahara Mayukha* throws very little light upon the present question. WEST, J., in *Lallubhai Bapubhai* v. *Mankuvarbai* (I. L. R., 2 Bom., 447) observes : "If the foundation of the rights of widows of *gotrajas* under the *Mitakshara* is slender, under the *Mayukha* it may be called almost shadowy."

The *Smriti Chandrika* is decidedly opposed to the appellant's claim. It rigidly enforces the *Sruti* text, declaring the incompetency of women to inherit, and it excludes even the grandmother from the line of heirs (see Ch. XI, s. v, 3-6).

The *Dayavibhaga*, in discussing the widow's succession, explains the text of *Sruti* cited above in a sense which makes it perfectly harmless as regards the heritable rights of women– (see *Burnell's Translation*, p. 33).

This might lead one to think that the author was in favour of a liberal admission of females into the order of succession. But, when considering the succession of *gotrajas*, he gives us no indication in that direction, and his enumeration of *gotrajas* is almost the same as that in the *Mitakshara*. The truth seems to be that the author's interpretation of the *Sruti* was only an additional argument in favour of the succession of the widow whose right had come to be generally recognized ; but the author was not prepared to carry that argument to its consequences by admitting other females whose rights were not so recognised.

The *Vivada Chintamoni* is wholly silent on the point.

The above examination of the *Mitakshara* and the leading authorities that supplement it in the different schools shows that [377] none of them expressly mentions the brother's widow or the widows of *gotraja sapindas* as entitled to succeed ; only two of them, the commentary of *Ballambatta* and the *Dayavibhaga*, afford any ground in favour of 'their claim ; while two others, the *Viramitrodaya* and the *Smriti Chandrika*, expressly deny their right ; and the rest are either silent on the point or imply their exclusion by omitting to mention them in their detailed list of heirs. In this state of things, considering the weight attached to the *Viramitrodaya* in the Benares School, we think,

so far as the original works on Hindu law are concerned, the weight of authority is against the appellant's contention that she is in the line of heirs.

Turning now to the later writers, European and Indian, who have examined the subject, we find that, according to Sir Thomas Strange, the instances in which females are allowed to inherit are deemed as exceptional, 'the general principle being that the sex is incompetent to inherit' (1 *Strange's Hindu Law*, 146). *Sutherland*, speaking of the daughter-in-law, says: "Nor does there exist any supposed case in which she could inherit" (2 *Strange's Hindu Law*, 235); and, in another place, speaking of the niece, he observes, "In the series of heirs the niece is nowhere enumerated, and my Pandit agrees with me that the estate of the deceased would escheat rather than descend to a niece." (2 *Strange's Hindu Law*, 240), *Macnaghten* does not name the widow of any collateral *gotraja sapinda* in his enumeration of heirs (*Principles of Hindu Law*, pp. 33, 34), nor does *Shama Charan* in the list given by him in the *Vyavastha Chandrika* (Vol. I, pp. 182, 204); while *Mayne's* (*Hindu Law*, para. 541), *Mandlick* (*Vyavahara Mayukha*, pp. 357-377), and *Sarbadhikari* (*Tagore Law Lectures*, pp. 665-673) distinctly affirm that the widows of *gotraja sapindas* are not regarded as heirs under the law of the Benares School. Against this view, however, there is the opinion of *West and Buhler* (*Digest of Hindu Law*, 2nd Ed., pp. 177, 178) that widows of *gotraja sapindas* are entitled to inherit under the *Mitakshara*; but that opinion has reference to the Mitakshara Law of the Bombay Presidency, and not to the law of the Benares School where the *Mitakshara* is supplemented by the *Viramitrodaya*.

[378] We come next to the most important class of authorities, the decisions of Courts of Justice.

In *Lallubhai Bapubhai* v. *Kassibai* (I. L. R. 5 Bom., 110), which is the leading case on the point in Bombay, while recognising the heritable rights of female *gotraja sapindas*, the Privy Council base that recognition not upon the *Mitakshara*, but upon the prevailing usage of the Bombay Presidency; and, with reference to the law of the other schools, the judgment of the Judicial Committee contains the following important observation: "According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of *Baudhayana*, which declares that women are devoid of the senses and incompetent to inherit. The same doctrine prevails in Benares; the author of the *Viramitrodaya* yields, though apparently with reluctance, to this text—(Ch. 3, Part 7.)"

In *Soodeso* v. *Bisheshur Singh*, S. D. A., N.-W. P. (1864) 375, the Sadr Court of the North-Western Provinces held that the brother's widow is not in the line of heirs. That is a case distinctly in point. In *Dilraj Koonwar* v. *Sooltan Koonwar*, S. D. A., N.-W. P. (1862) 240, a son's widow was held to be no heir under the *Mitakshara*. The Allahabad High Court in *Gauri Sahai* v. *Rukho* (I. L. R., 3 All., 45) held that none but females expressly named as heirs can inherit under the law of the Benares School, and that the father's sister's sons are entitled to succeed to the exclusion of the paternal uncle's widow, and the learned Judges observed: "We think it, however, unnecessary to discuss the question so fully argued in the judgment of the Bombay Court, whether the wife of a *gotraja sapinda* is to be held under the *Mitakshara* to be a *gotraja sapinda*? We are of opinion that looking to the *received* interpretation of the law, and the customary law prevalent in this part of India, none but females expressly named as heirs can inherit." And this view of the law is affirmed as correct by a Full Bench of that Court in *Jagat Narain* v. *Sheo Das* (I. L. R., 5 All., 311). Against these decisions there is only one case that

can be [379] cited on the other side, the case of *Bhuganee Daiee* v. *Gopaljee* [1 S. D.A., N.-W. P. (1862), 306]. In that case the widow of a nearer *gotraja sapinda* was allowed to succeed in preference to a more remote male *gotraja sapinda*. But the decision is based, not upon the right of inheritance, but upon the right by survivorship. The question, whether the plaintiff in this case is entitled to succeed upon this latter right, will be considered presently.

In the case of *Lalla Jatee Lall* v. *Doomanee Kooer* (W. R., Sp. No., 173), a Full Bench of this Court held that the step-mother is no heir under the *Mitakshara*. In *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315), after an elaborate examination of the authorities, MITTER and MACLEAN, JJ., came to the conclusion that, according to the law and usage of the Benares School, no females, except those expressly named as heirs, can succeed, and they, accordingly, dismissed the claim of the daughter-in-law on the ground that she was not in the line of heirs at all. And in *Jullessur Kooer* v. *Uggur Roy* (I. L. R., 9 Cal., 725) this Court disallowed the sister's claim to inherit upon the ground that, of female *sapindas*, only those that are specified by name as heirs can inherit according to the Mitakshara law.

It remains now to notice the Madras decisions. Neither of the two cases cited on behalf of the appellant is in point, as they both relate to the succession of the sister. But they were referred to in support of the argument that, though certain female relations are not entitled to succeed as *gotraja sapindas* or *bandhus* in preference to any male heir, yet they come in as heirs before the estate passes to any stranger; or, in other words, that the rule about exclusion of females is one of partial and not total exclusion, the claims of the excluded females being only postponed in favour of those of males. Now in the earlier of the two cases, that of *Kutti Ammal* v. *Radhakristna Aiyan* (8 Mad., H. C., 88), the decision in favour of the sister's right is evidently based upon a mistake in *Colebrooke's* translation of the *Mitakshara*. The learned Judges, after citing the case of [380] *Girdhari Lal Roy* v. *The Government of Bengal* (12 Moore's I. A., 448), and quoting the *Mitakshara* (Ch. II, s. vii, para 1), according to *Colebrooke's* translation, which runs thus: "If there be no relation of the deceased, the preceptor, or, on failure of him, the pupil inherits, by the text of *Apastamba*, 'If there be no male issue, the nearest kinsman inherits, or, in default of kindred, the preceptor" -observe: "It follows from the above not only that in regard to cognates is there no intention expressed in the law or to be inferred from it of limiting the right of inheritance to certain specified relationships of that nature, but that, in regard to other relationships also, there is free admission to the inheritance in the order of succession prescribed by law for the several classes, and that all relatives, however remote, must be exhausted before the estate can fall to persons who have no connection with the family." These observations would have been perfectly correct if the above passage of the *Mitakshara*, on which they are based, had been a correct translation of the original But that is not so. The word translated 'relations' is *bandhu*, and that rendered as 'kinsman and kindred' is *sapinda* in the original, and these are technical words very much restricted in their signification. There is, therefore, really no authority for the proposition that all relations, however remote, must be exhausted before strangers can claim the estate.

In the second case, that of *Lakshmanammal* v. *Tiruvengada* (I. L. R., 5 Mad., 241), though in the view that the Court took of the superior claim of the sister's son, it was not at all necessary to decide whether the sister was an heir or not, yet the learned Judges threw out the observation that *Vijnaneswara* recognized the texts excluding females so far as to give priority to males, and that it was not intended absolutely to exclude all but certain excepted females.

Now reading the *Mitakshara* and the *Viramitrodaya* together, we must say, with all respect for the learned Judges, that we do not find any ground for limiting the texts excluding women in that way. The texts say 'women are incompetent to inherit,' and we can find no authority for saying that they mean that women are incompetent to inherit only in competition with males.

[381] In a still later case—*Mari* v. *Channammal* (I. L. R., 8 Mad., 107)—which is somewhat more in point, and in which a Full Bench of the Madras High Court has held that the step-mother was not entitled to inherit in preference to a paternal uncle. TURNER, C.J., in delivering the judgment of the majority of the Court, made the following important observation: "No decision of the Sadr Adalat, the Supreme Court or this Court has been cited, nor has any usage been proved by which a right of succession has been recognized as appertaining to a step-mother or to any of the females who by marriage have entered the *gotra* and acquired *sapindaship* solely through their husband; for these reasons the claim of the step-mother as a *gotraja sapinda* has not been in my judgment established, and the claim of the paternal uncle must be allowed."

Upon a review of the foregoing authorities we come to the conclusion that, according to the law and usage of the Benares School of Hindu Law, which governs this case, the brother's widow is not in the line of heirs at all.

We have now to consider the second ground upon which the appellant puts her case. It is contended that, even if the appellant is not entitled to the properties in suit by right of inheritance she can claim them by right of survivorship as the last surviving member of the family to which the same belonged. No authority was cited in support of this contention, and, perhaps, the only authority that can be cited for the appellant is the case of *Bhugance Daice* v. *Gopaljee* [1 S. D. A., N.-W. P. (1862), 306] already referred to. No authority is referred to in support of that decision except the opinion of the Pandit upon which it is based; and even that opinion is not given *in extenso*. On the other hand, there is the case of *Ananda Bibee* v. *Nownit Lal* (I. L. R., 9 Cal., 315), which is binding upon us and which is clear authority to the contrary. In that case the same contention was raised in favour of the daughter-in-law, but the Court rejected it and allowed the estate to pass to remote *bandhus*, who were no members of the family, which originally owned it, to the exclusion of the daughter-in-law, MITTER, J., observing: "It has been said that she, while her father-in-law Gakul Chand was alive, was **[382]** living with him as a member of a joint Hindu family, and, therefore, on his death, she is entitled to the property left by him. It seems to me that this contention is wholly untenable. The foundation of the right of survivorship is joint ownership. In this case, it cannot for a moment be contended that the plaintiff had any sort of ownership in the property in dispute during the life-time of her father-in-law." These observations are equally applicable, *mutatis mutandis*, to this case. The following passage of the *Viramitrodaya* may be cited in support of the same view: "Her right is only fictional but not a real one: the wife's right to the husband's property, which, to all appearance, seems to be the same (as the husband's right), like a mixture of milk and water, is suitable to the performance of acts which are to be jointly performed; but it is not mutual like that of brothers, hence it is that there may be separation of brothers, but not of the husband and wife, on this reason is founded the text, viz.,—'Partition cannot take place between the husband and wife,' therefore it cannot but be admitted that upon extinction of the husband's right the extinction of the wife's right is necessary (—*G. C. Sarkar's Translation*, p. 165).

It was contended that it would be most unlikely that the Hindu law, which so jealously guards against escheat as to interpose even strangers, such

as the preceptor and the pupil, between the ordinary heirs and the Crown, should favour such hardship as the utter exclusion from inheritance of one whose husband was a joint owner of the estate. Now the recognition of the claims of the preceptor and the pupil is due, we think, not to any jealousy of the Hindu law to the claim of the Crown, but to a deserved deference to the relation between pupil and preceptor. In the good old days of Hinduism when every twice born man had to live in the house of his preceptor as a member of his family during his studentship extending over a long series of years, that relation was almost as intimate and as sacred as that between father and son. And then as for the hardship of the case, it seems to be more imaginary than real. If, as it must be conceded, the appellant's claim has to be postponed in favour of the remotest *samanodaka* or *bandhu* who would practically be a stranger to her, there is no greater hardship in allowing escheat **[383]** to the Crown from whose representatives she can well expect, and we hope will readily obtain, a much more liberal allowance for her maintenance with much less difficulty of realization than she could from a distant relation succeeding to the estate.

Upon all these grounds we think the judgment of the Court below is right and ought to be affirmed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[*See* also 28 All., 307. Even in Madras it has been held that females who become *gotraja Sapindas* by marriage cannot inherit, unless by virtue of an express text :—(1913) 26 M. L. J., 60.]

[16 Cal. 383]

PRIVY COUNCIL.

The 6th and 24th November, 1888.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE AND SIR R. COUCH.

Kristoromoni Dasi............Plaintiff

versus

Narendro Krishna Bahadur and others...........Defendants.

[On appeal from the High Court at Calcutta.]

Hindu Law, Will—Construction of Will—Successive interests bequeathed—Gift over after life-interest—Construction of gift to persons, and the heirs male of their bodies.

A will cannot institute a course of succession unknown to the Hindu law : and in conferring successive estates. the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event ; but an important part of the rules relating thereto is : first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift [as decided in the *Mulick Case* (*Soorjeemoney Doseee* v. *Denobundoo*

Mullick, (9 Moore's I. A., 123)] ; secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*) (*Juttendro Mohun Tagore* v. *Ganendro Mohan Tagore*, L. R., I. A., Sup. Vol., 47 ; 9 B. L. R., 377)], the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid.

A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her life-time ; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been [384] born), making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's life-time.

Held, that the gift of the residue, so far as it purported to confer an estate of inheritance on the half-brothers, and the heirs male of their bodies, was contrary to law and void ; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect : that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff : and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed.

APPEAL from a decree (16th December 1886) of a Division Bench of the High Court, in its Ordinary Original Civil Jurisdiction.

The question raised on this appeal was whether a bequest in the will of the late Raja Jadubindro Krishna Bahadur, deceased on the 22nd March 1852, had the effect of giving an absolute estate, or of giving an estate for life only, the testator's attempt to limit the succession to male issue of the donee failing, as contrary to Hindu law.

The appellant sued the representatives of the testator, who was her father, to have the will construed, and the rights of all parties declared under it. So much of the will, which was dated 5th March 1851, as is material appears in their Lordships' judgment.

The testator had two half-brothers who both survived him. He left no child but the plaintiff his daughter, who was married, but had no children, when her father died, and to whom afterwards six sons, parties to this suit, were born. The deceased half-brother, Nripendro Krishna, had no son when the testator died, but two sons were born to him afterwards, viz., the second and third defendants, Nil Krishna and Benoy Krishna. Narendro, the surviving half-brother, the first defendant in this suit, had three sons at the testator's death (one of them since deceased leaving a childless widow), and four sons born after the testator's death.

The plaintiff's contention was that, on the death of the half-brother Nripendro Krishna, which occurred on the 19th Novem-[385] ber 1885 as to all the moiety of the residue of the testator's estate to which Nripendro had been entitled, the trusts and limitations of the will, so far as they were legally capable of being carried out, had been satisfied and ended ; and that the plaintiff, as the testator's only child, had then become entitled to that moiety, for the estate of a daughter, by the Hindu law of inheritance. This was claimed as additional to her right under the will to receive for her life the income of the whole residue.

It was contended in the written statements, filed on behalf of the second and third defendants, the sons of Nripendro Krishna deceased, that the two

half-brothers took under the will an absolute interest in the testator's estate, subject to the plaintiff's life estate, and subject also to be divested in case Nripendro Krishna and Narendro Krishna should die without leaving an "heir or heirs male of their or either of their body." The second and third defendants also contended that if it should be considered that the half-brothers did not take such an absolute estate, then they, having been in existence at the death of the testator, were the proper objects of the gift in the will, viz., "to the heir or heirs male of their or either of their body."

The six sons of the appellant were in the same interest with her, contending that no such estate as the testator had sought to create could legally exist. Also they contended that assuming gifts of life estates to the half-brothers with remainders to those who might answer the description of heirs male of the body, this was a gift to a class of which some members might not be capable of taking, and it was therefore void. They claimed as heirs of the testator in remainder, immediately after the death of their mother, of all the estate not validly disposed of by the will.

The first of these contentions was allowed by the **judgment** of the High Court (PETHERAM C.J., and MACPHERSON, J.) delivered by PETHERAM, C.J.

This judgment stated that the claim of the plaintiff was that the gift of estate to her two uncles was more limited in its nature than the general law of succession would confer, and that the limiting the descent in their male line only was to attempt to create an estate repugnant to Hindu law, the latter being therefore null and void.

[386] The judgment proceeded thus:—

"The rule of law, as established by the *Tagore Case* (L. R., I. A., Sup. Vol., 47, 9 B. L. R., 377) appears to be that, inasmuch as you cannot give an estate or any interest in it to a person not in existence at the death of the testator, you must give the entire estate with all its ordinary incidents of devolution to the person to whom it is to be given, because anything which is less than that limits his power of disposal over the estate, and therefore gives an interest to some particular line of succession that comes after him to the exclusion of others. This appears to be the rule, and it is said to apply to this case because the words 'to the heir or heirs male of their or either of their body,' which immediately follow the devise to the two half-brothers, are words of limitation, and that such a disposition was an attempt to create in perpetuity an estate in violation of the rule of succession according to Hindu law, somewhat similar to an estate tail, by which this property would devolve from generation to generation in the male line to the exclusion of all females; and as that was not a gift of the entire estate to the first devisee, the devise beyond the interest of the first devisee must be limited by the ruling in the *Tagore Case* to the life interest coming thereafter, and that consequently, one of the brothers who had no sons at the time of the testator's death, having died, there was an intestacy as to one moiety of the estate, and that the plaintiff is entitled to a decree as to that.

"Now, as I said before, the first question for us to consider is, whether that is the meaning of the testator, whether that is the meaning to be collected from the whole of the will. Having regard to the whole of the will, it seems to us that the testator's intention, when he made this will, was that in the event of his two half-brothers (or either of them) living at the time of his death, having male issue, the estate should go to them in equal moieties, but in the event of either of them dying, with reference to their issue, in the same condition that the testator was, that is to say, leaving no son, his own daughter should take the estate in preference to the daughters or widow of his half-brothers; but all words, so far as we can ascertain, indicate that his intention was, that the estate, when vested in his half-brothers, should be an absolute estate and all that he had to give; but that in the event of their not having any sons at the time of their death the estate should revert to the son or

sons of his daughter, and that they should take the same estate as the testator's half-brothers would have taken in the first instance.

"Let us examine what the words are from which we come to that conclusion. It is necessary that there should be a verbal criticism of the language employed. The first devise is the devise of the income to the daughter, and as to that, as I have said before, there is no dispute; and then comes a direction to the trustees, that upon the death of the daughter [387] they are to pay over any cash that there may be in existence, and assign and convey the residue of the estate to his two half-brothers. It seems to us that the very use of the word 'pay' indicates that the intention of the testator was that the interest which the brothers were to take with the property so handed over to them was the entire interest in the property at the time. The fact of the trustees handing over the cash, and conveying the estate to the half-brothers of the testator is inconsistent with their handing over any thing else than the whole estate; and therefore the use of the words, 'to the heir or heirs male of their or either of their body,' is inconsistent with that view, if it has a tendency to limit that estate in any way.

"But when one comes to examine these words closely, so far from their being inconsistent with, they rather support that view of the meaning of the other words, and for this reason. As I said before, the property is to be paid and conveyed absolutely to the persons who may be found entitled to it by the first words of this clause, and it appears that the persons who if they were living, were to be the recipients of the estate, were the two half-brothers of the testator, and then come the words 'to the heir or heirs male of their or either of their body,' but there are after these words no words of limitation or exclusion; therefore, it appears to be pretty clear that the estate which was under any circumstances to be conveyed to the sons of the two half-brothers was to be an absolute estate, because, as I said just now, there is no attempt to limit it in any way. This shows that the intention was that whenever this estate was conveyed from his own trustees to his half-brothers who might be alive, or to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them.

"Then the question arises what effect ought to be given to the words which follow the word 'body,' 'in failure of which in trust to give the same to the son or sons of my said daughter,' and whether if we attempt to give effect to them by giving effect to the view which we have formed of the general meaning of this devise, we shall contravene any rule of law.

"As I said before, the meaning of the first clause in our opinion is, that this estate is, upon the death of the daughter, to be given absolutely to these two half-brothers of the testator, subject to anything that comes after. It appears from the *Tagore Case*, as I said just now, that if that is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23; L. R., 5 I. A., 138), and other cases besides, that although, according to Hindu law, it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty [388] may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. *Evans* and Mr. *Kennedy*, and may be taken as absolute law."

"Under these circumstances, it seems to us that this will may be read as carrying out what we consider to be the true intentions of the testator; which, as I have before said, we think was, that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them, if dead, should take the fee of this property, but that in the event of their having no male descendants at the time of their death, the estate should be divested, and go over to the son or sons of his daughter;

and that we think can be carried out on the law as laid down in the case of *Bhoobun Mohini Debi* without prejudice to any rule of Hindu law.

On this appeal,—

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne* (Sir *Horace Davey*, Q. C., with them) appeared for the Appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. Pitt-Kennedy*, for the six sons of the Appellant.

Mr. *J. Rigby*, Q. C., and Mr. *J. D. Mayne*, for the Respondents, Nil Krishna and Benoy Krishna.

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne* for the Appellant, submitted that the judgment of the High Court did not give due weight to the manifest intention of the testator to exclude in every event females from the line of succession, as shown, not only by the words "heir or heirs male of their" (*i.e.*, his half-brothers) "or either of their body," but also by the words which followed, viz., "in failure of which in trust to give the same to the son or sons of my daughter." These bequests were made with the intention of impressing on the testator's estate a mode of devolution declared in the judgment in the *Tagore Case* (L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377) to be contrary to Hindu law, and therefore void. It was not the intention of the testator to give to his half-brothers an absolute estate subject to defeasance in the event of they or either of them dying without leaving male issue; but he intended to give them estates which should descend to their heirs male only, excluding the female line. The estate of inheritance, then, which the testator tried to create, was inconsistent with Hindu law, and the bequest could not take effect, at all events, [389] for more than the lives of the half-brothers respectively. It would be contrary to the words of the will to make the estates of the half-brothers descend upon their heirs general, and a gift such as this, which was what in English law would be called an estate tail, must be cut down to a gift of a life estate, as it could not by any construction be expanded into a gift of the absolute estate.

They referred to the *Tagore Case* (L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377); and *Tarakeshwar Roy* v. *Shoshi Shikareswar Roy* (L. R., 10 I. A., 51; I. L. R., 9 Cal., 952).

Mr. *T. H. Cowie*, Q. C., and Mr. *J. Pitt-Kennedy* for the sons of the appellant, were in the same interests, maintaining the invalidity of the bequest to the heirs male, and asking for costs out of the estate.

Mr. *J. Rigby*, Q. C., and Mr. *J. D. Mayne* contended that the High Court had been right in holding that the testator's half-brothers took an absolute estate defeasible only on their dying without male issue living at their deaths respectively. If effect were given to the construction for which the appellant contended, certain important words in the will would not receive their full force and meaning. Those words were directory, *viz.*, "to pay, assign, and convey," and showed that the trustees were to make over the *corpus* of the estate absolutely. Again, it was assumed, in the argument for the appellant, that the bequest, "and to the heirs male of their or either of their body," were words of limitation, and that the bequest was not one of purchase, to use a term of the English law, to the first taker. But to make this assumption was to introduce the rule in *Shelly's Case* (1 Co. 96-A) a course most strongly to be deprecated in construing a Hindu will. The words "heirs male, &c.," were not words of limitation, and they should be struck out altogether; with the result that the gifts were absolute in the first instance. This case was distinguishable from the *Tagore Case* (L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377),

in which the first estate was one for life; it being here an estate to the half-brothers with a devise over to a class, viz., those who might [390] answer the description of the heirs of their body. The latter words did not qualify the estate given to the father, which was an absolute one when taken apart from the void limitation which followed it. *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (L. R., 10 I. A., 51; I. L. R., 9 Cal., 942) supported the respondents' case. The estate created in the half-brother was no unusual one, and that estate should receive effect by the will being re-moulded in accordance with the testator's views. They referred also to *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23; L. R., 5 I. A., 138), and *Baker* v. *Tucker* (3 H. L. C., 106).

Mr. *J. Graham*, Q. C., replied.

Their Lordships' **Judgment** was delivered by—

Lord Hobhouse.—The question in this case arises from a rather obscure passage in the will of Raja Jadubindro Krishna, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half-brothers Rajas Nripendro Krishna Bahadur and Narendro Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated 25th March 1851. The testator died in 1852. His daughter, who was his only child, is the plaintiff and appellant in this suit. She has six sons, all born after the testator's death. His brothers both survived him. One of them, Nripendro, has died, leaving only two sons, both born after the testator's death. The other, Narendro, is living. He had three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The defendants and respondents in this suit are Narendro, the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of Nripendro, who are also his executors; and the six sons of the [391] plaintiff. Every person therefore who could possibly claim an interest under the residuary gift is a party to the suit.

The plaintiff contends that the residuary gift is invalid, except so far as it confers life interests on herself and her uncles, and that on the death of Nripendro the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, viz., in each case, the death of the brother without leaving male heirs of his body then living. The High Court have adopted the latter view of the case, and have dismissed the suit. From their decree this appeal is brought.

The view of the High Court has been supported by the counsel for the respondents, the brothers' families, who expressly stated that their argument, though endeavouring to amplify and illustrate the High Court's view, must be taken as not departing from it. The High Court considered that the true intention of the testator was "that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them if dead, should take the fee of this property; but that in the event of their having no such descendants at the time of their death, the estate should be devested and go over to the son or sons of his daughter."

This conclusion is rested, first, on the direction to the trustees to "pay, assign, and convey," which, it is said, shows that the whole estate is to be dealt with ; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression "heir or heirs male of his or their body;" and, thirdly, on a view of the law which is stated thus—

"It appears from the *Tagore case* (L. R., I. A., Sup. Vol., 47 ; 9 B. L. R., 377), as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23 ; L. R., 5 I. A., 138) and other cases besides, that although according to Hindu law it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the [392] entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be devested or defeated by something which takes place after. That this is established by this case, is admitted by Mr. *Evans* and Mr. *Kennedy*, and may be taken as absolute law."

The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on a contingency, but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to these rules. It is important to have them accurately stated. And their Lordships find that the statement of the High Court requires some qualifications.

The *Tagore case* decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick case* [*Soorjeemoney Dossee* v. *Denobundhoo Mullick* (9 Moore's I.A., 123)] ; and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore case*.

The *case of Bhoobun Mohini* conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, "No other heir shall be entitled." This was held to mean that, if Kasiswari [393] died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter.

Upon the construction of this will, their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the

period for which the trust continues; it is on her death that the trustees are to pay, assign, and convey; and the question is, to whom? The payment, etc., is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression "pay, assign and convey" is important to show as much as that, but their Lordships do not enter upon any discussion, such as has taken place in England, as to the effect of such words upon the nature of the gift over. They treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words "heirs male" be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator.

The latter of these two alternatives can only be reached by reading the word "and" as if it was "or." Indeed one [394] passage of the judgment looks as if this construction was in the minds of the learned Judges. They point out that no words of limitation are attached to the words "heirs, etc." And they add, "This shows that the intention was that whenever the estate was conveyed from his own trustees to his half-brothers who might be alive, or to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them." This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general, or it might be to the alienees, not to the male descendants.

The absence of words of limitation after the words "heirs, etc.," does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the appellant's than the respondents' construtıon, because if "heirs, etc.," are themselves words of limitation, words of limitation attached to them would be inappropriate, otherwise they would be appropriate, and they would tend to show that the "heirs" were objects of direct gift.

But upon putting it to Mr. *Rigby* whether he claimed to read the word "and" in a disjunctive sense, he at once disclaimed any such contention: and, indeed, it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the respondents.

Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is composed in English: the draftsman seems to have had a smattering of English real property law; he clearly knew there was a difference between a son and an heir male of the body; and apparently he had English dispositions of property in his eye. This seems to be an attempt of a kind not infrequent among Bengal zemindars of late years to introduce English estates tail into Hindu property which the law will not allow. At all events their Lordships must construe the words in their plain and obvious sense: and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling

[393] an English estate in tail male. That cannot take effect. But the testator intended to benefit his brothers personally; and his gift to them and their heirs male would, if valid, have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (L. R., 10 I. A., 51; I. L. R., 9 Cal., 952).

Whether the words which introduce the gift over, "in failure of which," import a general failure of the brothers' issue is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remainder after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails, because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effecting the actual intention of the testator. But if this testator intended not to give an absolute interest, which their Lordships hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordships would not be justified in taking any such liberty with the will.

The plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lord-[396]ships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of the portion discharged there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half-brothers and the heirs male of their bodies, is contrary to law and is void; that in the events which have happened the gift to the sons of the plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half-brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the plaintiff; and that, on the death of Raja Nripendro Krishna Bahadur, the inheritance of his moiety devolved on the plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled in possession to one moiety of the residue. The High Court should place her in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who, by a reasonable construction, could claim them. The suit, or some like suit, was absolutely necessary, and it is not too exten-

sively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree therefore should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal.

They will humbly advise Her Majesty in accordance with this opinion.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Watkins and Lattey.*

Solicitors for the Respondents, the Coomars—Nilkrishna and Benoy Krishna: Messrs. *Lawford, Waterhouse and Lawford.*

Solicitors for the Respondents, the Mittras (sons of the Appellant): Messrs. *Watkins and Lattey.*

C. P.

NOTES.

[The rule as to unborn persons is of general application in Hindu Law:—(1902) 30 Cal., 369; (1891) 16 Bom., 492; (1895) 20 Bom. 450; (1897) 21 Bom., 709; (1897) 25 Cal. 405; (1906) 30 Bom. 477.

Clear unambiguous words will have their natural effect, 24 Cal., 834 at 846; 25 Cal., 816 at 822; 20 Bom., 571; 18 Mad., 252.

It is not open to private persons to create estates with new course of inheritance, 9 Cal., 952; 14 Bom., 360; 24 Cal., 839; 38 Cal., 603; 32 Mad., 315; 4 Bom. L.R., 509—where there were attempts at restricting the course of inheritance to males or females, or heirs by particular persons, etc.

By a devise to daughters and their respective sons with a proviso that in the event of one of the daughters dying without leaving any male issue surviving her, the share of the deceased daughter is to go to the surviving daughter and her sons to the exclusion in both cases of female issue, it was held that the intention to exclude daughter's daughter was clear and it was construed as a life estate to the daughters, with remainder to their sons, (1908) 35 Cal., 896 **P.C.** reversing 33 Cal., 947.

In 1911 P. W. R., 15: 9 I. C., 742, the gift to the widow was cut down to a imited extent by virtue of an executory devise in favour of the son.]

[397] PRIVY COUNCIL.

The 13th, 14th and 15th November, 1888.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, AND MR. STEPHEN WOULFE FLANAGAN.

Shankar Baksh............Defendant

versus

Hardeo Baksh and others............Plaintiffs.

On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Partition—Inheritance of talukdari estate in Oudh—Sanad recognizing primogeniture, effect of as to existing rights of inheritance—Shares held by members of family—Mesne profits on specific and definite shares.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition.

A talukdari estate which, before and after annexation, was subject to the common Hindu law of Oudh, viz., the Mitakshara, was restored, after the general confiscation of 1858, to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards, in 1861, was issued a primogeniture sanad of the above talukdari estate. This sanad could not prevail against the family rights of inheritance; and effect was given to family arrangements, with the same result as regards the two villages.

On the contention that the family, by the effect of the sanads, was to have one head and sole manager in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture: *Held*, that this kind of managership was entirely unknown to the common Hindu law of Oudh; and that, apparently, the Oudh Estates Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was, accordingly, decreed to the members of the family suing for it.

Pirthi Pal Singh v. *Jawahir Singh* (L. R., 14 I. A., 37; I. L. R., 14 Cal., 493), as to the right to partition of a talukdari estate, referred to and followed: also, the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family.

[398] APPEAL from a decree (12th March 1883) of the Judicial Commissioner, confirming, after a remand (27th April 1882), a decree (17th April 1881) of the District Judge of Sitapur.

The plaintiffs in the suit out of which this appeal arose, Hardeo Baksh, Jagan Nath Singh, and Ganga Baksh, sued for separate possession of their several shares, upon partition of family talukdari estate, together with their shares of profits therein for the Fasli year 1288; claiming also their shares in the other property of the family.

The defendant, Shankar Baksh, denied their right to partition, alleging that they were entitled only to maintenance out of the profits of the talukdari estate, which he claimed as inherited by himself, according to the rule of primogeniture; the latter having been, as he alleged, established by sanad in regard to the taluk.

The principal question, on the whole case, having been whether the talukdari estate descended to the eldest son alone, or was subject to division into shares, in the course of this appeal, the defence on which reliance was mainly placed, on behalf of the appellant Shankar Baksh, was that, notwithstanding that there was participation between the members of the family in the profits, or a beneficial interest in the talukdari estate to that extent, their rights went no further, and that by the effect of the primogeniture sanad, the eldest son was entitled to be sole talukdar, having the management of the estate in his hands, subject to the trusts for the benefit of the other members.

On the annexation in 1856, a talukdari estate, Rampur Kalan, in the Sitapur District, was settled with Anant Singh, Balwant Singh, Hardeo Baksh, the three sons, and with Jagan Nath Singh, the grandson of Dariao Singh, a Kanungo in Oudh. After the Mutiny settlement was made with, and a sanad dated 25th October 1859 was granted to the same four persons. At the same time separate sanads were given to Dariao Singh as sole talukdar of the separate villages of Saraiyan and Piprawan, which, out of confiscated lands not restored to the previous owner, were granted to him as a reward for his services.

In 1861, Dariao, having received the circular regarding the descent of taluks to one talukdar, replied that the taluk [399] Rampur Kalan was held by the family in shares, also recognized by the sanad of 1859, and that there was no occasion for a new one. The primogeniture sanad, to which the present question related, was however sent to and retained by him.

On the 2nd September 1867 he died; and, in the following December, mutation in the revenue register was made in the names of the four persons abovenamed.

At the regular settlement, the shares of the brothers were recorded thus: Anant Singh, 6 annas; Balwant Singh, 5 annas; Hardeo Baksh, 5 annas.

On 3rd November 1871, Balwant, the second son, died; and mutation of name was made in favour of his two sons, Jagan Nath and Ganga Baksh, on the application of Anant Singh, their uncle.

In the official list of talukdars down to 1878, the names of all the sons and grandsons of Dariao were mentioned. Anant Singh, the eldest son, died on 11th October 1879; the name of Shankar Baksh, his son, being entered in his place and the amount of his share being recorded as 6 annas.

In or about 1880, differences arose between Shankar Baksh on the one side and Hardeo Baksh and Jagan Nath on the other, in regard to the question of the rule of inheritance in the talukdari, with the result, after other litigation, that the present suit was instituted.

The District Judge found that the property was ancestral, save the two villages acquired by Dariao, and a small part consisting of purchases by the family: also that the whole was held by the members of the family in specified shares. He referred to the case of *Hardeo Baksh* v. *Jawahir Singh* (L. R., 4 I. A., 178; I. L. R., 3 Cal., 522), adding that, apart from the admissions of Dariao Singh, and his son Anant Singh, "as to the rights of the plaintiffs, their names are entered in the khewats as recorded proprietors, and these papers have been attested both by Dariao and Anant Singh, and upon that point there is and cannot exist any dispute. The plaintiffs, moreover, are in possession up to the present date. They are in the enjoyment of the usufruct according to their respective shares in the estate, and their status as such has never been once disputed, except by the present defendant."

[400] His judgment also stated the following:—

"A Commissioner was appointed under the provision of s. 392, Act X of 1877, to make a local investigation as to the exact value of the moveable property appertaining to the estate as well as the profits due to the plaintiffs as recorded proprietors according to the shares so recorded. As, however, the defendant admitted that the profits claimed by the plaintiff were correct, there was no need for further enquiry upon that point, and the Commissioner's enquiry was therefore limited to the moveable property of the estate. The Commissioner's report upon that question is full and satisfactory, and as no objections have been raised to that report, the finding of the Commissioner will be accepted as correct and binding upon the parties to the suit."

The District Judge's decree was "for the plaintiffs to the extent of a 10-anna share in the entire estate, Rs. 88,182; moveable property of the estate Rs. 20,797 as profits, and Rs. 12,065 debts due to the estate. The partition will be made by the Collector under s. 265 of Act X of 1877."

On the defendant's appeal, the suit was remanded, under s. 562, Civil Procedure Code, by the Judicial Commissioner, for the evidence of some witnesses tendered, but not examined. The result was the same decree. The Judicial Commissioner upheld it, in a judgment of which the material part was as follows:-

"I agree with the District Judge that the fact that a primogeniture sanad was granted to Dariao Singh cannot deprive his younger sons of rights which were acknowledged before the grant of that sanad, and were admitted and recorded in the settlement papers after the grant of that sanad.

"All the evidence tends to show that, though the members of the family had agreed as to the manner in which the property should be divided if a separation should take place, they continued to live as a joint family. Had Hardeo Baksh, for instance, had no share in the estate, villages would not have been purchased in his name from the profits of the estate. But the main contention is that, after the declaration of definite and certain shares, the joint family could no longer exist: such a declaration being incompatible with the status of a united family.

"It appears to me that the intention of the parties must be looked to. In the settlement records the share of each brother was recorded, but no separation ever took place. The members of the family continued to [401] live together, there was no division of profits, there was nothing in fact to show that any separation of right or of property took place or was intended to take place. The family having recorded that the share of the elder branch should be 6 annas and the shares of the younger branches 5 annas each continued to live in union. The arrangement could not come into effect till the family separated. Acting on this arrangement the plaintiffs, respondents, have now sued for their share as representatives of the two younger branches, not for their legal shares as three members of an undivided Hindu family.

"I am of opinion that, though the share which each branch should eventually have was defined, anything like an actual separation of right or of property was indefinitely postponed, and that the family still remained joint and undivided.

"The last objection is that, though there is not a title of evidence of appellant having any moveable property in his possession, the lower Court has decreed Rs. 88,182-5-6 on this account,—and that the law did not authorize the Judge to delegate his function by appointing a Commissioner to value the property.

"It appears that on the 5th July 1881, the District Judge appointed a Commissioner under s. 392 of the Civil Procedure Code, to ascertain the value of the moveable property referred to in the 12th issue, which was "what is the nature and value of the moveable property in the whole estate." The defendant's agent attended the Commissioner; it has not been brought to my notice that the defendant made any objection to the appointment; it was not made a ground of appeal in the first appeal, and I do not see that the appointment was contrary to s. 392 of the Code of Civil Procedure, which empowers the Court to issue a Commission "for the purpose of . . . . . . ascertaining the market value of any property." The Commissioner has given full details of the property, and no objection has been taken to the items. I disallow the general objection and uphold the District Judge's finding regarding the amount to which the plaintiffs-respondents are entitled as their share of the moveable property."

On the 8th September 1883, a certificate under s. 600 of the Civil Procedure Code (Act XIV of 1882) was granted by the Judicial Commissioner. On the 13th June 1884, the appellant applied to withdraw his appeal, and to have back the security bond and costs deposited by him; and an order was made to that effect, striking the application for leave to appeal off the file.

On the 16th June 1884, the appellant applied to the Judicial Commissioner for leave to proceed, notwithstanding the above, and the respondents were called upon to show cause why this [402] application should not be granted. They urged that the case having been struck oft, the case was not then within the competency of the Court to deal with.

On the 28th July 1884, the Judicial Commissioner made an order in the applicant's favour, giving his reasons. They were that a ruling of the Full Bench of the High Court, Calcutta, in *Radha Binode Misser* v. *Kripa Moyee Debia* (7 W. R., 531; B. L. R., Sup. Vol., 730), laid down that "the High Court has the power, and ought to exercise its discretion in each particular case with regard to restoring appeals to the Privy Council, dismissed for default, or removed, for any reason, from the file of the Court." He concluded that under

the circumstances, and considering that no harm had been caused to the respondents by the action of the applicant, he ought to accede to his request, on the condition of his paying the respondents' costs of the application, and he directed that the appeal be re-admitted upon the register, and proceed.

On this appeal,—

Mr. *R. V. Doyne* appeared for the Appellant.

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon* for the Respondents.

Objection was taken for the respondents to the hearing of the appeal, on the ground that it had not been duly admitted. The Judicial Commissioner had no authority under the Code of Civil Procedure to make his order of the 28th July 1884. The only course for the appellant at the time was to apply for special leave to appeal.

LORD HOBHOUSE said that Counsel for the respondents would be at liberty to make this objection part of their argument, if they should think proper so to do, after the case for the appellant had been heard.

Mr. *R. V. Doyne*, for the appellant, contended that the sanad of the 11th October 1860 was effective to show the introduction of the rule of primogeniture.

The rights of the respondents, regard being had to the terms of the sanad, and to the family declarations and admissions, were to obtain their proportionate shares of the profits or income of the talukdari estate. It was not shown that, by arrangement [403] contrary to the terms of the sanad, the members of the family had a right to partition. They might, it was not disputed, take their shares of the profits; but they had no right to break up the taluk. The conduct of the parties pointed to this course, that while the senior member of the family managed the estate, the junior members received their proportion of the profits, as separate interests of their own; and it had been repeatedly decided that a talukdar might be held a trustee; trusts obliging him to hold in some cases on behalf of others interested in the estate. There was no surrender or waiver of the primogeniture sanad, yet it was admitted that the talukdar was bound to give, not only maintenance, but a specific share of the profits to his younger brothers and their sons. The succession to the talukdari estate was governed by the rule of primogeniture, the talukdar having the perpetual right of management, and he alone being invested with that title. He referred to *Hurdeo Baksh* v. *Jawahir Singh* (L. R, 4 I. A., 178; I. L. R., 3 Cal., 522), *Hurdeo Baksh* v. *Jawahir Singh* (L. R., 6 I. A., 161), *Widow of Shankar Sahai* v. *Kashi Pershad* (L.R., 4 I. A., 198; L. R., Sup. Vol., 220), *Pirthi Pal Singh* v. *Jawahir Singh* (L. R., 14 I. A., 37; I. L. R., 14 Cal., 493).

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon*, for the respondents were called upon only as to the question whether mesne profits should be allowed. They were also heard as to the re-admission of this appeal on 28th July 1884. They referred to s. 599, Civil Procedure Code, arguing that the Judicial Commissioner had no other power than such as was given in Chapter XLV, Civil Procedure Code, and could not review the order of 13th June 1884. *Radha Binode Misser* v. *Kripa Moyee Debia* (7 W. R., 531; B. L. R., Sup. Vol., 730) was referred to.

LORD HOBHOUSE said that the Judicial Commissioner could bring the appeal on to the file again.

On the question as to the right to mesne profits, it was maintained that the right of the respondents to receive profits had not been questioned. The appellant had made collections, [404] and it was on their specific and admitted shares, as regards the profits, that the respondents had been entitled to

them. There was an admission as to this spoken of in the judgment of the District Judge.

Mr. *R. V. Doyne*, in reply, said that as long as the family remained joint, the statement of an account could not have been called for. He referred to the finding of the District Judge that the plaintiffs had continued to enjoy the profits of the estate, according to their specific shares, down to the date of the judgment.

Their Lordships' **Judgment,** at the end of the arguments of Counsel, was delivered by

Lord Hobhouse.—The principal question raised in this case is whether certain estates which belonged to Dariao Singh, talukdar of Rampur Kalan, go according to the law of primogeniture, or are subject to a family arrangement by which they were divided into shares? The principal estate is known by the collective name of Rampur Kalan. It was an estate which was subject to the common Hindu law of Oudh--the Mitakshara law. It was confiscated with other Oudh estates, and it was restored to the family by sanads. The only material difficulty that exists in the case is owing to the circumstance that two different sanads were granted for the purpose of the restoration: one recognizing a division into shares, and the other establishing primogeniture.

Their Lordships have not to deal with the difficult question which has been agitated in so many cases here, whether, to use rather a popular than a legal term, equities shall prevail against the form of the sanad; because, although it was maintained in the Courts below that the primogeniture sanad was to prevail against all inferences to be drawn from the transactions among the family, yet that position has been abandoned now, and Mr. *Doyne* has very candidly stated that he cannot resist the conclusion that, as regards the beneficial interest in the profits, there must be participation between the members of the family. But what he maintains is that the arrangements led to this inference, that the family was still to have a sole head to it, and that he would take the title of talukdar and have the [405] management of the property, and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate, and that they could not displace the head of the family from that position.

It is extremely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership, or headship, which could never be displaced or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the common Hindu law of Oudh. Nor is any such thing apparently contemplated by the Oudh Estates Act. Their Lordships do not pronounce an opinion here whether it could legally exist; but assuming that it could, there must be some very clear arrangements between the parties to prove its existence.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. In the last case of *Hardeo Baksh* that of *Pirthi Pal Singh* v. *Jawahir Singh* (L. R., 14 I. A., 37; I.L.R., 14 Cal., 493) in the 14th volume of Indian Appeals, very much the same sort of contention was set up. Let us take the statement of the defendant's contention—he was the head of the family—from page 60 of the report. Jawahir Singh prayed a declaration that he was entitled to hold the property "as an integral, impartible, and indivisible estate or taluka subject to the beneficial interest of the defendant in respect of the profits thereof to the extent of his share as declared by the Court." Sir RICHARD COUCH delivered the judgment of the Committee, and observes that Jawahir Singh did hold the estates in "trust for the joint

family, but as a joint family estate they were subject to partition, and as a trustee he is bound to allow the partition to be made."

Their Lordships then ask what is the evidence in this case to show that there was an agreement between the members of the family that the head of the family should continue to hold the estate as an entire estate, and hand over the profits? To answer that question it is necessary to touch upon the heads of the case; but owing to the position the argument has assumed, [406] it will not be necessary to go with great particularity into the documents.

It appears that in 1856 a temporary settlement was made, which, by the desire of Dariao Singh, the then head of the family, was in the names of his three sons—Anant, Bulwant, and Hardeo, and a grandson, who was a son of Bulwant. Bulwant and the grandson took one share between them, and the grandson's name may be left out of our consideration. The estate was settled in definite shares, nearly equal, but giving a slight preference of three pies to Anant, the eldest son.

It next appears that a sanad, of which we have no copy, was issued on the 25th of October 1859, in the terms of that temporary settlement. In December 1860 came the circular that was issued to the Oudh talukdars, calling upon them to elect whether they would take their sanads according to the common law of the Mitakshara or according to the law of primogeniture. It is impossible to read that circular without seeing that the officials then were desirous that the talukdars should choose the primogeniture sanads. To that circular Dariao made a reply to this effect: "That at the time of the settlement of 1264 Fusli, in order to avoid future dispute, and according to the custom prevailing in his family, he caused a kabuliat to be executed;" and then he states that it was executed in the manner which has been mentioned, "The sanad, dated 25th October 1859, has been granted by the Chief Commissioner according to the above terms. The petitioner has now no occasion to apply for a fresh sanad, because the aforesaid sanad is enough for them." Therefore he distinctly elects to take a sanad which recognises the co-sharing of all his sons. That election of his is the more pointed because there were two other villages, not then part of Rampur Kalan, though they have since become part, Saraiyan and Piprawan. Those were granted by Government to Dariao Singh in consideration of loyalty; and as to those he prays that "Saraiyan and Piprawan be after the petitioner's death in the name of Anant Singh, the eldsest son, in addition to the 5½ annas shares out of taluka Rampur Kalan." Dariao Singh knew perfectly what he was about, and he elects that as to Rampur [407] Kalan it shall go in shares, and as to the two other villages they shall go according to primogeniture.

It is a very strange thing that in answer to that request of Dariao Singh, the officials should have sent him a primogeniture sanad; but they did so. It was dated, strange to say, before the date of Dariao's answer. Dariao's answer was on the 29th of January 1861; and the sanad is dated on the 11th of October 1860. It was cut-and-dried ready to issue. When precisely it was received by him does not appear, but it was some time between the 13th of December 1860 and the 14th of April 1863. No remark was made upon it. Whether he did not observe that the wrong sanad had been sent to him, or whether he did what is so exceedingly common for Indian gentlemen to do, thought it was best not to be offensive, and to comply with the wish of the Sircar, we do not know. In point of fact no remark was made upon the sanad at that time.

Only one event took place, between Dariao's death and the receipt of the sanad, having any bearing on the question, and that is, that Dariao personally

accepted and agreed to pay the Government jumma, and it would seem that his name was entered in the Collector's books as the talukdar.

Nothing further occurred until the 2nd September 1867, when Dariao died; and then came the necessity for a mutation of names; and what took place upon that occasion is, as their Lordships think, the most important feature in the whole case. It is very unfortunate that these documents have been tossed together in a way that makes it difficult to disentangle the proceedings. It will be best to take the case of Saraiyan first.

On the 13th of November 1867, the tahsildar of the district made a statement regarding the death of Dariao, " lambardar of village Saraiyan," and, after showing that his heirs were his three sons, he names as the heir able to become lambardar Anant Singh, that is the eldest son. Then he enters a remark " Dariao Singh, lambardar, has left three young sons, Anant Singh, the eldest son of the deceased, is able to become a lambardar; " and he states that, subject to notice, Anant [408] Singh's name deserves entry in the register. But Anant Singh was not willing to accept that position, and he presents a petition. In that petition he says that " there has been unanimity without 'any feeling of estrangement' between him and his brothers, and he prays that their names may be entered along with his in the column 'Name of Lambardar.' "

It is difficult to trace the exact proceedings, further in respect of Saraiyan; but it is clear that in the result Saraiyan, though clearly granted in primogeniture, was entered in the four names of the three sons and the one grandson.

Turning to Rampur Kalan, we again find that Anant Singh was not desirous of appearing as the sold talukdar. He was called upon to present a fatehnama for mutation of names on his father's death. He sends one as to Saraiyan, and excuses himself as to Rampur Kalan. The three brothers present a petition on the 7th of April 1868, saying, " that the kabuliat of ilaka Rampur Kalan has stood in the name of the petitioners, and a sanad has also been granted in their names, such being the case a fatehnama should not be called for in respect of Rampur Kalan, " meaning that no alteration of name was necessary. A fatehnama, however, appears to have been insisted on, and one is sent on the 11th April, but with a protest in the shape of a deposition by Anant. He there states that his father's name was entered as proprietor for Saraiyan only, but since 1264 Fusli " my name and the names of Bulwant Singh and Hardeo Baksh, my brothers, have been entered in the column 'Name of Proprietor,' in respect of the rest of taluka Rampur Kalan. The deceased's name was not there; moreover, the Government has granted a sanad in the name of us three brothers." Then he adds his desire that, " the names of the three brothers be also entered in the column 'Name of Lambardar.' Since 1264 Fusli the names of us three brothers have been entered in respect of all the villages of taluka Rampur Kalan which are situated in Tahsil Biswan; and our names were also entered in respect of certain other villages, but as Dariao Singh, my father, used to remain with the Settlement Officer, and was my superior, therefore at the time of assessment of the present settlement jumma his name was entered in respect of these villages; I now [409] desire that jointly with my name the names of Bulwant Singh and Hardeo Baksh my brothers be entered as before in equal shares in these villages also; " a most distinct return to the state of things which existed before this primogeniture sanad was sent wrongly to Dariao Singh, and his name was entered in the Collector's book.

The proceedings seem to have occupied a considerable time. No order was made until the 29th of April 1869, when an order was issued in this form by the Deputy Commissioner: " The case is before me for an order as to mutation

of names. There is no one to dispute the title of these sons. The hitch, if any, is the fact that Jagan Nath (Bulwant Singh's son) is entered in the Malguzari Register: it must remain there." He was an infant at that time. "Mutation of names is to be in the name of all four: Anant Singh, Bulwant Singh, Hardeo Baksh, and Jagan Nath."

The same sort of proceedings took place in respect of Piprawan, but it is not necessary to follow them out with the same particularity. The result is summed up by the Deputy Commissioner in the year 1841 in a judgment which he delivered on an application for partition, which is quoted in the District Judge's judgment in this case. He says: "In the khewats prepared at regular settlement the shares in the whole ilaka, and also in the grant, were defined as follows: Anant Singh six annas, and the other two sons five annas each. These shares are slightly different from what was stated by Dariao Singh in his letter of 19th January 1861." That was in answer to the circular about the sanads. "By this new arrangement the eldest son, Anant Singh, gave up his exclusive right to two mauzas, and he was recorded as proprietor of a 6-anna share in the whole estate instead of a 5½-anna share in part of it. The khewats were signed by Anant Singh with his own hand."

That was the result. These proceedings show exactly the footing on which the family stood. It is not a question whether Anant Singh made a conveyance to his brothers; though if that had been the question there might be reason to maintain the affirmative. As to Piprawan and Saraiyan, he did most distinctly make a conveyance because those were granted according to the **[410]*** law of primogeniture. He took a consideration for it by receiving a larger share in the whole estate. But the value of the proceedings is to show that from 1856 onwards the estate had been treated, notwithstanding the issue of the primogeniture sanad, as an estate which was held in the shares designated in Dariao's letter.

There are many other things in this record which show the same condition of the family, but their Lordships think it not necessary to refer to them, because what has been stated is quite sufficient. But some notice must be taken of those things which, according to the contention of the appellant, would lead to the contrary inference. Mr. *Doyne*, in his argument, referred to three circumstances. One was that Anant Singh has rested his title not entirely on the earlier sanad, but on both sanads. Another is that in the lists of talukdars that were made out, Dariao Singh's name was entered in respect of Rampur Kalan, in list No. 3, which is one of the primogeniture lists. Another is that in the wajib-ul-arz, which seems to have been framed either under the signatures, or with the assent of the three brothers, they claim that the succession is to go according to s. 22 of the Oudh Estates Act, which relates to the primogeniture estates.

With respect to the reliance on the two sanads, that is contained in a statement which is called a petition; but it is a statement of Anant Singh's made on the 9th of July 1868, in the course of the proceedings for mutation of names. All he says is this: he mentions the earlier sanad and then he says that, "a fresh sanad in English and Persian in the name of the petitioner's father (deceased) has been granted as an additional favour, so the taking effect of both the sanads is the cause of further stability of the (ilaka) estate." He then goes on to reiterate the case for partition. "From 1263 Fusli, up to 1266 Fusli, and up to this day, the settlement of ilaka Rampur Kalan has been in the name of the petitioner, Bulwant Singh, Hardeo Baksh, and of Jagan Nath Singh, son of Bulwant Singh, and in the registers of the Collector's Court and of the tahsils, the above-mentioned

names are entered all along; such being the case under the rule laid down in the directions of the revenue officers, mutation of names should be [411] effected without any alteration in the names entered as proprietors." That is the occasion on which he mentions both sanads. But on the very same occasion he also states that the estate is held in co-parcenary according to the family arrangement, and there is not the least appearance upon the face of this document that Anant Singh was considering that there was any conflict between the primogeniture sanad and the co-sharing of the estate between the family, or that he intended for a moment to set up any claim under the primogeniture sanad which was in contravention of the family arrangement.

In March 1869 the sanads were called for, and were sent in for the purpose of preparing the lists. On that occasion, in a petition* signed by the three brothers, they prayed that, under Rule No. 3 " our names may be entered in list No. 3; " and the order made by the Deputy Commissioner was: " Enter names in the list." That order was made on the 10th of March 1869. Again, we find what one must characterise as a most extraordinary proceeding. Instead of entering the names in the list No. 3, as prayed, the name of Dariao, then dead, was entered in the list No. 3, so that, according to the effect of that list, the estate would go by the rule of primogeniture, and go to Anant alone instead of being divided among the three. It does not appear that any explanation was given to these gentlemen, that any questions were asked of them, that it was pointed out to them that there was an inconsistency between the entry in list No. 3 and the desire to keep the estate in the three names; but there seems to have been, without any further communication, a simple entry of Dariao's name in the list. It is impossible for their Lordships to attach importance to such a proceeding as that.

The third document relied on is the wajib-ul-arz, which was framed on the 1st January 1870; and there, no doubt, occurs a passage that " as the proprietors are talukdars, succession will be regulated by s. 22, Act I of 1869.' Well, that is a matter of law, on which they were not very competent to speak; but on the matters of fact, on which they are the most competent of all men in the world to speak, they have no doubt whatever as to what the state of the family was. They state: " From the death of Dariao Singh, the sons, the present taluk-[412]dars, have continued in possession of the taluk;" and then lower down they say: " This village "—that is Rampur Kalan, the whole estate,--" is in the possession of talukdars as a joint zemindary; the shares being as follows;" a table shows the shares: Anant Singh six annas; Bulwant and Jagan Nath five annas; Hardeo Baksh five annas. " All the co-sharers live in commonsality; accounts of profits and losses are not rendered. Anant Singh, as head of the family, manages the work of collection and assessment." Now that document is an extremely important document as regards the statements of fact. As regard the statement of law, the succession descending according to s. 22, it is of little value. The document is a strong assistance to the case of the plaintiff, and bears directly against the case of the defendant. In fact, every group of facts that Mr. *Doyne* has referred to as leading to the inference that the estate was to be held by the head family as an entire estate, excepting the one fact that there was an improper entry in list No. 3 of the talukdars, strengthens the case for the co-sharership.

Only one other remark has to be made, which is, that during the life of Anant Singh, no attempt was made to disturb this state of things. It was after his death, and when his son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture.

Both Courts have decided against that claim. Their Lordships entirely agree with them; and they think that the plaintiffs are entitled to a decree for partition.

The only other question remaining is that which concerns the mesne profits. In a partition suit, relating to an ordinary joint family, mesne profits are not recoverable, as was pointed out in the judgment at page 59 in the 14th Indian Appeals. Speaking of the provisions of the Code as to mesne profits, Sir RICHARD COUCH says: "These provisions are intended for, and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree." The taluk here in question was in a very peculiar position; the family were living together as a joint family, and in commensality, Anant acting as head and not [413] accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family, but in specific and definite shares. Their Lordships consider that if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition. Before the suit, there seems to have been some inconsistency in the defendant's position. Sometimes he said his brothers were only entitled to maintenance; at other times that they were entitled to specific shares of the profits. But by the plaint and the written statement the matter was distinctly put in issue. The plaintiffs claimed between them a 10 annas share of mesne profits. An issue was stated which is perfectly precise upon the point. "For what period are plaintiffs entitled to mesne profits, and what were the aggregate collections for the period claimed?" A commission of inquiry into that question was ordered, but before the commission, although an inquiry was made as to the value of the estate, there was no inquiry as to the profits, because it was considered that sufficient admissions had been made by the defendant to avoid the necessity of any such inquiry. The exact form in which these admissions were made does not appear, but in the judgment of the District Judge, on the issue that has just been read, the 13th, he finds "that the plaintiffs are entitled to Rs. 20,797 as profits upon the defendant's own admission." That is in the first judgment which he delivered before the remand. There was an appeal from his decision to the Judicial Commissioner, and, on that appeal, one of the grounds of objection was, "that the lower Court should have held that the plaintiffs were not entitled to any profits." The suit was then remanded to the District Judge, not on this ground, but on other grounds, to take oral evidence, and, on the remand, the District Judge came to exactly the same finding with respect to mesne profits. A second appeal was presented to the Judicial Commissioner, and in the grounds of objection upon that second appeal there is no mention whatever of any error as to mesne profits. Therefore, although there are difficulties in understanding the exact grounds upon which the Court came to its conclusion, their Lordships must take it that something passed, either before the Commissioner or before the Court itself, on which [414] that finding was rested, and which must, at the time of the appeal from the decree on remand, have been satisfactory to the parties. The alternative would be a most disastrous one; it would be necessary to send back this case for an inquiry, which might result in something more being found for mesne profits, or something less, but which would probably cost a great deal more than the amount in dispute.

Their Lordships think that they ought not to disturb the decree upon this point, and the result is that the appeal fails on every point, and it must be

dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal dismissed with costs.

Solicitors for the Appellant : Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondents : Messrs. *Barrow* and *Rogers.*

C. B.

NOTES.

[*See* also (1903) 26 All., 119 ; (1899) 2 O. C., 213 ; (1890) 15 Bom., 247 ; (1891) 16 Bom., 29 ; (1896) 21 Bom., 458.]

[16 Cal. 414]

APPELLATE CIVIL.

The 10th January, 1889.

PRESENT .

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

Gunamoni Nath......... ..Defendant No. 7

versus

Bussunt Kumari Dasi (Plaintiff) and others (Defendants).*

Vendor and purchaser —Notice—Notice of possession of rent—Notice of tenancy—Purchaser how far affected with notice of lessor's title.

Notice of possession of the rents of property is notice of the tenancy ; but does not of itself affect a purchaser with notice of the lessor's title.

Barnhart v. *Greenshields* (9 Moore's P. C., 18) referred to.

THE plaintiff, Busunt Kumari Dasi, brought a suit against Nashiram Haldar and six others for the partition of a plot of rent-free *brohmutter* land, containing homestead and garden land and a tank, situate in the village of Barisha in Pergunnah Khaspur, in the District of the 24-Pergunnahs. The property belonged to a family which, at one time, consisted of three brothers—Kristo [415] Chunder Haldar, Pitumber Haldar, and Horihor, also called Horish Haldar. Kristo Chunder died without issue, leaving a widow Padyamoni Debi. Pitumber died leaving a son, Kenaram Haldar (defendant No. 2). Horihor Haldar died in the month of Aughran 1285 B S. (November-December 1878), leaving a son Nashiram Haldar (defendant No. 1), and a grandson by a son, Upendro Nath Haldar. By a registered deed of sale, bearing date the 24th Choit 1292 B. S. (5th April 1886), Upendro sold his share in the property, in suit to the plaintiff. Gunamoni Nath (defendant No. 7) purchased the proprietary right of Padyamoni and Horish Chunder in one bigha one cotta of land let out by them in mourasi to Narasingh Kumar Dut (defendant No. 3) under a lease dated 23rd Assar 1281 (6th July 1874). He also purchased nine cottas more from Padyamoni and Horish contained in the same boundary. This

*Appeal from Appellate Decree No. 142 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 8th of November 1887, modifying the decree of Baboo Hurikrishno Chatterjee, Munsif of Alipore, dated the 14th of February 1886.

purchase Gunamoni made under a kobala dated the 20th Srabun 1285 (4th August 1878). The deed was not registered, but Padyamoni and Horish made over to Gunamoni the registered kabuliut executed in their favour by the defendant Narsingh Kumar Dut.

This suit and another, brought by the plaintiff against Nashiram Haldar (defendant No. 1), Kenaram Haldar (defendant No. 2), and a third person, for the partition of the joint family dwelling house of the Haldars, were tried together by the Second Munsif of Alipur. The issue, so far as the defendant Gunamoni was concerned, and so far as is material to this report, was whether the kobala under which Gunamoni claimed was genuine and *boná fide*, and was to be preferred to the registered kobala of the plaintiff.

At the trial dakhilas (receipts) were filed to show that Narsingh Kumar Dut had paid rent to Gunamoni since his purchase in respect of the one bigha one cotta held by him under the lease of 23rd Assar 1281. But Gunamoni admitted that he had not been able to obtain possession of the remaining nine cottas covered by his deed of sale. It was contended for the plaintiff that this deed was a forgery: and, as an unregistered document, could not be preferred to the plaintiff's kobala, which was a registered document and of a later date.

On this issue the Munsif held that the deed of sale to Gunamoni was not a forgery, but a genuine document; and that, as far **[416]** as the one bigha one cotta leased to Narsingh Dut was concerned it had been accompanied with delivery of possession. He also held that the plaintiff was affected with notice of Gunamoni's purchase. He said: "Although mere possession under an unregistered conveyance is not in itself sufficient to establish a good title against a subsequent registered purchaser, as ruled in the Full Bench case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (I. L. R., 8 Cal. 597 S.C.; 10 C.L.R, 241), still such possession, especially the possession in the present case is a very cogent proof of notice—*Nani Bibi* v. *Hafizullah* (I.L.R., 10 Cal., 1073)." The Munsif accordingly decided the issue in Gunamoni's favour, preferring his purchase to that of the plaintiff.

On appeal the District Judge of the 24-Pergunnahs found that there was no proof of notice, nor was there any evidence that the plaintiff knew that Gunamoni was in receipt of rent from Narsingh Kumar Dut. He held that Gunamoni's purchase was invalid as against the plaintiff for want of registration, thus reversing the decision of the Munsif.

The defendant Gunamoni appealed to the High Court.

Baboo *Umakali Mookerjee* for the Appellant.

Baboo *Rash Behary Ghose* for the Respondents.

The **Judgment** of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

In this case the point of law which it is necessary to decide is what is the effect as regards notice of possession of the rents of the property in suit. If it be true that the purchaser is bound without notice of the lessor's title, no doubt the learned Judge in the Court below was wrong. If, on the other hand, it be true, as a proposition of law, that he has only notice of the tenancy, and it is the tenant in actual possession alone who can raise any equity against the purchaser, then the Judge in the Court below was right. The point has been expressly decided by the Privy Council. In the case of *Barnhart* v. *Greenshields* (9 Moore's P. C., 18) their Lordships, in dealing with this question, say as **[417]** follows: "In all the cases to which we have referred, it will be observed that the possession relied on was the actual occupation of the land; and that the equity sought to be enforced was on behalf of the party so in possession.

There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on."

It seems, therefore, to us that the point has already been concluded by authority of the Privy Council. The purchaser was bound, as their Lordships say, with notice of the tenancy, and was liable to any equity which the tenant in occupation could raise against him; but he was not bound by notice of the lessor's title, and he has no equity whatsoever.

The result is that this appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[In (1903) 25 All., 366 the principle of possession being notice was applied to affect subsequent incumbrances with notice of the first mortgage under which the mortgagee was in possession.]

[16 Cal. 417]

SMALL CAUSE COURT REFERENCE.

The 5th March, 1889.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE TREVELYAN.

Heilgers & Co.............Plaintiffs

versus

Jadub Lall Shaw and another...........Defendants.*

Contract, Construction of—Cash on delivery—Readiness and willingness to take delivery—Delivery, Failure of, in terms of contract—Breach of contract—Custom.

Where a contract is for delivery "free on board," and cash on delivery is provided for, payment may be required upon delivery of the goods at the time and place mentioned for delivery in the contract.

THIS was a suit brought by Messrs. Heilgers & Co. to recover Rs. 2,000 as damages from the defendants, who were jute balers, for failure to deliver certain bales of jute in accordance with a contract.

The contract bore date the 25th June 1887, and under it the plaintiffs bought from the defendants two thousand bales of jute at Rs. 12-8 per bale, the terms and conditions being cash on delivery; one thousand bales to be shipped in October, and one [418] thousand bales between the 1st and 28th November 1887, in lots of 250 at a time.

The suit bore reference only to the thousand bales to be shipped between the 1st and 28th November.

On the 23rd November, the plaintiffs wrote to the defendants, requesting them to place alongside the *G. R. Skolfield*, on the 25th and 26th, two hundred and fifty bales each day, and alongside the *Belle of Bath* two hundred and fifty

* Small Cause Court Reference No. 6 of 1888, made by H. Millett, Esq., Chief Judge of the Small Cause Court of Calcutta.

bales each day, on 26th and 28th November. On the 24th November, the defendants wrote to the plaintiffs, stating that they were unable to deliver on the exact dates referred to, but would deliver the one thousand bales alongside by the 28th November, commencing export from the 26th November.

Early on the morning of the 27th, the defendants sent alongside the *Belle of Bath* five boats' load of jute, but were unable to deliver the same on board owing to the 27th being a Sunday. On the 28th they sent alongside the *G. R. Skolfield* four boats laden with jute; thus completing the delivery alongside of the 1,000 bales.

The defendants, on the 28th November, wrote to the plaintiffs informing them that the bales were alongside as requested, and called upon them to pay for the bales as, and when, delivery was given on board. The plaintiffs received this letter at a quarter to four on the evening of the 28th November, and at once sent off two persons with Rs. 5,000 each to the two ships; these persons arrived alongside at a quarter past four, at which hour both ships had ceased work for the day, and they shortly after returned to the plaintiffs, having been unable to take delivery.

The plaintiffs requested the defendants to bring the boats alongside on the 29th, but they replied that they had tendered the bales on the 28th in accordance with the contract of the 25th June, and that the plaintiffs not having taken delivery and paid for the bales, the contract was considered by them to be cancelled.

The plaintiffs thereupon brought the present suit to recover damages. The defendants admitted the contract, but pleaded that the plaintiffs were not ready and willing to perform their part of the contract.

[419] The evidence produced showed that the defendants had, on the 15th October 1887, complained to the plaintiffs of delay in payment of their bills under other contracts; and had also on the 26th October informed them that cash on delivery was essential under the present contract, and regretted that the plaintiffs had not hitherto complied with these terms; and on the 25th November again wrote to the plaintiffs, complaining of their delay in making payments under the present contract. The plaintiffs called two or three witnesses, who stated that "Cash on delivery by force of custom" meant "Cash on delivery of the mate's receipts," but no specific instances of such custom were given; and, on the other hand, one of such witnesses stated that he had—since the decision of *Vale King* v. *Jadub Lall Shaw and others*, the present defendants (a case decided on the 12th August 1887 by the Chief Judge in which the defendants had insisted on payments on delivery of the bales with a contract similar to the present, and Vale King & Co., had endeavoured to prove a practice of paying on production of the mate's receipts, and in which the Court held that cash on delivery of each bale was rightly insisted on), for safety's sake—inserted in all future contracts "Cash on production of mate's receipts."

The Chief Judge, in the present case, held that the evidence above referred to was not sufficient to establish a local custom, subverting the plain and well-understood meaning of the words "cash on delivery," which could only mean cash as the goods were delivered; he further found that the plaintiffs had failed to prove that they were ready and willing to perform their side of the contract, as the evidence given showed that had the ships been capable of working at 4-15 on the 28th November, no more than 150 bales could have been received by each boat that evening. He, therefore, dismissed the suit, but

at the request of the plaintiffs' Counsel referred the following questions to the High Court :—

(1). When and where was payment to be made by the buyers under the contract ?

(2). What is the meaning and effect of the expressions "Cash on delivery," "Free on board," in the said contract with respect to the mode of payment thereunder ?

(3). Were the buyers bound under the contract to make payment on board ship ?

[420] (4). Having regard to the course of business followed in contracts of this nature, was payment under the present contract to be made at the office of the buyers against the mate's receipts ?

(5). Did the plaintiffs in any case show sufficient readiness and willingness to perform their part of the contract by their tender made on the 28th November 1887 ?

At the hearing of the reference,—

Mr. *Acworth*, for the Plaintiffs, contended that the meaning of "cash on delivery" was cash in exchange upon mate's receipts at the office; that the words "on" or "upon" have been construed to mean "before" "at time of" or "after," and cited *Cowasjee* v. *Thompson* (5 Mad., H .C., 165) where the goods had been paid for. [WILSON, J.—That case was one of stoppage *in transitu*, and does not throw any light on this case.] See Benjamin on Sales, p. 838. He also cited *Queen* v. *Humphery* (10 Ad. & El., 335), to show that to construe the words strictly would reduce business to a standstill; and referred to *Bourne* v. *Gatliff* [11 Cl. & F., 45 (49)] as to previous course of business between the parties, and *Humphrey* v. *Dale* (7 El. and Bl., 226), to show when oral evidence fixing a liability not provided for by the contract can be used.

Mr. *Bonnerjee* and Mr. *Sale* for the Defendants were not called upon.

The **Opinion** of the Court (WILSON and TREVELYAN, JJ.) was delivered by

Wilson, J.—We do not think there is any necessity for us to call on the defendants in this case.

The point is a very small one. The contract out of which the suit arises was a contract for delivery of certain bales of jute, so many in October and so many within certain days of November. The contract was a written one, and contains only a few words having any bearing on the question in dispute. The amounts and price are set out. The goods are to be delivered free on board, and the sellers undertake to deliver as soon as possible. Then under the heading, "Terms and conditions," come the words "Cash on delivery." Then it is provided that 1,000 bales are to **[421]** be shipped during October, and 1,000 bales between the 1st and 28th November, in lots of 250 at a time. The real point now is, what is the meaning of "Cash on delivery"? What happened was this: Some days before the 28th November, I think on the 23rd, plaintiffs wrote to the vendors (defendants) and said they desired a certain quantity of bales delivered on the 25th and 26th November, so much on one ship, so much on another. The defendants replied that they could not exactly comply with the plaintiffs' desire as to time of delivery, but they would deliver the whole quantity by the 28th, which would be within time according to the contract. As a fact, it turned out that the vendors had their lighters alongside the ships on Sunday and Monday, the 27th and 28th, and were ready and willing to give delivery, if paid then and there for the jute.

On Monday the 28th, rather late in the day, a communication was made to the purchasers on the subject, and then when it was too late for delivery to be given on that day of the whole of the bales, they sent some one on board the ships with cash to pay for the bales as they were delivered. The consequence of this delay was that the bales were not delivered. The plaintiffs cannot say they were taken by surprise, as there had been correspondence between the parties in which the vendors said they would insist strictly on their rights under the contract, and it was known what they meant by that, as similar points had been the subject of litigation in a case in which the present defendants were concerned; and that the plaintiffs did not think they could safely assert any other view of the contract is plain from what they did on the 28th when they sent cash on board the ships. Under these circumstances, the plaintiffs have brought this suit against the defendants for non-delivery of the jute. The defence is that the vendors were ready and willing to deliver the jute if the plaintiffs had been ready to pay for it as it was delivered. The only question, then, as I said before, is what is the meaning of the words "Cash on delivery." The defendants say the words mean, cash as the bales are delivered over the ship's side.

The plaintiffs say they mean, cash in exchange for mate's receipts to be brought to their office. These words are of common occurrence not only in this country, but all over the world; and it would be a most dangerous thing if we were to introduce [422] any doubt as to their meaning. Cash on delivery means cash in exchange for and simultaneous with delivery of the goods. If doubt were allowed as to the meaning of these words, it might also be raised as to the meaning of other just as common words, such as payment against shipping documents.

No doubt such a contract, if rigidly enforced, may in many cases prove very troublesome to the parties, and, consequently, we find from the evidence that some mercantile men avoid such a form of contract Sometimes the purchaser waives a little of his rights and pays for the goods a little before delivery. Sometimes the vendor waives a little of his rights and takes payment on presentation of the mate's receipts. But that does not alter the plain meaning of the words.

Then it is said that there is evidence of custom which alters the meaning of the words. In the first place, I think it may well be questioned whether evidence could be given to contradict the plain meaning of these words of a written contract; but whether that be so or not, there is nothing in this case amounting to evidence of custom to show that a different meaning should be put on the words from the natural one. The evidence goes no further than to say that the difficulty in most cases is got over by one party giving way a little. The result is that we think the learned Judge's decision is correct.

The first three questions referred to us are—

[His Lordship read the first three questions, see *ante* p. 419, and continued.]

Those three questions it is convenient for us to answer together by saying that, where a contract is for delivery "free on board," and "cash on delivery" is provided for, payment may be required upon delivery of the goods at the time and place mentioned in the contract for delivery.

The other two questions we answer in the negative.

Messrs. *Sanderson & Co.*: Attorneys for the Plaintiffs.

Mr. *H. C. Chick*: Attorney for the Defendants.

T. A. P.

---

[423] APPELLATE CIVIL.

The 31st January, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE GHOSE.

Sonatun Shah and others............Decree-holders

versus

Ali Newaz Khan and another.........Judgment-debtors.*

Transfer of Property Act (IV of 1882), ss. 88, 90--Decree unsatisfied by sale of mortgaged property—Right to decree for sale of other than mortgaged property.

The holder of a decree on a mortgage obtained an order under s. 88 † of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this, when sold, being insufficient to satisfy the decree, he applied for a decree under s. 90 ‡ for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under s. 88. *Held*, that the decree-holder was entitled to the decree asked for. The terms of s. 90 contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under s. 90 for realization of the balance from other properties of the debtor [see *Gopal Das* v. *Ali Muhammad* (I. L. R., 10 All., 632)].

* Appeal from Order No. 401 of 1888, against the order of Baboo Promotha Nath Banerjee, Subordinate Judge of Mymensingh, dated the 4th of September 1888.

† [Sec. 88 :—In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Decree for sale.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

Power to decree sale in foreclosure suit.

‡ [Sec. 90 :—When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.]

Recovery of balance due on mortgage.

IN this case the decree-holders obtained, on the 5th December 1879, a decree on a mortgage executed in their favour by the judgment-debtors : and on 25th February 1885, they obtained a decree for sale of the mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882). Under that decree the mortgaged property was sold, but the proceeds of sale were insufficient to satisfy the amount due under the mortgage decree, and they then applied for an order under s. 90 of the Act for realization of the balance from the other property of the judgment-debtors ; and on this application the Subordinate Judge made the following order :—

"The judgment-debtors in this case have objected that there being no order in the decree executed for the realization of the decretal amount from the person or other property of the judgment-debtors, the present application for execution against the property of the judgment-debtors [424] other than the property mortgaged is not tenable. It is admitted by the pleader for the decree-holder, and it also appears from the decree filed, that a decree enforcing the lien on the mortgaged property was obtainede by the decree-holder on the 5th December 1879, *i.e.*, previous to the passing of the Transfer of Property Act (IV of 1882), and that the decree-holder prayed for an order for the sale of the mortgaged property in a subsequent suit under the provision of Act IV of 1882. The decree obtained in the latter suit (a copy of which has been filed) shows that there is simply an order for the realization of the decretal amount from the sale of the mortgaged property, and it does not contain any order for the realization of the balance, if any, of the money due from the person or the other property of the judgment-debtors: consequently I am of opinion that the decree-holder cannot proceed against the other property of the judgment debtors without such an order. Rule 12 framed by the High Court under the provision of s. 104 of the Transfer of Property Act directs that every decree for sale under the Act shall direct that if the proceeds of the sale shall not be sufficient to satisfy the decree. the defendant (mortgagor) shall personally pay the amount of the deficiency (see p. 735, Appendix B of Macpherson's Law of Mortgage, 7th Edition, and p. 168, para. 1 of Belchambers' Rules and Orders of the High Court). It has been held by the Allahabad High Court [see *Pran Kuar* v. *Durga Prasad* (I. L. R., 10 All., 127)], and also by the Bombay High Court [see *Budan* v. *Ram Chundra Bhunjgaya* (I. L. R., 11 Bom., 537)], that a decree upon a mortgage which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor. It has also been held by the Bombay High Court in the case above quoted that a decree cannot be extended in execution beyond the real meaning of its terms. The pleader for the decree-holder contended that he has obtained the latter decree under the provision of 67 of Act IV of 1882, and that the provision of s. 90 of the Act is applicable to it ; but the said section shows that if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum ; it cannot make an order in the execution department for the recovery of such sum. My predecessor in office, who decided the case, might have passed a decree for the recovery of any such sum. For all these reasons, I allow the objection with costs, and strike off the execution case as being unsustainable."

From this order the decree-holders appealed to the High Court.

Baboo *Hem Chunder Banerjee*, Baboo *Mohini Mohun Roy*, and Baboo *Kashi Kant Sen* for the Appellants.

Munshi *Seraj-ul-Islam* for the Respondents.

[425] The **Judgment** of the Court (PRINSEP and GHOSE, JJ.) was as follows :—

The appellant obtained a decree within the terms of s. 88 of the Transfer of Property Act for sale of the mortgaged properties. These properties, when sold, failed to realize the amount of the mortgage debt. The mortgagee, decree-holder, accordingly made an application somewhat vaguely expressed,

but evidently intended to ask for a decree within the terms of s. 90 of the Transfer of Property Act for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge has refused to make any decree or order under s. 90, considering himself in some manner restricted by the action of his predecessor in passing the previous decree under s. 88. We think that this is a mistaken view of the law. The terms of s. 90 in our opinion clearly contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, mortgagor, he can ask for and obtain a decree within the terms of s. 90 for realization of the balance from other properties of the debtor. We accordingly set aside the order of the Subordinate Judge, and if we had before us sufficient materials, we should ourselves have passed a decree under s. 90. But in the absence of sufficient information, we think it right to set aside the order of the Subordinate Judge and to direct that, after making the necessary enquiries, he do pass a decree under s. 90, and then allow the execution to proceed. It is not necessary, as contended by the respondents' vakeel, to bring a separate suit for this matter. We give no costs in this appeal.

J. V. W. *Appeal allowed.*

NOTES.

[The order for balance is to be made in the same suit, (1889) 16 Cal., 423 ; (1893) 21 Cal., 26 ; (1888) 10 All., 632 ; (1889) 11 All., 486, even though no provision is made for it in the decree for sale (1892) 14 All., 513 : (1895) 5 M.L.J., 294 ; and an order thus passed was treated as an order *in the suit* (1906) 33 Cal., 867, where MOOKERJEE, J., dissented from (1902) 25 Mad., 244, and reviewed the cases.]

[426] APPELLATE CIVIL.

The 5th March 1889.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE

Shama Dass............Plaintiff

versus

Hurbuns Narain Singh and others...........Defendants.*

Appeal – Ex parte *decree —Order setting aside* ex parte *decree--Civil Procedure Code (Act XIV of 1882), ss. 108, 588—Notification in "Gazette."*

There is no appeal from an order setting aside an *ex parte* decree.

THIS was an appeal against an order setting aside an *ex parte* decree, on the ground that the summons had not been served upon the defendants.

Mr. *Bonnerjee* and Baboo *Umakali Mookerjee* for the Appellant.

Mr. *C. Gregory* and Baboo *Romesh Chunder Bose* for the Respondents.

Mr. *Gregory* took a preliminary objection that there was no appeal from such an order.

* Appeal from Order No. 434 of 1888, against the order of Baboo Rakhal Chunder Bose, Subordinate Judge of Shahabad, dated the 13th of August 1888.

The following **Judgments** were delivered by the Court (TOTTENHAM and BANERJEE, JJ.)

Tottenham, J.—This is an appeal against an order passed by the lower Court setting aside an *ex parte* decree.

A preliminary objection was taken on the part of the respondents by Mr. *Gregory*, that from such an order no appeal lies under s. 588 of the Code.

This question was argued at considerable length; and reserving our judgment upon it, we also heard the appeal on the merits. Upon consideration, I am of opinion that Mr. *Gregory* is right, and that no appeal lies. When Act XIV of 1882 was passed, the wording of s. 588, cl. 9, was to this effect: "Orders rejecting applications under s. 108, or an order to set aside a decree *ex parte*." Under this clause, apparently, an appeal would lie from the order now before us; but I find that the word "or" in the clause after s. 108 was by an error placed for the word "for." In August 1882, that is, one month after the Act came into force, a corrigendum was **[427]** published in the *Gazette of India*, under the signature of the Secretary to the Government in the Legislative Department, by which it was notified that the word "for" ought to have stood for "or" in this clause. I think I am justified in taking judicial notice of this notification and acting upon it. It is true that the amending Act (VII of 1888) assumes the original wording of the clause to have been correct, for the Act deliberately provides that the word "for" shall stand in the place of "or," but in the statement of objects and reasons, which accompanied the Bill when framed, it was stated that the amendment of this clause was only intended to correct a typographical error. It is clear to me, therefore, that the Legislature never intended to enact that there should be an appeal from an order setting aside a decree passed *ex parte*.

That being so, I allow the preliminary objection in this case and dismiss the appeal with costs.

Banerjee, J.—I also am of the same opinion. I think that the Code of Civil Procedure, even as it stood previous to the passing of the amending Act (VII of 1888), did not allow any appeal from an order granting an application for setting aside an *ex parte* decree.

It was contended that cl. 9 of s. 588, as it stood before the amendment by Act VII of 1888, allowed such an appeal. If that clause stood alone, this contention would have been right. But that is one of a series of clauses; and regard being had to the context, and especially to the language of cl. 8, which immediately precedes, it is clear that the word "or" in cl. 9 is a misprint for the word "for." Orders against which appeals are provided for by s. 588 are invariably referred to in the plural number, and where more descriptions of orders than one are provided for in one and the same clause, they are connected by the word "and," and not by the disjunctive particle "or." Clause 14 may be referred to in this connection. Referring to the state of the law as it stood before the passing of Act XIV of 1882, we find the same view supported; for cl. 9 of Act XII of 1879, which in other respects agrees word for word with the clause now under consideration, has the word "for" in the place of the word "or," thereby indicating that **[428]** the Legislature then allowed appeals only against orders rejecting applications for setting aside *ex parte* decrees, and not against orders allowing such applications. And going further back, and referring to Act VIII of 1859, we find that the state of the law was the same under that Act. The reason of the thing would show that there is no ground for thinking that the Legislature intended to make any change in the law; for whereas an order rejecting an application for setting aside an *ex parte* decree leaves the party against whom the order is passed without any further remedy except

an appeal against that order, an order allowing an application for setting aside an *ex parte* decree leaves the party against whom the order is made ample remedy by prosecuting his suit, in which, if he is in the right, he may yet succeed. All this was conceded in argument; and the learned counsel for the appellant admitted that, if the construction of this clause depended merely upon a construction of s. 588, the preliminary objection would be almost unanswerable. But it was contended that the Legislature, by having recourse to the process of legislation for the purpose of altering the word "or" into "for," has shown that we are no longer at liberty to suppose that it was a misprint for "for." I do not see much force in this contention. All that the Legislature did was only to guard against any possibility of error in construing s. 588; and, as my learned brother has shown, a reference to the statement of objects and reasons for making the change in question shows that what the Legislature meant to do was merely to correct a typographical error. If that is their express object, there is no force in the argument that we must presume their object to have been to alter the law and make it by the amending Act something different from what it was originally intended to be.

T. A. P. *Appeal dismissed.*

NOTES.

[Messrs. Woodroffe and Ameer Ali in their Civil Procedure Code, 1908 (1908 Edn. p. 747) stated: "It is not open to the plaintiff to prefer an immediate appeal from an order setting aside his decree, 16 Cal., 426; and though there is some authority to the contrary (25 W.R., 301; 22 W. R., 5; 23 W. R., 147) the better and more recent opinion is that such an order (ordinarily at least) is not one affecting the decision of the case under C.P.C., 1908, sec. 99, and cannot be contested on appeal from the final decree (9 C.W.N. 584; 22 Cal., 981: 15 W.R., 315; the order, however, was successfully contested in appeal in 26 Mad., 604; *see* also (1912) 34 All. 592). It is subject to attack under sec. 115 if the conditions of that section are fulfilled, 25 Cal., 155.]

[429] CIVIL RULE.

The 20th February, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

In the matter of Anund Chunder Roy...........Auction-purchaser

versus

Nitai Bhoomij...........Judgment-debtor.*

Appeal—Appeal newly given by law—Proceedings instituted prior to change in procedure—Appeal from order under s. 312, Civil Procedure Code (Act XIV of 1882)—Act VII of 1888, ss. 55 and 56.

It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made.

Held, accordingly, that an appeal from an order under the second paragraph of s. 312 of the Civil Procedure Code, although made before Act VII of 1888 came into force, would, upon the operation of that Act, lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made. *Hurrosundari Dabi* v. *Bhojohari Das Manji* (I. L. R., 13 Cal., 86) explained and distinguished.

ON the 5th September 1887, Anund Chunder Roy purchased a tenure at an auction sale held in execution of a decree for rent against Nitai Bhoomij. On

* Civil Rule No. 1302 of 1888, against the order passed by E. N. Baker, Esq., Deputy Commissioner of Manbhoom, dated the 27th of August 1888.

the 7th June 1888, the sale was set aside by an order made by the Munsif of Purulia under the second paragraph of s. 312 of the Code of Civil Procedure. In July 1888, a few days after Act VII of 1888 came into operation, Anund Chunder Roy appealed from this order to the Deputy Commissioner of Manbhoom, who dismissed the appeal on the ground that he had no jurisdiction to hear it, observing: "It is, however, clear that no appeal lies. By s. 588, clause (16) and s. 589, it is provided that an appeal lies *to the High Court* from 'orders under s. 294, the first paragraph of s. 312 or s. 313, for confirming, or setting aside, or refusing to set aside a sale of immoveable property.'

"The difference between the terms of s. 588, clause (F) of Act X of 1877, the former Civil Procedure Code, appears to indicate that the Legislature advisedly took away the right of appeal in cases in which the objection had been allowed, and the sale set aside. Even if this were otherwise, the appeal, if any, **[430]** would lie to the High Court, and not to this Court. I have, therefore, no jurisdiction.

"By ss. 55 and 56, Act VII of 1888, an appeal has been allowed in this class of cases to the District Court. This Act came into force on the 1st July 1888, a few days before this appeal was filed; and it is argued that the procedure and jurisdiction in the case before me are therefore governed by its provisions. This, however, does not appear to be correct. In *Hurrosundari Dabi* v. *Bhojohari Das Manji* (I. L. R., 13 Cal., 86), it was held that the words 'any proceedings commenced before the repealing Act shall have come into operation' in s. 6 of the General Clauses Act I of 1868 include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. The *ratio decidendi* of this case applies equally whether the repealing Act repeals an entire Act, or only portion of an Act. It follows, therefore, that this appeal is governed by the law as it stood at the time of institution of the original suit, *i. e.*, in the year 1883. As already stated, no appeal lies to this Court under the law as it stood then."

On the 16th November 1888, Anund Chunder Roy moved the High Court, and obtained a rule, calling upon the judgment-debtor, respondent, Nitai Bhoomij, to show cause why the order of the Deputy Commissioner of Manbhoom, dated the 27th August 1888, refusing to hear an appeal from an order under s. 312 of the Civil Procedure Code, made by the Munsif of Purulia, and dated the 7th June 1888, should not be set aside on the ground that the Deputy Commissioner had jurisdiction to entertain the appeal under the provisions of Act VII of 1888.

On the rule coming up for argument,—

Baboo *Kishori Lal Goswami* for the Petitioner.

Baboo *Issur Chunder Chuckerbutty* and Baboo *Upender Chunder Bose* for opposite party.

The **Judgment** of the Court (PIGOT and BEVERLEY, JJ.) was as follows:—

In this case an order under the second paragraph of s. 312 of the Civil Procedure Code, setting aside a sale on the **[431]** ground of a material irregularity, was made by the Munsif of Purulia.

The order was made on the 7th June 1888, before Act VII of 1888 came into force; and, therefore, when the order was made, no appeal lay from it to the Court of the Deputy Commissioner.

Act VII of 1888 came into force on July 1st, 1888. By that enactment an order made under s. 312 is made appealable to the Court, to which an appeal

would lie from the decree in the suit in relation to which such order was made. In the present case such Court would be that of the Deputy Commissioner.

After the 1st July, an appeal was presented to the Deputy Commissioner from the order of June 7th. The Deputy Commissioner rejected it, holding that the new enactment did not apply, as the suit in which the order was made was instituted under the Act of 1882, under which no such appeal was allowed to his Court; that, therefore, the old law governed the matter, and that he had no jurisdiction to hear the appeal.

From that order this appeal is brought. The decision appealed from is founded on the decision of this Court in *Hurrosundari Dabi* v. *Bhojohari Das Manji* (L. R, 13 Cal., 86), in which it was held that no appeal lay against a decree in a suit instituted under the old Bengal Rent Act VIII of 1869, although the appeal was presented after the new Act VIII of 1885 came into force, by which Act (it was assumed for the purpose of the argument) an appeal was given.

That case was decided upon the construction of s. 6 of the General Clauses Act. The appeal, if it was given, was given by the Act of 1885, which repealed the Act of 1869; and it was held, that as the repeal of the Act of 1869 could not affect proceedings commenced before the repealing Act came into operation, and as the word "proceedings" in the General Clauses Act includes an appeal against a decree made before the passing of the repealing Act, the appeal did not lie.

In the present case, the question does not arise in respect of the provisions of a repealing Act. So far as the ss. 55 and 56 of Act VII of 1888 affect the present proceedings, they do so, not by repealing the former Act, but by adding to its provisions [432] an appeal in a case in which the former Act did not allow one. They advance the remedy of the subject in this particular respect. We do not think, therefore, that the General Clauses Act applies.

That being so the general principle of law is applicable, that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. That principle is contravened by the General Clauses Act (whether intentionally or not) in cases where the appeal is conferred by means of the operation of the repeal of an existing Act. But that effect of the General Clauses Act must be limited to the cases strictly covered by its provisions. The present is not such a case. We hold, therefore, that the appeal lies to the Court of the Deputy Commissioner. We make the rule absolute.

We set aside the order of the Deputy Commissioner, and direct him to entertain the appeal.

The costs of this Rule will be disposed of by the Deputy Commissioner on the hearing of the appeal we now direct him to entertain. We assess the hearing fee on each side at three gold mohurs.

C. D. P. *Rule made absolute.*

NOTES.

[See the notes to 16 Cal., 267, *supra*.]

[16 Cal. 432]

CIVIL REFERENCE.

The 6th March, 1889.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE TREVELYAN.

Ramon Chetty............Plaintiff

versus

Mahomed Ghose and another............Defendants.*

Stamp Act, 1879, Sch. I, Arts. 11, 19—Cheque—Bill of Exchange, Admissibility in evidence—Post-dated cheque—Stamp Act, 1879. s. 67—Penalty.

In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at.

Bull v. *O'Sullivan* (L. R., 6 Q. B., 209), *Gatty* v. *Fry* (L. R., 2 Ex. D., 265), and *Chandra Kant Mookerjee* v *Kartick Charan Chaile* (5 B. L. R., 103) referred to.

[433] Where a cheque bearing a stamp of one anna was dated the 25th September, and the evidence showed it to have been actually drawn on the 8th September, and therefore to have been post-dated, it was contended that the cheque was really a bill of exchange, payable 17 days after date, and therefore inadmissible in evidence as being insufficiently stamped:

Held, in a suit to recover the amount of the cheque on its being dishonoured, that it was admissible in evidence.

REFERENCE to the High Court at Calcutta under s. 54 of the Burma Courts Act, 1875.

The case was stated as follows in the reference:—

"This suit is described in the plaint as a suit for the recovery of the sum of Rs. 1,543-14 due for principal and interest on a dishonoured cheque.

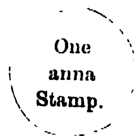
"The plaint sets out that, on the 8th September 1888, the second defendant drew a cheque on the Bank of Bengal, directing the payment to the first defendant or bearer of the sum of Rs. 1,541-5-0

"The cheque is as follows:—

M. 41036. RANGOON, *25th September 1888.*

No.—

BANK OF BENGAL.



Pay to S. Mahomed Ghouse, or bearer, Rupees fifteen hundred forty one and annas five only (Rs. 1,541-5-0).

(Sd.) TURNER & Co.

"The plaint continues that the first defendant requested the plaintiff to pay the said sum of Rs. 1,541-5, and the plaintiff accordingly paid the same, less discount; that on the 25th September the cheque was presented at the Bank of Bengal for payment, but was dishonoured.

"The second defendant admits having made, and the first defendant admits having endorsed, the cheque, but they defend the suit on the ground that the cheque having been post-dated when made, and the plaintiff having received

* Rangoon Reference No. 1 of 1889, made by C. E. Fox, Esq., Officiating Recorder of Rangoon, dated the 11th of January 1889.

and dealt with it, knowing it to be post-dated, it cannot be admitted in evidence, and cannot be recovered upon. It is contended that the persons making and dealing with the cheque are subject to the penalty mentioned in s. 67* of the Stamp Act, and that the [434] cheque must be regarded as a bill of exchange payable at 17 days after date, and, not being stamped as such, it is inadmissible in evidence by the first clause of the proviso to s. 34 of the Stamp Act. In support of these contentions the cases of *Allen* v. *Keenes* (1 East, 435; 3 Esp., 281) and *Whitwell* v. *Bennett* (3 B. and P., 559), decided under the older English statutes, and *Forster* v. *Mackreth* (L. R., 2 Ex., 163) are relied on. In the latter case four learned Judges, after much consideration, were all of opinion that in substance a post-dated cheque could not be distinguished from a bill of exchange at so many days' date.

"For the plaintiff it is contended that a person making or dealing with a post-dated cheque is not subject to the penalty mentioned in s. 67, because the word 'cheque' is not expressly mentioned in the section, whereas it is expressly mentioned in s. 61 of the Act. This omission is said to indicate an intention on the part of the Legislature that post-dating cheques should not be subject to penalty, although 'cheque' is defined in the Act as meaning 'a bill of exchange drawn on a banker and payable on demand.' Further, it is contended that the cheque is rightly stamped on the face of it, and that nothing further can be considered in testing whether it is admissible in evidence under the Stamp Act. The cases of *Bull* v. *O'Sullivan* (L. R., 6 Q. B., 209) and *Gatty* v. *Fry* (L. R., 2 Ex. D., 265) are relied on in support of this contention. The judgment of PEACOCK, C.J., in the case of *Chandra Kant Mookerjee* v. *Kartick Charan Chaile* (5 B. L. R., 103) also supports this view.

"It appears to me that these cases afford great authority for holding that the cheque in suit is admissible in evidence, but being of opinion that s. 67 does attach a penalty to the making of and dealing with a post-dated cheque, thereby differing from the English statutes under which the two English cases above referred to were decided, and in view of the opinion of the Judges in the case of *Forster* v. *Mackreth* (L. R., 2 Ex., 163), I entertain doubt whether in this case, where the allegations in the plaint show that the plaintiff knowingly dealt with a post-dated cheque, that cheque can be admitted in evidence and be recovered on.

"I therefore refer to the High Court the question whether the cheque sued upon in this suit is admissible in evidence."

[435] At the hearing of the reference,—

Mr. *P. O'Kinealy* appeared for the plaintiff, and contended that the cheque was sufficiently stamped, and that there were no findings of fact to bring the case within s. 67.

The defendants were not represented by Counsel.

The following **Opinions** were delivered by the Court (WILSON and TREVELYAN, JJ.):—

Wilson, J.—In my opinion the authorities which are referred to by the learned Recorder in his order of reference are conclusive upon the question

* [Sec. 67:—Whoever, with intent to defraud the Government of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made, and whoever, knowing that such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note, or in any manner negotiates the same,

Penalty for post-dating bills, etc.;

and whoever, with the like intent, practises or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force, shall be punished with fine which may extend to one thousand Rupees.]

for other devices to defraud the revenue.

which is now before us. The cases of *Bull* v. *O'Sullivan* (L. R., 6 Q. B., 209), and *Gatty* v. *Fry* (L. R., 2 Ex. D., 265), which cases are entirely in accordance with the earlier authorities, are clear to show that in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, you must look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence; and exactly the same law is laid down in this Court in the judgment of Sir BARNES PEACOCK in the case of *Chandra Kant Mookerjee* v. *Kartik Charan Chaile* (5 B. L. R., 103) in the passage at page 105 of the report. That is conclusive of the present case; for it is clear, I think, that the present Stamp Act in India ought to be construed according to the same principles of construction as the Stamp Act in England and the earlier Stamp Acts in this country. In argument, apparently, before the Recorder, s. 67 of the Act was referred to. That section imposes penalties in certain cases upon persons who post-date bills of exchange. It is not necessary to say whether a cheque is a bill of exchange within the meaning of that section, or what the effect of that section would be, in any case to which it applied, upon the admissibility of a bill, because in the present case there is no evidence apparently, and certainly no finding, of the circumstance which alone could make the section applicable, namely, the intention to defraud. The result is that we answer the question referred to us in the affirmative.

Trevelyan, J.--I agree with this decision.

J. V. W.

NOTES.

[As regards the sufficiency of the stamp for post-dated cheques, *see* also (1904) 6 Bom. L.R., 699.

As regards admissibility of extrinsic evidence, *see* also (1902) 27 Bom., 279; (1900) 24 Mad., 259.]

---

[436] SMALL CAUSE COURT REFERENCE.

The 6th March, 1889.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE TREVELYAN.

Boistub Churn Naun and others

versus

Wooma Churn Sen.*

Excise Act (Bengal Act VII of 1878)—Revenue, Protection of—Contract Act (IX of 1872), s. 23—Public policy.

The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well.

An agreement, therefore, for the sale of fermented liquors, entered into by a person who has not obtained a licence under that Act, is void and cannot be recovered on.

* Small Cause Court Reference No. 7 of 1888, made by H. Millett, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 24th of July 1888.

SUIT to recover money for goods sold and delivered.

The plaintiffs who had not taken out a licence for the sale of fermented liquors, under Bengal Act VI of 1878, sold to the defendant a certain quantity of porter and beer, and sued him for the price thereof.

The defendant contended that the contract was void under s. 23 of the Contract Act, inasmuch as the plaintiffs had sold the goods without obtaining a licence under the Excise Act.

The Chief Judge of the Small Cause Court held that the Excise Act of 1878 was an Act framed in the interest of the public, and that the contract under which the goods were sold by the plaintiffs, who were unlicensed, was void under s. 23 of the Contract Act, and that, therefore, this suit to recover the price of the goods so sold would not lie; he therefore dismissed the suit, but, at the request of the parties, referred the following question (amongst others) to the High Court, viz. :—

4. Is the agreement void having regard to the provisions of the Bengal Excise Act of 1878 ?

Mr. *Acworth* (with him Baboo *Kali Nath Mitter)* for the Plaintiffs.—The Bengal Excise Act is purely a Revenue Act, and has no [437] such effect, as has been given to it, on the contract of sale. There is no section in the Act which forbids such a suit as the present. This case does not fall within *Bexley* v. *Bignold* (5 B. & Ald., 335); nor is the passage in p. 487 of *Maxwell on Statutes* referred to by the Judge applicable. Revenue Acts are treated as being for the protection of the revenue and not on grounds of public policy. I submit the contract was not illegal. See *Maxwell on Statutes*, p. 490, and *Bailey* v. *Harris* (12 Q. B., 905) decided on 2 Wm. IV, c. 16, s. 12, and 6 Geo. IV, c. 80, s. 115. See also *Brown* v. *Duncan* (10 B. & C., 93); *Johnson* v. *Hudson* (11 East, 180) decided under 29 Geo. III, c. 68, ss. 72 and 124; *Smith* v. *Mawhood* (14 M. & W., 452) decided under 6 Geo. IV, c. 81, s. 26.

Mr. *Hill* for the Defendant.—The Excise Act has for its object the protection of the public as well as the revenue. As to cases on similar statutes in force in England, and to the general rule deducible from such statutes, see *Benjamin on Sales*, 526. Sections 11 and 53 of the Bengal Excise Act show it was the intention of the Legislature to prevent the sale without licence of anything but very small quantities of fermented liquors, and the distinction drawn in that section between "tari" and fermented liquors shows that it is the question of these liquors being intoxicating which is paramount; the case of *Ritchie* v. *Smith* (6 C. B., 462) was decided on the Statute 9 Geo. IV, c. 61, which was held to be for the protection of public morals as well as of the revenue. The case of *Judoonath Shaha* v. *Nobin Chunder Shaha* (21 W. R., 289), decided on Bengal Act II of 1866, decides that an agreement having for its object the carrying on a trade in contravention of the Excise Law is illegal —See also *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (I. L. R., 12 Bom., 422) and *Debi Prasad* v. *Rup Ram*, (I. L. R., 10 All., 578). Sections 14, 29 and 50 of the Bengal Excise Act also show that one of the objects of the Legislature in passing the Act was the prevention of drunkenness.

Mr. *Acworth* in reply.—No cases have been cited by the other side showing that a sale similar to the present contract [438] of sale has been held to be void; I however admit that there are cases somewhat resembling those in which contracts have been held to be void on grounds of public policy or under some particular statute. In *Ritchie* v. *Smith* (6 C. B., 472) the case of a sale was expressly exempted, and the Court in the course of argument expressly stated that it was not intended to touch the case of *Smith* v. *Mawhood* (14 M. &.W., 452)

and that the contract was not illegal so as to make it absolutely void. The plaintiffs and defendant were not parties conspiring to defeat the Act. The English cases show that where a penalty is exacted it does not invalidate the sale. Licensing Acts have always co-existed in England with the Excise Acts; does it make any difference, if it be so, that the two Acts are consolidated in this country? The English Licensing Act of 1872, 35 and 36 Vic., c. 94, s. 13, is almost identical with s. 67 of the Bengal Act. The case of *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (I. L. R., 12 Bom., 422) is decided on the principle laid down in *Ritchie* v. *Smith* (6 C. B., 472); the case of *Debi Prasad* v. *Rup Ram* (I. L. R., 10 All. 578) is also decided on that principle; but *Ritchie* v. *Smith* does not belong to the class of cases which should be considered in answering the question referred. All that *Ritchie* v. *Smith* decides is that where one man takes advantage of another man's license, such an act is illegal, but the case does not refer to an outside purchaser. Section 14 only provides that the operation of the Act may be suspended in certain cases; the Government may have had reason for exempting where the consumption is small. The argument of the other side on s. 50 is answered by *Bailey* v. *Harris* (12 Q. B., 905). Section 23 of the Contract Act only affirms the English law on the subject. The case of *Lorymer* v. *Smith* (1 B. & C.) was a sale by sample and has no application to the particular case; here the defendant bought specific goods on their own judgment—*Cf. Burnby* v. *Bollett* (16 M. & W., 644; 3 M. & W., 390).

[439] The **Opinion** of the Court (WILSON and TREVELYAN, JJ.) was delivered by

Wilson, J.—The principal question which has been raised before us in this reference is whether a contract for the sale of fermented liquor, by a person who has not obtained a license under Bengal Act VII of 1878, is illegal and therefore void.

The sections bearing upon the matter are these: Section 4 has defined exciseable articles as including spirituous and fermented liquors. Section 11 says that no person shall sell any exciseable article without a license from the Collector. Section 53 says whoever manufactures or sells any exciseable article without a license shall be liable to a fine not exceeding Rs. 500 for every such manufacture or sale, and then come the provisos, with the last of which I shall deal presently.

A number of cases have been cited to us from the English Courts upon the question, in what cases and under what statutes the imposition of a penalty is to be construed as intended to prohibit the act to which the section refers, and in what cases that penalty should be regarded as only a means for protecting the revenue.

Two tests have been applied in many of the cases. First, in a number of cases it has been said, and the view has been acted upon, that in an Act intended only for the raising of revenue and the protection of that revenue, a clause imposing a penalty may well be construed, not as prohibiting a transaction in such a sense as to make it illegal and void, but as providing a means of enforcing the liability of the person on whom the penalty is imposed.

If that test be applied in the present case, it seems to me that the conclusion at which the Judge of the Small Cause Court has arrived is correct; because it seems to me clear that the Act with which we are dealing is not, and was never intended to be, a mere Act for the protection of the revenue, but that it is an Act having other objects of public policy in view as well. In the first place we should be shutting our eyes to what is a matter of common knowledge, that in this country as well as in England for many years past, from a period long before this Act was passed, public men have never supposed

that the regulation of the traffic in intoxicating liquors is to be dealt with upon considerations of [440] revenue alone. In the second place, when we turn to the Act itself, I think the same thing is apparent from its express language, in which respect it is unlike the Act of 6 George IV, c. 51, under which several of the cases cited to us were decided, particularly the case of *Smith* v. *Mawhood* (14 M. & W., 452). The preamble of the Act is a good deal wider than if the object were merely the protection of the revenue. It is this: "Whereas it is expedient to consolidate and amend the laws relating to the manufacture, sale and possession of exciseable articles;" and there is another object, "the collection of the revenue derived therefrom;" and as we go through the Act, we find that these two objects are kept, side by side, in view, the regulation of the drink traffic in the interests of the public, and the protection of the revenue.

This is particularly apparent from certain sections in the Act. Section 14 was referred to, and it is not without weight. The 29th section is an important section, because it shows that a license is to be cancelled, not only on grounds affecting the revenue, but on grounds affecting the character of the holder, showing, I think, clearly, that in that section at any rate the Legislature had in view public morals, as well as the protection of the revenue.

Then s. 62 has been referred to, and I think rightly referred to, because it shows that a difference is made between the holding the same article for a purpose connected, and for a purpose not connected, with the traffic in intoxicating drinks.

Then s. 67 expressly deals with cases of misconduct on the part of a person holding a license, and the permission of misconduct by such a person of a character directly connected with public morals and not with the receipts of revenue. And again, s. 80 is another special provision relating to the case of cantonments. The object of s. 80, I apprehend, can be nothing but the securing of the discipline, the morals and good conduct of the troops in cantonments. The consequence then to my mind is, that both on general principles and the terms of the Act itself, this Act cannot be said to be a mere Revenue Act, but it is an Act having no doubt the protection of the revenue in view, but having in view also important objects of public policy.

[441] Another test has been applied in various cases in order to determine whether the penalty imposed by an Act was intended to create a prohibition so as to invalidate a specific act of dealing in violation of the law in which the penalty is to be found, and that is, to see whether the penalty is imposed in general terms for the carrying on of a trade, or for the omission of some preliminaries which the law imposes on the opening of a trade, or some such general purpose as that, or whether the penalty is imposed on each specific act of dealing. In the latter class of cases, the Courts have been prone to construe the penalty as creating a prohibition, and therefore vitiating each transaction.

If that test be applied in this case, it is clear that the penalty is imposed on each specific act. Section 53 of the Act imposes, for selling an exciseable article without a license, a fine of so many rupees for evey such sale. Thus what the Legislature had in view was not merely the general carrying on of the trade of a trader, but every specific act of sale. This is the more apparent from some of the provisos which follow the general words in that section. The third proviso says that "Nothing contained in the first clause of this section applies to the sale of any imported spirituous or fermented liquors purchased by any person for his private use and so disposed of upon such person quitting a station or after his decease." That proviso shows that in the view of the framer of the section, if it had not been for the proviso, any

officer who, on being ordered from one station to another in Bengal, sold his stock of wine to his successor, or to anybody else, would be liable to the penalty if he did so without having a license; and that if the executor of any gentleman dying in Calcutta were to sell his stock of wine, without taking out a license, he would, but for the proviso, be liable to a penalty. All this shows that the thing which the Legislature had in view was any act of sale; and that according to the authorities is strong to show that the penalty is imposed with the view of prohibition.

The result then is, that, according to the authorities, this case falls within the class of those in which the penalty is imposed for the purpose of prohibition, and not of those in which it is imposed solely for the benefit of the revenue.

[442] Several cases decided in the Indian Courts have been cited, but they do not throw a very strong light upon this case. They related not to contracts of sale but contracts of a different character. The result is that, in my opinion, we ought to answer the fourth question referred to us in the affirmative, and as that disposes of the whole case, it is unnecessary to answer any of the others.

Attorney for the Plaintiffs: Baboo *Kali Nath Mitter.*

Attorney for the Defendant: Baboo *B. N. Bose.*

T. A. P.

NOTES.

[For similar cases of prohibitions based on public policy as well as protection of revenue, *see* also (1887) 12 Bom., 422; (1888) 10 All., 577; (1894) 19 Bom., 626; (1900) 24 Mad., 401; (1901) 3 Bom. L. R., 164; (1902) 26 Mad., 430; (1904) 31 Cal., 798; (1906) P.R., 114; (1909) 33 Bom., 636.]

[16 Cal. 442]

FULL BENCH.

The 21st March, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE MITTER, MR. JUSTICE PRINSEP, MR. JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

Nilmony Poddar and others............Appellants

versus

Queen-Empress...........Respondent.*

Sentence—Separate sentences for rioting and grievous hurt—Penal Code, ss. 71, para. 1, 144, 147, 148, 324—Act VIII of 1882—Criminal Procedure Code (Act X of 1882), s. 35.

Per Curiam **(TOTTENHAM, J., dissenting).—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were**

* **Full Bench on Criminal Appeal No. 78 of 1889, against the judgment of Mr. B. L. Gupta, Officiating Sessions Judge of Farridpore, dated the 8th December 1888.**

guilty of that offence under s. 149 of the Penal Code. *Empress* v *Ram Partab* (I. L. R., 6 All., 121), approved ; *Loke Nath Sarkar* v. *Queen-Empress* (I.L.R., 11 Cal,, 349) overruled.

REFERENCE to a Full Bench made by Mr. Justice MITTER and Mr. Justice MACPHERSON under the following order :—

The question reserved by us in this case is, whether separate sentences passed upon the appellants Nos. 1, 3, 4 and 5 for offences of rioting and hurt are legal.

The finding of the lower Court which we have upheld is that these appellants, who are guilty of rioting, did not individually commit any acts which amounted to voluntarily causing hurt; **[443]** but they are guilty of that offence, because their co-appellants, Charan and Nobin, with whom they were associated as members of an unlawful assembly, committed certain acts which amounted to voluntarily causing hurt—in prosecution of the common object of that assembly. The appellants Nos. 1, 3, 4, and 5 were, therefore, found guilty of the offence of hurt under s. 149 * of the Indian Penal Code.

In Appeal No. 38 of this year this question arose, and following *Empress* v. *Ram Partab* (I. L. R., 6 All., 121) we held that separate sentences for the two offences are not legal. At that time we were not aware that in *Empress* v. *Loke Nath Sarkar* (I. L. R., 11 Cal., 349) the contrary view was taken.

We, therefore, refer the following question to a Full Bench: whether separate sentences passed upon appellants 1, 3, 4, and 5 for offences of rioting and hurt are legal, it being found that they individually did not commit any act which amounted to voluntarily causing hurt, but are guilty of that offence under s. 149 of the Indian Penal Code.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.—In the prosecution of the common object of the unlawful assembly, which was to take possession of certain lands, several huts were broken down; one man, Bhagidhar, was badly beaten by one of the rioters not under trial, and by other rioters not identified. Another man, Miajan, was wounded with a spear by one of the accused, and with a lathi by another accused. Force and violence having been used in pulling down the huts and in beating Bhagidhar, the accused have all been found guilty of rioting and sentenced to the full punishment awardable; and the two men who wounded Miajan have also been separately punished for causing hurt to him, but the four other accused, not having individually caused hurt to any one, the question whether they may be separately punished for the hurt has been referred to the Full Bench. It is conceded that all the prisoners were punishable for rioting, and that two of them were separately punishable for the hurt they caused in prosecution of the common object of the riot. If these two, as is conceded, were guilty of an offence punishable separately for the punishment awarded for the riot, all the others are, it is submitted, also punishable in a like manner; for **[444]** by s. 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of a common object, every member is guilty of that offence. If the offence is separable in the one case, it is a separable offence in the other. Section 71 † of the Penal Code does not apply to a case of this

Every member of an unlawful assembly to be deemed guilty of any offence committed in prosecution of common object.

*[Sec. 149 :—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.]

Limit of punishment of offence which is made up of several offences.

†[Sec. 71 :—Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.]

nature. Illustration (*a*) to that section shows what was in contemplation by the words " an offence made up of parts." This refers to one offence, in regard to which there can, in the nature of things, be only one trial; as where hurt is caused by several blows with a stick, the several blows make out one offence, and could only be tried and be punishable as one offence. The second illustration applies to the present case. The hurt inflicted on Bhagidhar is no part of the offence against Miajan Each might have insisted on a separate trial, and although the facts in evidence in the two cases, viz., that the accused took part in the riot, but could not be identified as having struck any particular blow, might be the same, the offences for which they were responsible as rioters would be separate and distinct, and they would be equally responsible to Miajan as to Bhagidhar. Section 35* of the Criminal Procedure Code, which relates to convictions for separate and distinct offences at one trial, governs this case and not s. 71 of the Penal Code.

Rioting is an offence against the public tranquillity, and is dealt with in a different chapter of the Penal Code from offences affecting the human body. Examples of " more offences than one " are given in illustrations (*a*) to (*h*). In s. 235 of the Criminal Procedure Code, illustration (*g*) shows that the offences of rioting and hurt are separate. If they are separate offences, s. 71 of the Penal Code cannot apply to them. The illustration given in *Empress* v. *Ram Partab* (I. L. R., 6 All., 121, on p. 124, line 26), as applicable to the first part of s. 71, is not appropriate to that part, but comes under part 3 of that section. A person cannot be punished both for being a member of an unlawful assembly and for riot, because, when force is superadded to the first, it becomes the second, and the combination of unlawful assembly and force constitute a different offence. The illustration regarding the man who holds up his first, then strikes, and then stabs, is of the same character as the several blows in one beating are one offence; but the causing of grievous hurt to three [445] people, which were the facts found in that case, did not culminate in the riot for which the accused was punished. If the riot, on the other hand, culminates in murder, or, as in the above case, in grievous hurt, the rioters become liable, it is submitted, for those separate offences under s. 149. The other cases against my contention followed and accepted the arguments in the above case. They are, however, dissented from in *Queen-Empress* v. *Dungar*

* [Sec. 35 :—When a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonments or transportation, to commence the one after the expiration of the other in such order as the Court may direct.

Sentence in cases of conviction of several offences at one trial.

It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court :

Maximum term of punishment.

Provided as follows :—

(*a*) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years :

(*b*) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

For the purpose of confirmation or appeal, aggregate sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.]

† [Sec. 235, Ill. (*g*):— A, with six others, commits the offences of rioting, grievous hurt, and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under Sections 147, 325 and 152 of the Indian Penal Code.]

Singh (I. L. R., 7 All., 29); *Loke Nath Sarkar* v. *Queen-Empress* (I. L. R., 11 Cal., 349); *Queen-Empress* v. *Pershad* (I. L. R., 7 All., 414); *Queen-Empress* v. *Sakharam Bhau* (I. L. R., 10 Bom., 496); *Queen-Empress* v. *Nirichan* (I. L. R., 12 Mad., 36).

No one appeared for the prisoner.

The following **opinions** were delivered by the Court (PETHERAM, C.J., MITTER, PRINSEP, WILSON, and TOTTENHAM, JJ.) :—

Petheram, C.J., Mitter, Prinsep and Wilson, JJ.—We are of opinion that the questions referred in this case should be answered in the negative.

The appellants Nos. 1, 3, 4 and 5 were found guilty of rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code, and each of them was sentenced to three years' rigorous imprisonment for that offence. Two of their co-appellants, whose appeals are not before us, are found to have committed, in prosecution of the common object of the unlawful assembly of which they were all members, acts which amounted to voluntarily causing hurt under s. 324 of the Indian Penal Code. The appellants Nos. 1, 3, 4 and 5 were, therefore, also found guilty of voluntarily causing hurt under s. 324 of the Indian Penal Code, coupled with s. 149 of the Indian Penal Code. For this offence each of them was sentenced to a further period of rigorous imprisonment for one year. We think that under the first paragraph of s. 71 of the Indian Penal Code these separate sentences are not legal.

Paragraph 1 of s. 71 of the Indian Penal Code is to the following effect:—

"Where anything which is an offence is made up of parts, any of which part is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided."

[446] In this case the offence of voluntarily causing hurt under s. 324, coupled with s. 149 of the Indian Penal Code of which these appellants have been found guilty, is primarily made up of two parts, *viz.*, (1) of their being members of an unlawful assembly, by which force and violence was used in prosecution of its common object, and the members of which were armed with deadly weapons; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, viz., rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of s. 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishments for the two offences is illegal under it.

The following cases were cited before us: *Empress* v. *Ram Partab* (I. L. R., 6 All., 121); *Loke Nath Sarkar* v. *Queen-Empress* (I. L. R., 11 Cal., 349); *Queen-Empress* v. *Dungar Singh* (I. L. R., 7 All., 29); *Queen-Empress* v. *Pershad* (I. L. R., 7 All., 414); *Queen-Empress* v. *Ram Sarup* (I. L. R., 7 All., 757); *Queen-Empress* v. *Sakharam Bhau* (I. L. R., 10 Bom., 496); *Queen-Empress* v. *Nirichan* (I. L. R., 12 Mad., 36).

With the exception of the first two, the other cases do not appear to us to be any authority upon the question under our consideration. In some of the Allahabad cases Mr. Justice BRODHURST expressed his opinion upon it; but we do not find that this question legitimately arose in them.

For the reasons set forth above, we agree with the view expressed by Mr. Justice STRAIGHT in *Empress* v. *Ram Partab* (I. L. R., 6 All., 121).

The result is that the sentence of one year's rigorous imprisonment passed upon each of the appellants Nos. 1, 3, 4 and 5, under s. 324, coupled with s. 149 of the Indian Penal Code, will be set aside.

[447] **Tottenham, J.**—In my opinion the separate sentences passed upon the appellants Nos. 1, 3, 4 and 5 for offences under ss. 148 and 324 of the Penal Code are legal. The legality of the convictions is not in dispute before us, and it seems to me that the prisoners are each liable under s. 35 of the Code of Criminal Procedure to receive sentences in respect of each of these offences, unless s. 71 of the Penal Code protects them from being punished for each offence.

Section 71, as amended by Act VIII of 1882, provides for three cases in which the offender shall not be liable to be punished for more than one of two or more offences of which he may have been convicted.

The first clause of that section is the only one that need be considered in this case ; for that is the one, if any, which may be applicable to this case.

The first clause then is in these words: "When anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided."

The prisoners have been convicted of offences punishable under ss. 148 and 324 of the Penal Code. It is true that the offence punishable under s. 148 is made up of parts, either of which parts is itself an offence, viz., being a member of an unlawful assembly, armed with a deadly weapon (s. 144), and rioting (s. 147); but s. 148 expressly provides a higher punishment than could be awarded for either of those two offences.

The offence under s. 324, of which also the prisoners have been convicted, is not necessarily made up of parts, any of which parts is itself an offence : so that s. 71 does not very clearly affect the liability of the prisoners to be separately sentenced for each offence.

But an opinion has been expressed that, because the conviction of the prisoners of the offence punishable by s. 324 is justified only by the provisions of s. 149, therefore that offence is in this case made up of parts, any of which parts is itself an offence, the parts being offences under ss. 143 to 147 and 148 by the [448] prisoners themselves, and an offence under s. 324 committed by another person.

I am unable to adopt this view. I could perhaps do so if s. 149 defined and made punishable any specific offence ; but it does not do this. It simply declares that under certain circumstances every person, who is a member of an unlawful assembly, is guilty of the offence committed by some other member of it, whatever that offence may be; and, if he is guilty, I apprehend he is liable to be punishd for it.

He is not convicted of an offence punishable under s. 149, but of an offence punishable under whatever section such offence is made punishable. Section 149 simply makes the participators in an unlawful assembly equally liable with the actual perpetrator for any offence committed by him in prosecution of the common object.

The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits ; and if such further offence is committed in prosecution of the common object of the rioters, s. 149 declares that each one of these is guilty, notwithstanding that he did not do the act or abet it. It places each member of the unlawful assembly in the same position as the actual perpetrator of the further offence. This seems to me to be the plain

meaning of the law, and I cannot agree in holding that the offence punishable under s. 324 is made up of several parts upon the ground that it is s. 149 which declares the guilt of the prisoners.

I think the sentences passed are legal.

T. A. P. *Sentence varied.*

NOTES.

[The cases on the subject upon which there has been a conflict of case-law have been very clearly set forth by Mr. **G. P. Boys** in his *Criminal Procedure Code*, 1898, I Edn. (1914) at 91 *et seq.*

See also 3 C.W.N., 174; 4 C.W.N., 245; 8 C.W.N., 395; 8 C.W.N., 344; 8 C.W.N., 483; 22 Cal., 805; 16 Cal., 725; 19 Cal., 105; (1894) P.R., 31; (1895) P.R., 8; (1901) P.R., 4; (1892) 17 Bom., 260.

In the Cr.P.C., 1898, the *explanation* and the *illustration* to sec. 35 were newly inserted.]

---

[449] APPELLATE CIVIL.

The 15th January, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE GHOSE.

Bir Chunder Manikya............Plaintiff

versus

Raj Mohun Goswami and others............Defendants.*

Limitation Act, 1877, Art. 130—Suit for assessment of rent on lakheraj land after decree for resumption—Effect of decree as creating or not relationship of landlord and tenant.

The plaintiff brought a suit in 1861 against *C* for resumption of. and for declaration of his right to assess rent upon, *C*'s lands within his zemindari which *C* held as *lakheraj*. That suit was presumably instituted under Regulation II of 1819, s. 30, which related only to resumption of *lakheraj* lands existing prior to 1790, but there was nothing to show conclusively under what law it was instituted, or whether the *lakheraj* grant was one subsequent or anterior to 1790. In that suit an *ex parte* decree was passed in 1863 that "the suit be decreed, and the land in dispute be declared to be *shukur*," *i.e.*, liable to assessment. In a suit brought in 1886 against the representatives of *C*, after serving a notice upon them to pay rent for the land at a certain rate, to assess the land at the rate mentioned in the notice, and for the recovery of rent at that rate: *Held*, that the decree of 1863 had not the effect of creating the relationship of landlord and tenant between the parties, and therefore the suit, not having been brought within 12 years from the date of that decree, was barred by art. 130† of the Limitation Act XV of 1877.

---

* Appeal from Appellate Decree No. 2231 of 1887, against the decree of Baboo Nil Madhub Bundopadhya, Subordinate Judge of Tipperah, dated the 2nd of July 1887, affirming the decree of Baboo Chunder Prosunno Dutt, Munsif of Commilla, dated the 14th of March 1887.

† [Art. 130:—

Description of suit.	Period of limitation.	Time from which period begins to run.
For the resumption or assessment of rent free-land.	Twelve years ...	When the right to resume or assess the land first accrues.]

THIS was a suit for assessment of rent on certain lands which the predecessor of the defendants had held as *lakheraj* lands, but which had been declared liable to assessment by an *ex parte* decree, dated the 14th January 1863, which, as the plaintiff claimed, had the effect of establishing the relationship of landlord and tenant between himself and the defendants.

The defence (so far as it is material to this report) was that the decree passed in 1863 had not the effect ascribed to it by the plaintiff, and that the suit was consequently barred by lapse of time. Both the lower Courts decided in favour of the defendants, and the plaintiff appealed to the High Court.

Mr. *P. O'Kinealy* and Baboo *Srinath Banerjee* for the Appellant.

[450] Baboo *Akhoy Coomar Banerjee*, and Baboo *Gobind Chunder Doss* for the Respondents.

The following cases were cited : *Sonatun Ghose* v. *Abdool Farrar* (B. L.R., Sup. Vol., 109 ; 2 W. R., 91) ; *Madhusudan Sugory* v. *Nipal Khan* (8 B. L. R., Ap., 87 (note) ; 15 W. R., 440), *Saudamini Debi* v. *Sarup Chandra Roy* (8 B. L. R., Ap., 82 ; 17 W. R., 363), *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (2 C. L. R., 569), and *Nilkomul Chuckerbutty* v. *Bir Chunder Manikya* (Special Appeal No. 1605 of 1885 decided on the 13th May, 1886).

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE GRANT.

Nil Komul Chuckerbutty and others............Defendants

versus

Bir Chunder Manikya............Plaintiff.*

Limitation Act, 1877, Art. 130—Suit for assessment of rent on lakheraj land after decree for resumption—Effect of decree as creating or not relationship of landlord and tenant.

The plaintiff in 1862 obtained a decree for resumption of land held under an invalid *lakheraj* title created before 1790, the decree declaring the land liable to assessment. In a suit brought more than twelve years after the decree against the representatives of the defendant in the suit of 1862 to assess the land : *Held*, that the decree of 1862 did not create the relationship of landlord and tenant between the parties, and that the suit was, therefore, barred under Art. 130 of the Limitation Act XV of 1877.

THE facts of this case are sufficiently stated in the judgment.

Baboo *Troyluckonath Mitter* and Baboo *Golap Chunder Sircar* for the Appellants.

Baboo *Rutnessur Sen* (for Baboo *Kali Mohun Das*), and Baboo *Durga Mohun Das* for the Respondent.

The **Judgment** of the Court (MITTER and GRANT, JJ.) was as follows :—

This is a suit brought by the plaintiff to assess certain lands, which were declared by a decree of 1862 to be liable to assessment as invalid *lakheraj*. One of the objections taken by the defendants in this Court, as well as in the lower Courts, is that the suit is barred by limitation. Another point urged here is that one of the defendants in that suit, viz., Prosunno Coomar Chuckerbutty, was a minor at the time when the decree was passed, and that he was not represented by his guardian. As we think that upon the first point taken, namely, the point of limitation, the defendants appellants are entitled to succeed, it is unnecessary to express any opinion upon the other point.

* Appeal from Appellate Decree, No. 1605 of 1885, against the decree of Baboo Kali Dass Dutt, Subordinate Judge of Tipperah, dated the 22nd of April, 1885, reversing the decree of Baboo Gour Chunder Roy, Munsif of Kushtia, dated the 28th of April, 1884.

Now, to a suit of this kind, Art. 130 of the second schedule of the Limitation Act applies. That article says that in a suit for the resumption or assessment of rent-free land the period of limitation is twelve years from the date when the right to resume or assess the land first accrues. The right to assess accrued in this case in the year 1862, when the resumption decree was passed, and the present suit having been brought more than twelve years from that date is barred. But it has been contended on behalf of the respondent that that article does not apply, because in this case the decree in 1862 established a relationship of landlord and tenant between the plaintiff and the predecessor in title of the defendants. If that were so no doubt it would be an answer to the contention of the appellants that the suit is barred by limitation under Art. 130. Now what has been settled by authorities on this point is this, that the mere mention of s. 30, Regulation II of 1819, is not conclusive, although that section only refers to the resumption of invalid *lakheraj* lands created before the 1st December 1790, that is, although on the face of the decree it appeared that that section was mentioned, yet the suit was really a suit for assessment of rent upon land alienated from the *mal* estate after the 1st December 1790, and that the decree established a relationship of landlord and tenant between the person in whose favour the decree was passed and the person against whom it was passed. If that is not established, then it would be taken to be a decree for resumption of invalid *lakheraj* lands under s. 6, Regulation XIX of 1793. In this case the decree has been placed before us, and we cannot say that it is shown thereby that, although it purports to have been based upon s. 30, Regulation II of 1819, yet it was really a decree for assessment of *mal* land. That being so, we must take it that the decree of 1862 was a decree for resumption of land held under an invalid *lakheraj* title created before the 1st December 1790. For assessment of such lands, the procedure laid down in s. 9, Regulation XIX of 1793, has first to be adopted by the zamindar. The last part of that section says: "If the proprietor shall agree to pay the revenue required of him, he and his heirs and successors shall hold the lands as a dependent taluk, subject to the payment of such fixed revenue for ever." But that section does not provide for a case where the proprietor, that is to say, the *lakherajdar*, refuses to pay the revenue required of him. It is clear that in a case of that description the zamindar must proceed by a regular suit to assess the land according to the provisions of s. 8, Regulation XIX of 1793. To a suit of that description, Art. 130 of the Limitation Act would apply. In this case there is nothing to show that the plaintiff first proceeded under s. 9, Regulation XIX of 1793, and that then finding that the *lakherajdar* did not agree to pay the revenue assessed upon the land, he was compelled to bring this regular suit. But it is clear from the proceedings in the lower Court that the defendants would not consent to pay any revenue at all. Their contention was that the suit is barred. It is, therefore, quite unnecessary to require the plaintiff to proceed first according to the direction contained in s. 9, Regulation XIX of 1793. We may take it that the *lakherajdars*, the defendants, would refuse to pay the revenue that might be assessed on their lands under the provisions of Regulation XIX of 1793. That being so, the simple question is whether the present suit is barred under Art. 130 of the Limitation Act. I have already pointed out that, unless the decree of 1862 established a relationship of landlord and tenant, the present claim would be barred. It has been already shown that that decree does not go to establish that point in favour of the plaintiff. The suit is, therefore, barred by the limitation prescribed by Art, 130.

We accordingly reverse the decree of the Lower Appellate Court and dismiss the suit with costs.

[451] The facts and arguments are sufficiently stated in the **Judgment** of the Court (PRINSEP and GHOSE, JJ.) which was as follows:—

The question involved in this appeal is one of limitation under Art. 130 of the second schedule of Act XV of 1877; and it arises in this way:—

The plaintiff, who is the zamindar of Chuckla Rashinabad, instituted a suit on the 28th of December 1861 against one [452] Choituno Mohun

Adhicary in the Collector's Court for the purpose of resuming, and for having his right declared to assess rent upon, certain lands within the ambit of his zemindari which he, the defendant, held as *lakheraj*. It does not appear from the decree pronounced in that suit, and which we may here mention is the only proceeding before us in connection with it, whether it was a suit under the provisions of s. 30, Regulation II of 1819, or s. 28,* Act X of 1859, or under any other law; but we have it that subsequently to the passing of Bengal Act VII of 1862, which provided for the transfer of suits instituted under s. 30, Regulation II of 1819, from the Collector's Court to the Civil Court, that suit was transferred from the Collector's to the Civil Court; and there can be little doubt that, as this transfer was made immediately after the passing of that Act, and no special reason is assigned for its transfer, it was made in consequence, and that, therefore, the suit had been brought under s. 30, Regulation II of 1819. And we may here observe that if it had been a suit under Act X of 1859, there [453] was nothing to prevent the Collector from proceeding with it. In the Full Bench case of *Sonatun Ghose* v. *Abdool Farrar* (B. L. R., Sup. Vol., 109; 2 W. R., 91), the majority of the Judges who constituted that Bench held that s. 30, Regulation II of 1819, related only to resumption of *lakheraj* existing prior to 1790. And if this suit be regarded as one brought under that law, it would seem that it was barred under the law of limitation then in force (XIV of 1859, s. 14).† But however that may be, an *ex parte* decree was passed in January 1863 in these words: "The suit be decreed, and the land in dispute be declared to be *shukur*." These words, taken with the recitals of the claim given in the decree, mean, as we take it, that the prayer for resumption of the *lakheraj* be allowed, and the lands be declared liable to pay revenue or rent, as the case might be, with reference to the grant set up being either anterior or posterior to December 1790.

Nothing was done in furtherance of that decree, until the year 1886, when a notice was served by the zemindar upon the defendants, who are the representatives of Choituno Mohun Adhicary, calling upon them to agree to hold the lands at a certain jumma; and he subsequently brought the present suit

* [Sec. 28:—So much of Section X, Regulation XIX, 1793, Section X, Regulation XLI, 1795, Section VI, Regulation XXXI, 1803, Section XXI, Regulation VIII, 1805, and Section XXIV, Regulation XII, 1805, as authorises and requires proprietors and farmers of estates and dependent talooks, in cases in which grants for holding land exempt from the payment of revenue have been made subsequent to the dates specfied in the said sections, of their own authority to collect the rents of such land and to dispossess the grantees of the proprietary right in the land and to re-annex it to the estate or talook in which it may be situate, is repealed; and any proprietor or farmer who may desire to assess any such land or to dispossess any such grantee shall make application to the Collector, and such application shall be dealt with as a suit under the provisions of this Act. Every such suit shall be instituted within the period of twelve years from the time when the title of the person claiming the right to assess the land or dispossess the grantee, or of some person claiming under him, first accrued. If such period has already elapsed or will elapse within two years from the date of the passing of this Act, such suit may be brought at any time within two years from such date.]

Application to dispossess grantees of land exempt from revenue.

† [Sec. 14:—In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.]

Computation of period of limitation in case of suit prosecuted *bonâ fide* but in wrong Court.

on the 12th of July 1886 for the purpose of assessing the lands at the rate mentioned in the notice, and for recovery of rent at that rate.

This suit has been dismissed by both the lower Courts as barred by limitation.

The main contention that was raised before us by Mr. *O'Kinealy*, the learned counsel for the appellant, was that, although more than 12 years have elapsed from the date of the decree of 1863, still no limitation would apply, because the effect of the decree was to re-annex the land that had been improperly alienated after 1790 to the *mal* estate of the zemindar, and to create between the parties the relationship of landlord and tenant. Mr. *O'Kinealy* further contended that the land having been already declared to be *mal*, art. 130 of the Limitation Act had no application. And he relied upon the rulings of this Court in *Madhusudan Sagory* v. *Nipal* **[454]** *Khan* [8 B. L. R., Ap., 87 (note); 15 W. R., 440], *Saudamini Debi* v. *Sarup Chandra Roy* (8 B. L. R., Ap., 82; 17 W. R., 363), and *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (2 C. L. R., 569).

The validity of the contention raised before us depends entirely upon what may be the true interpretation and effect of the resumption decree passed in January 1863. That decree, as already mentioned, does not show under what law it was passed, nor is there anything stated in it as to whether the grant set up by the *lakherajdars* was a grant subsequent or anterior to December 1790. Unless this be shown, we cannot say that the effect of the decree was to establish, as contended for the appellant, the relationship of landlord and tenant between the parties. It has been held in certain cases by this Court that a decree for resumption of a *lakheraj* grant before December 1790 does not by itself create such a relation; that it is after the decree has been followed up by a proceeding assessing the revenue payable by the *lakherajdar*, and when the latter agrees to pay the revenue assessed, that such a relationship is created; while in the case of a grant subsequent to the year 1790, the decree declaring the zemindar's right to assess rent does establish such a relation. See *Madhub Chandra Bhadory* v. *Mahima Chandra Mazumdar* [8 B. L. R., Ap., 83 (note); 12 W. R., 442], and *Shamasunderi Debi* v. *Sitab Khan* [8 B. L. R., Ap., 85 (note); 15 W. R., 474].

Taking the law as thus laid down we think that, in the absence of anything being shown by the plaintiff as to the law under which the above decree was passed, and whether the alienation was anterior or subsequent to the year 1790, we cannot say for him, upon the bare words of the decree, that it established the relationship of landlord and tenant; while, on the other hand, the fact of the suit being transferred after the passing of Bengal Act VII of 1862 from the Collector's to the Civil Court indicates to our mind that it was a suit under s. 30, Regulation II of 1819, which related to the resumption of grants made before the year 1790. If the alienation was made before that year, there can be no doubt that the decree was in respect of **[455]** lands falling within s. 6, Regulation XIX of 1793, and it follows that the zemindar was bound to have adopted the procedure laid down by ss. 8 and 9, Regulation XIX of 1793, for the assessment of revenue upon those lands. And if this had been done, the relationship of landlord and tenant would have been established between the parties. But so far as the words of the decree of 1863 are concerned, they merely amount to this, that the *lakheraj* is not a valid one, and that the lands are liable to pay revenue or rent, as the case might be. It does not declare that the lands belong to the *mal* estate of the zemindar.

If this decree did not establish the relationship of landlord and tenant, and if it did not declare that the lands were the *mal* land of the zemindar, it seems to us to be clear that the plaintiff was bound to have brought his suit within twelve years from the date thereof for the assessment of the lands.

As to two of the cases relied upon by Mr. O'KINEALY, viz., *Madhusudan Sagory* v. *Nipal Khan* [8 B. L. R., Ap., 87 (note); 15 W. R., 440] and *Saudamini Debi* v. *Sarup Chandra Roy* (8 B. L. R., Ap., 82; 17 W. R., 363), we may observe that the question of limitation was not raised in either of them; and there is nothing in those decisions, as we understand them, which militates against the view we have expressed. It was no doubt laid down in the first of these two cases that, in regard to decrees passed before the Full Bench decision in the case of *Sonatun Ghose* v. *Abdool Farrar* (B. L. R., Sup. Vol., 109; 2 W. R., 91), it could not be said that merely because the procedure laid down in s. 30, Regulation II of 1819, was followed, it must be inferred that the grant was anterior to December 1790. But it is to be observed that it was found in the judgment delivered in the resumption case, which was before the Judges in the above case, that the defendant had failed to prove that the *lakheraj* existed prior to 1790; while so far as the resumption decree with which we are concerned, there was no such finding: and, in the second place, as already remarked, there are other facts before us which lead us to infer that the grant which was the subject-matter of the decree of 1863 was one anterior to 1790.

[456] As regards the other case relied upon by Mr. O'KINEALY, viz. *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (2 C. L. R., 569), it is sufficient to state that the judgment proceeds mainly upon the construction which the learned Judges put upon the resumption decree that was before them. That decree was construed to have the effect of declaring "that the land in the possession of the defendant had been part of the permanently-settled estate, and had been separated by an invalid grant, and thereon to resume the same and re-annex the land to the zemindar's estate." We have not before us the terms of the decree in that case, nor do we know what were the facts from which this construction was arrived at. The terms of the decree in the suit of 1886, now before us, do not however enable us to come to the same conclusion.

Our attention has been called by the learned vakil for the respondent to an unreported decision by another Divisional Bench of this Court (MITTER and GRANT, JJ.) in Second Appeal No. 1605 of 1885, decided on the 13th May 1886, which altogether supports the view adopted by the lower Appellate Court, holding that the plaintiff's claim was barred under article 130 of the Limitation Act. The facts of that case were very similar to this, and we may say that we quite concur in that ruling.

The appeal will accordingly be dismissed with costs.

Appeal Nos. 2219, 2230, 2233 will be governed by the decision in No. 223. And so far as the latter of these cases is concerned, it being found that the predecessor of the present defendant was no party to the resumption decree, there can be no question whatever that the plaintiff's suit is barred by limitation. These appeals are accordingly dismissed with costs.

J. V. W. *Appeal dismissed.*

---

[457] APPELLATE CIVIL.

The 7th February, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

Gokul Kristo Chunder............Judgment-debtor

versus

Aukhil Chunder Chatterjee............Decree-holder.*

In the Matter of the Petition of Ishan Chunder Das, Decree-holder.

Rasharaj Bose and others............Judgment-debtors

versus

Gobinda Rani Chowdhrani ....Decree-holder.†

Moola Kumari Bibee............Decree-holder

versus

Mool Chand Dhamant and another, Judgment-debtors, and

Bissun Chand Doodhuria............Decree-holder

versus

Mool Chand Dhamant and another............Judgment-debtors.‡

Execution of decree—Transfer of decree for execution—Jurisdiction—Civil Procedure Code (Act XIV of 1882) ss. 6 and 223.

Having regard to the provisions of s. 6 of the Code of Civil Procedure, a Civil Court has no jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code, when the decree has been passed in a suit the value or subject-matter of which is in excess of the pecuniary limits of its ordinary jurisdiction. *Narasayya* v. *Venkata Krishnayya* (I. L. R., 7 Mad., 397) dissented from.

Sidheshwar Pandit v. *Harihar Pandit* (I. L. R., 12 Bom., 155), *In re Balaji Ranchoddas* (I. L. R., 5 Bom., 680), and *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, (I. L. R., 8 Cal., 51) referred to.

Appeal No. 284 of 1888.

THIS was an appeal from an order of the 16th July 1888, of the District Judge of Burdwan, affirming the order of the Munsif of Cutwa, dated the 12th May 1888.

A decree of the High Court in its Ordinary Original Civil Jurisdiction had been sent to the Munsif of Cutwa for execution. The application of the judgment-creditor for execution was objected to by the judgment-debtor on the ground that the Munsif had no jurisdiction to execute the decree, inasmuch as it [458] had been passed in a suit, the value or amount of the subject-matter of which was in excess of the pecuniary limits of his ordinary jurisdiction. The Munsif overruled the objection and ordered execution. On appeal, the

* Appeal from Order No. 284 of 1888, against the order of F. B. Taylor, Esq., Judge of Burdwan, dated the 16th of July 1888, affirming the order of Baboo Raj Narain Chuckerbati, Munsif of Cutwa, dated the 12th of May 1888.

† Civil Rule No. 1032 of 1888, against the order passed by Baboo Upendra Nath Bose, Munsif of Munshigunge, dated the 28th of April 1888.

‡ Civil Reference No. 8-A of 1888, made by Baboo Nobin Chunder Ganguli, Judge of the Small Cause Court, Berhampore, dated the 10th of April 1888.

District Judge upheld the order of the Munsif on the authority of the case of *Narasayya* v. *Venkata Krishnayya* (I. L. R., 7 Mad., 397).

The judgment-debtor appealed to the High Court.

Civil Rule No. 1032 of 1888.

This was a rule on the judgment-debtors and the decree-holder, Govinda Rani Chowdhrani, to show cause why an order of the Second Munsif of Munshigunge, dated the 28th April 1888, allowing Govinda Rani to participate in the assets to be realized in execution of the petitioner's decree, should not be set aside.

The facts of the case in which this rule was issued were as follows :—

A decree for Rs. 853 was made in favour of the petitioner, Ishan Chandra Das, by the Munsif of Patuakali, on 17th February 1879. This decree was transferred to the Second Munsif of Munshigunge for execution, and on the 27th October 1887, certain of the judgment-debtor's property within his jurisdiction was attached, and on the 12th March sold for Rs. 300. On the 7th March 1888, five days before the sale, Govinda Rani Chowdhrani who, with others, on the 6th April 1877, had obtained a mortgage decree against the same judgment-debtor for upwards of Rs. 11,000 in the Court of the First Subordinate Judge of Dacca, applied to that Court to send the decree to the Munsif of Munshigunge for execution. The application was granted, and on the 11th March 1888, Govinda Rani applied to the Munsif for execution, and for a rateable distribution of sale proceeds in execution of the petitioner's decree under s. 295 of the Civil Procedure Code. On the 14th April the petitioner objected to this application: but the Munsif overruled the objection, and by his order, dated the 28th April 1888, directed a rateable distribution of the sale proceeds. Against this order, on the 2nd August 1888, the petitioner moved the High Court on the ground, *inter alia*, that Govinda Rani's decree, being for a sum of over Rs. 11,000, must presumably have been made in a suit which the [459] Munsif would have had no jurisdiction to try, and that, therefore, the Munsif was not competent to execute the decree or to make any order respecting it under s. 295 of the Code, and a rule was issued in the above terms.

Civil Reference No. 8-A of 1888.

This was a reference to the High Court from the Small Cause Court at Berhampore.

The facts of the case in which the reference was made were these: The Judge of the Small Cause Court at Berhampore was also the Subordinate Judge of Moorshedabad. On the 4th January 1888, Moola Kumari Bibee obtained a decree against Mool Chand Dhamant and another in the Small Cause Court at Berhampore. In execution of her decree, she attached the moveable properties of the judgment-debtors on the 20th January 1889. The properties were sold on 9th March 1889; prior to the sale, on the 2nd March, Rai Bissun Chand Doodhuria Bahadoor, who had, on the 28th January 1889, obtained a decree for Rs. 3,209 against the same judgment-debtor in the Court of the Subordinate Judge of Moorshedabad, applied to that Court to send the decree to the Small Cause Court at Berhampore for execution. The application was granted; and on 7th March Rai Bissun Chand applied to the Judge of the Small Cause Court for execution, and for a rateable distribution of the sale proceeds under s. 295 of the Civil Procedure Code. Moola Bibee met the application with the objection, amongst others, that inasmuch as the Judge of the Small Cause Court had no jurisdiction to try the suit, he was not competent to execute the decree.

The Judge made an order for rateable distribution contingent on the opinion of the High Court.

In Appeal No. 284 of 1888,—

Baboo *Karuna Sindhu Mukerjee* for the Appellant.

Baboo *Benode Behari Mukerjee* for the Respondent.

In Rule No. 1032 of 1888,—

Baboo *Hurri Mohun Chuckerbutty* for the Petitioner.

Baboo *Lal Mohun Das* for the Opposite Parties.

In Reference No. 8-A of 1888,—

Baboo *Srinath Das* for the Decree-holders.

Baboo *Kali Kissen Sen* for the Judgment-debtors.

[460] The following **Judgments** were delivered by the High Court (PIGOT and BEVERLEY, JJ.).

Beverley, J.—In these three cases the question raised is practically one and the same. It may be broadly stated thus: Has a Civil Court jurisdiction to execute a decree sent to it for that purpose under s. 223* of the Code when that decree has been passed in a suit the value or amount of the subject-matter of which was in excess of the pecuniary limits of its ordinary jurisdiction?

[The judgment here set out the facts in the three cases and then proceeded.]

In all three cases, therefore, the point is virtually the same, namely, whether under s. 223 of the Code a decree can be sent for execution to, and can be executed by, a Court which, as regards its pecuniary jurisdiction, was not competent to make the decree.

On the one side, it is contended that s. 223 contains no limitation as regards the pecuniary jurisdiction of the Court to which a decree may be sent

* [Sec. 223:—A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained.

Court by which decree may be executed.

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or,

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or,

(c) if the decree directs the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or,

(d) if the Court which passed the decree considers, for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

The Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto.

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure.

If the decree has been passed in a case cognizable by a Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificate respectively mentioned in clauses (a), (b) and (c) of section 224; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But if the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.]

for execution, similar to that contained in s. 25 *; that by s. 28 the Court to which a decree is sent for execution is expressly vested with the same powers in executing it as if the decree had been passed by itself; that if there is any force in the limitation sought to be imposed, the provisions of s. 295 regarding the rateable distribution of assets would, in many cases, be unfairly restricted in their operation. And we have been referred to the case of *Narasayya* v. *Venkata Krishnayya* (I. L. R., 7 Mad., 397) in which TURNER, C.J., and MUTTASAMI AYYAR, J., held that s. 223 gave an extraordinary jurisdiction to a Court to execute a decree in a suit beyond its pecuniary jurisdiction sent to it for execution.

On the other hand, it is said that the proceedings in execution are merely a continuation of the suit, and that a Court, which has no jurisdiction to try the suit, can have no jurisdiction to execute a decree made in that suit. And in support of this view, the case of *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit* (I. L. R., 12 Bom., 155) decided by SARGENT, C.J., and NANABHAI HARIDAS, J., has been cited before us.

[461] It appears, therefore, that the Madras and Bombay authorities are opposed to each other on this point. The point is one of some importance, but it would seem that no decision of this Court upon it is to be found in the reports.

The question turns to some extent upon the Civil Courts Acts, which prescribe the pecuniary jurisdiction of the various Civil Courts. And it may be pointed out here that, whereas the Madras and Bombay Civil Courts Acts (Act III of 1873, s. 12†, and Act XIV of 1869, s. 24) speak of the jurisdiction of the Courts in "*suits and proceedings*" of a civil nature, the Bengal Civil Courts Act refers to "*suits*" only. The distinction is probably unimportant and, in fact, it appears that, in the report of the Madras case referred to, the words "*suits and applications*" are quoted by some mistake as being the words used in the Madras Act instead of the words "*suits and proceedings.*"

The Madras decision proceeds upon the principle that s. 223 of the Code confers an extraordinary jurisdiction which is limited by no restriction such as is to be found in s. 25.

We are of opinion that we ought not to follow that decision.

It seems to us that the learned Judges who decided that case overlooked the provisions of s. 6 of the Code of Civil Procedure, which appears to contain words which, we think, were expressly intended to limit the jurisdiction which

* [Sec. 25:—The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit whether pending in a Court of First Instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

Transfer of suits.

For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Jurisdiction of District Judge or Subordinate Judge in original suits.

† [Sec. 12:—The jurisdiction of a District Judge or a Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature.

Jurisdiction of District Munsif.

The jurisdiction of a District Munsif extends to all like suits and proceedings, not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed two thousand five hundred Rupees.]

would otherwise be given by s. 223. We are also of opinion that there are other indications in the Code going to show that, as SARGENT, C. J., said in the Bombay case, a Court which could not have entertained the suit is incompetent to deal with it in execution.

The last clause of s. 6 runs as follows: "Nothing in this Code shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

It is contended that the word "*suits*" in this clause must be limited to proceedings in the cause up to the passing of the decree, and that it does not, therefore, operate to curtail the power of a Court to execute a decree. We see no sufficient reason for giving the word this restricted meaning. On the other hand, there would appear to be several weighty reasons for assigning it a **[462]** wider signification so as to cover all proceedings in a suit, including the proceedings in execution.

By s. 9 the Code is divided into ten parts, the first of which treats of *suits in general*. It is important to observe that that part of the Code contains the rules relating to the execution of decrees (Chap. XIX). So far as it goes, this circumstance seems to show that the framers of the Code regarded the proceedings in execution as a part of the suit.

In s. 3, moreover, we find proceedings up to decree and proceedings after decree equally referred to as being proceedings in the suit.

Again, if the words "*jurisdiction over suits*" in s. 6 are to be limited to the institution and hearing of causes up to decree only, it is difficult to conceive any case to which the clause in question would apply. We have been unable to discover any provision in the Code which could, if uncontrolled by this clause, have operated to give a Court jurisdiction to try a suit in excess of the limits of its pecuniary jurisdiction. Chapter II contains the rules as to the Court in which a suit is to be brought; and it will be seen that in almost every section in that chapter the pecuniary jurisdiction of the Court is expressly or impliedly referred to. [See ss. 15, 16, 17, 19 and 25].

On the other hand, s. 223, if uncontrolled by s. 6, gives to a Court a very wide—in fact a practically unlimited—jurisdiction in many important matters in respect of suits, the amount or value of the subject-matter of which may exceed the pecuniary limits of its ordinary jurisdiction.

By s. 228*, the Court executing a decree sent to it has the same powers in executing the decree as if it had been passed by itself, * * * and its order in executing such decree is made subject to the same rules in respect of appeal as if the decree had been passed by itself.

Accordingly, if the decree of a District or Subordinate Judge can be sent to a Munsif for execution, the Munsif has jurisdiction to try all questions relating to the execution of the decree (*e.g.*, limitation, claims to attached property, complaints of resistance or obstruction, and generally all questions under s. 244), and the appeal from his orders would lie in every case to the District Judge,—no matter **[463]** what might be the value of the suit. As WESTROPP, C.J.,

Powers of Court in executing transmitted decree.

Appeal from orders in executing such decrees.

* [Sec. 228:—The Court executing a decree sent to it under this chapter shall have the same powers, in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its orders in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.]

remarked in *Balaji Ranchoddas* (I. L. R., 5 Bom., 680), questions arising in the execution of decrees are frequently quite as important as the questions in issue in suits and appeals, and there would seem to be no reason why the limitation of jurisdiction thought necessary in respect of hearing the original suit should not be also necessary in respect of trying questions relating to the execution of the decree.

There are other considerations which go to bear out the view that the jurisdiction conferred by s. 223 must be considered as qualified by the last clause of s. 6.

Section 223 itself contains a clause empowering the Courts of Small Causes at Calcutta, Madras, Bombay, or Rangoon, to execute decrees sent to them in certain cases, but such a decree must have been passed in a case cognizable in a Court of Small Causes, or, as Act VII of 1888 more clearly puts it, "in a suit of which the value, as set forth in the plaint, did not exceed two thousand rupees, and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes." In other words, we have here a distinct recognition of the rule which appears to be contained in s. 6, that no Court can execute a decree passed in a suit, the value of the subject-matter of which would have been in excess of its pecuniary jurisdiction.

Section 649 refers to a case in which a Court, which passed a decree, may have ceased "to exist or to have jurisdiction to execute it." The use of these words in the Code seems to imply that the jurisdiction of a Court in the execution of decrees is subject to limitation, and that it is not competent to every Court to execute the decree of another Court that may be sent to it for that purpose.

The last clause of s. 6 was first introduced into the Code of 1877. But the Code of 1859 everywhere assumes that the power to execute a decree is not a power possessed by all Courts indiscriminately, but is subject to restrictions of jurisdiction. That Code speaks of the Court "*whose duty it is to execute the decree*" (*see* ss. 206, 207, 285). That Court need not necessarily be the Court which passed the decree (s. 206), but it must be a [464] Court having jurisdiction to execute it, and by s. 287 that Court must apparently be either the principal Civil Court of original jurisdiction in the district," or "any Court subordinate thereto to which it may entrust the execution of the decree."

In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (I. L. R., 8 Cal., 51; L. R., 8 I. A., 123), their Lordships of the Privy Council said: "It appears to their Lordships that an application for the execution of a decree is an application in the suit in which the decree was obtained." This and similar remarks which are to be found elsewhere support the view that the proceedings in a "suit" do not necessarily terminate with the decree, but that the word "suit" may fairly be interpreted to include the proceedings taken to execute the decree. If this be so, it follows that s. 6 must operate to limit the jurisdiction conferred by s. 223. We are of opinion that it does so operate, and that these cases ought to be decided accordingly.

The rule will accordingly be made absolute with costs. The appeal from Order No. 284 will be allowed with costs, the order of the lower Courts being set aside. And the reference will be answered in the terms of this **judgment**.

Pigot, J.—I am of the same opinion. In the judgment which has been just read, an argument adduced by the learned pleader, Babu *Lal Mohan Das*, has not been mentioned by us, and we think it is well to add these words of reference to it. That argument was used as an answer to the objections referred to in our judgment as to allowing Courts of inferior jurisdiction to deal

with questions of great amount or great importance, and it was suggested that s. 239 meets that difficulty by providing for recourse to the Court making the decree in certain cases. That suggestion is, however, met by the observation that the power of having recourse to the Court granting the decree given by that section is limited to the judgment-debtor. We think that disposes of that argument.

C. D. P. *Appeal allowed and Rule made absolute.*

NOTES.

[The view in this case was adopted in (1889) 16 Cal., 465; (1889) 17 Cal., 457; (1889) 17 Cal., 465; (1910) 37 Cal., 574; (1888) 12 Bom., 155; (1901) P.R., 9; (1903) P.R., 39; but a different view was taken by the Madras High Court in (1884) 7 Mad., 397; (1894) 17 Mad., 309; (1909) 7 M. L. T., 132; *see* also (1891) 15 Mad., 345. In (1892) 16 Bom., 731, which was a case under the Pensions Act, a different rule from that in this case, was held to apply.]

[465] APPELLATE CIVIL.

The 21st February, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE GHOSE.

Durga Charan Mojumdar............Decree-holder

versus

Umatara Gupta............Judgment-debtor.*

Execution of decree—Transfer of decree for execution—Civil Procedure Code, 1882, s. 223.

Section 223 of the Code of Civil Procedure, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to *another Court*, should be interpreted to mean another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction.

Narasayya v. *Venkata Krishnayyar* (I. L. R. 7 Mad., 397), dissented from.

THE facts as stated by the Lower Appellate Court were as follows:—

"Umatara Gupta obtained a decree for about Rs. 500, against one Rajoni Kanta Sen, in the Subordinate Judge's Court, at Commillah. About the same time Rajoni Kanta obtained a decree for about Rs. 800, against Umatara, in the Court of the First Munsif of Muradnagor. Rajoni subsequently sold his decree to Durga Charan Mojumdar. When execution of the larger decree was taken out in the Munsif's Court by the then decree-holder, Durga Charan Mojumdar, Umatara Gupta applied to have her own decree set off against that which was sought to be executed. Her application was rejected by the Munsif on the ground of want of the necessary certificate under s. 224 of the Civil Procedure Code from the Court (that of the Subordinate Judge) which had passed the decree. On appeal to this Court the Munsif's order was affirmed. Umatara Gupta then applied to the Subordinate Judge for the necessary certificate under s. 224, which she obtained and duly filed in the Munsif's Court: this was on the 16th February 1888. The Munsif deferred consideration

* Appeal from Order No. 416 of 1888, against the order of D. Cameron, Esq., Judge of Tipperah, dated the 30th of June 1888, reversing the order of Baboo K. D. Chowdhry, Munsif of Muradnagor, dated the 9th of April 1888.

of the petition until the 9th April, the date fixed for the sale of Umatara Gupta's attached property, and on that date he [466] passed an order rejecting her application for set-off, on the ground that her judgment-debtor was Rajoni Kant Sen, and not Durga Charan Mojumdar, the transferee of the decree under execution."

The Judge reversed the decision of the Munsif, and directed that "the set-off applied for be allowed."

From this order Durga Charan Mojumdar appealed to the High Court on the ground, among others, that the Subordinate Judge had no power to transfer the decree to the Munsif for execution.

Baboo *Okhoy Coomar Banerjee* for the Appellant.

Baboo *Rajendro Nath Bose* for the Respondent.

The **Judgment** of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

The matter for our decision in this appeal is whether the Munsif was competent to execute a decree transferred to him by the Subordinate Judge who passed it.

It appears that the appellant obtained a decree from the Munsif which he put into execution. Another decree had been obtained against him, or rather against his assignor, in the Court of the Subordinate Judge, and the decree-holder thereupon obtained an order from the Subordinate Judge to transfer the decree by an order under s. 223 to the Court of the Munsif, in order that it might be set off as a cross-decree. The sole question submitted for our decision is whether such an order can be passed by the Subordinate Judge so as to give the Munsif jurisdiction. The terms of s. 223, standing by themselves, are sufficiently wide to permit this, but we think that they should be read with the other portions of the Code which restrict their application. Section 6 of the Code declares that "nothing in this Code affects the jurisdiction or procedure, or shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction." Now all matters relating to execution of decrees are regarded as proceedings in a suit, and the chapter relating to matters in execution forms portion of Part I of the Code which is entitled "Of suits in general." We may also refer to the well-known case of *Mungul Pershad Dichit* v. *Grija* [467] *Kant Lahiri* (I. L. R., 8 Cal., 51; L. R., 8 I. A., 123) in which their Lordships of the Privy Council expressed themselves in a similar manner. Section 246 of the Code, Explanation I, relating to the execution of cross-decrees, is also important in this respect. It declares that the decrees contemplated by that section are decrees capable of execution at the same time and by the same Court. These expressions, in our opinion, seem to indicate a limitation in respect to the powers of execution by Courts of inferior jurisdiction. In respect to s. 223, we may also observe that the Court of the Munsif, although inferior to the Court of a Subordinate Judge, is not, within the terms of s. 2, subordinate thereto. The definition of "District Court," as therein given, seems to contemplate that all Courts within a district are subordinate to the District Court, that is to say, the principal Civil Court of Original Jurisdiction, rather than to the Court of the Subordinate Judge, which is a Court generally having concurrent original jurisdiction with a District Court. We accordingly hold that s. 223, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to *another Court*, should be interpreted to mean another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. We have considered the case of *Narasayya* v. *Venkata Krishnayya* (I. L. R., 7 Mad., 397), but we are unable

to concur in the opinion expressed by the learned Judges of the Madras Court. We have been referred to a case decided by another Division Bench of this Court (PIGOT and BEVERLEY, JJ.), on the 7th instant—*Gokul Kristo Chunder* v. *Akhil Chunder Chatterjee* (*Ante* p. 457)—in which the view taken of the decision of the Madras Court coincides with that we now express. The respondent is not without remedy in obtaining a set-off for the amount of his decree against the decree now under execution against him, provided he can satisfy any objections that may be raised as to a set-off being no longer allowable by reason of the assignment. He can, if so advised, apply to the District Court under s. 25 for the transfer of the decree **[468]** under execution in the Court of the Munsif to that for the Subordinate Judge, so that the Subordinate Judge may deal with both decrees together. The order of the lower Appellate Court is accordingly set aside, and the order of the Munsif disallowing execution of this decree restored, but not on the grounds stated by the Munsif, which are still open for consideration before a properly constituted Court.

J. V. W. *Appeal allowed.*

NOTES.

[See the Notes to 16 Cal., 457, *supra*.]

[16 Cal. 468]

PRIVY COUNCIL.

The 16th November, 1888.

PRESENT :

LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, AND MR. STEPHEN WOULFE FLANAGAN.

Majid Hossain and others............Plaintiffs

versus

Fazl-un-Nissa............Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Registration—Registration in accordance with the rules of 1862, regulating the place and mode of it, in Oudh—Oudh Estates Act 1 of 1869, s. 13.

An Oudh talukdarni made a grant of a village, part of her talukdari, to her adopted daughter; the instrument requiring, in order to be valid under Act I of 1869, s. 13, to be registered within one month after execution. With a view to its registration, she, being a purdanashin, sent for the neighbouring Pargana Registrar, who attended at her house for her convenience, took her acknowledgment of the document, recorded the registration, and filed a copy of the document in his office.

Held, that this proceeding was a registration of the document, complete and effective; having been, substantially, a registration at the Pargana office.

APPEAL from a decree (26th August 1885) affirming a decree (1st June 1885) of the District Judge of Lucknow.

The question was, whether a deed of gift required to be registered under Act I of 1869, s. 13, had been effectively registered.

The suit in which this question was raised was brought by Amir Haidar, talukdar of Gauria in the Lucknow District, to have set aside a deed of gift of villlage Nizampur, executed, on 21st March 1871, by the late Mussammut Kutb-un-Nissa, his [469] predecessor in estate, in favour of her sister Mussammut Fazlun-Nissa, the defendant. Amir Haidar was brother and heir of the last male talukdar; and he had, in March 1884, obtained the order of her Majesty in Council, affirming a decree for the taluk against his nephew, Abdool Razzak, to whom Kutb-un-Nissa had bequeathed it by a will, which, not having been duly registered in accordance with Act I of 1869, s. 13, was held invalid, (*Haji Abdool Razzak* v. *Munshi Amir Haidar*, L. R., 11 I. A., 121; I. L. R., 10 Cal., 976).

The village in suit being a portion of the talukdari estate of Gauria, could not be given to Fazl-un-Nissa, except by an instrument of gift, executed and attested, not less than three months before the death of the donor, and registered within one month from the date of its execution—(Section 13, Act I of 1869). By the term "registered," according to the interpretation clause of the same Act, is to be understood registered according to the provisions of the Rules relating to the Registration of Assurances for the time being in force in Oudh.

The Judicial Commissioner's Circular, 41 of 1862, dated 25th February 1862, gave the rules for registration in force in Oudh in 1871. The first provided that there should be one Registrar in each pargana, who should register contracts regarding immoveable property. The second rule, after providing that all deeds, relating to "real property," must be registered at the office of the Registrar of the Pargana in which the property was situate, contained the following: "All deeds of a value exceeding Rs. 500 will be registered by Tahsildars in outlying Tahsils, or by the Sadr Registrar, if the property is within the jurisdiction of the Sadr Tahsil, but they are invariably to send a copy for record in the Pargana office."

In the present case the donor, an aged purdanashin, sent for the Pargana Registrar to her own house. What followed is set forth in their Lordships' judgment.

The Courts in Oudh concurred in the opinion that there had been substantial compliance with the rules in force; the Judicial Commissioner, Mr. T. B. Tracy, affirming the decree of the District Judge dismissing the suit. Pending an appeal to Her [470] Majesty in Council, Amir Haidar died, and was succeeded by the present appellants, by order of revivor, dated August 1888.

Mr. *R. V. Doyne*, for the Appellants, argued that the attempted registration was ineffectual. It occurred in the outlying Tahsil of Mohanlalganj, and the proper registering officer was the Tahsildar. And even if the Pargana Registrar had authority, he was authorized to effect registration only in his own registry office, in the absence of special cause assigned by him for registering at the house of the party executing.

Mr. *C. W. Arathoon*, for the Respondent, was not called upon.

Their Lordships' **Judgment** was delivered by

Lord Fitzgerald.—Their Lordships are of opinion that this objection ought not to prevail.

Kutb-un-Nissa made a grant to her adopted daughter of the village of Nizampur, which required to be executed three months before her death, and to be registered within a month after the date of its execution. The objection taken to the instrument was that it was not presented at the office of the Registrar, but that the Registrar was sent for to Kutb-un-Nissa's residence

where the deed was executed and registered. She appears to have been a purdanashin; and the mode in which registration was effected was in this manner: She sent for the Pargana Registrar, whose name is given as Kali Churn, and he attended at her house. Her house appears to be near the office of the Pargana Registrar, and actually within the very village which was the subject of the grant. Kali Churn having attended her, and having the deed acknowledged in his presence, word for word, by the granting party, and having examined it, it was handed to him for registration.

The record of registration by the Registrar is as follows:

"*No. 131, Volume* 2.—On Tuesday, the 21st March 1871, at 10 A. M., Mussammat Kutb-un-Nissa, aged about 65 years, wife of Jahangir Bakhsh, talukdar of Gauria, sent for me at her house in the village Gauria. She got this document executed in the presence of Ganesh Bakhsh and of Beni Parshad, the witnesses named on the margin, and having presented it for **[471]** registration, admitted its execution on her part and attested the contents word for word, and, having seated herself on the threshold of her doorway, marked the document with her own hand in my presence. Mussammat Amiran, wife of Mahbub Ali, resident of Amethi, identified the obligor: therefore having registered this deed, drawn up on a blue impressed stamp of the value of Rs. 16, it is returned in original through Ganesh Bakhsh, a copy thereof having been kept, and Rs. 5, on account of fees, having been received.

(Sd.) KALI CHARAN,

Pargana Registrar of Mohanlalganj.

No. 26."

Their Lordships presume part of his duty was either to make a copy himself or to examine the copy made. Having thus got the original deed into his hands, and marked it, and having had that deed duly acknowledged so as to give the best testimony of its execution by the grantor, and having examined the copy which was either prepared by himself or prepared for him, and examined it word for word with the deed, his next step is to take those instruments to his office; to enter the registration in the book; and to file the copy in the proper Pargana office of the District.

The sole objection to that registration upon which their Lordships are asked to invalidate that deed is that the grantor did not go to the office of the Pargana Registrar. He came to her as a matter of convenience and received the deed and copy at her house. That is the sole objection. And upon that their Lordships are asked to declare this registration to be null and void, and consequently that the deed is worthless.

The registration is to be in accordance with the rules for the time being in force, and the registration is to be judged by those rules, and those alone. The first rule is this: "There must in future be only one registrar in each pargana for the registration of deeds relating to real property, who shall be especially appointed for that purpose, and styled the Pargana Registrar. He may, of course, register any other contracts that can be registered by ordinary registrars, but no other registrar **[472]** may register any contract regarding immoveable property." He certainly could not be more clearly ear-marked as the proper and only registrar to register this deed under the circumstances. But there was something more to be provided for; and accordingly their Lordships find this in rule 2: "All deeds regarding real property, or in any way creating liens and encumbrances upon it, must be registered at the office of the registrar"—that is to say, the Registrar previously named, namely the Pargana Registrar—" of the pargana in which the property is situated, and must

be copied in full. If for any special reason, parties at a place distant from the property wish to register a deed affecting it, they must go to the Tehsildar or Sadr Registrar, who will register it, and will immediately transmit a copy to be registered at the office of the Pargana in which the property is situated, charging and transmitting an extra fee for the same." That addition to or alteration of the second rule provides for a case of public convenience. These districts are no doubt very large in India, and it may be a very great inconvenience and expense for parties by reason of distance to attend at the Pargana office, and then by this rule they get the facility in place of attending at the Pargana office of going before the Tehsildar, or the Sadr Officer, who receives the deed, and makes the copy, and transmits it to the Pargana Registrar. It is obvious that this is not one of those exceptional cases, for the lady did not live at a distance from the Pargana District. She was within it, and a very short distance from the office of the Registrar. The registration in fact took place at the office of the Pargana Registrar, though the officer attended to receive the deed, to receive its acknowledgment, and to compare the deed with the copy. He brought it all to his own office, and the registration is in fact the recording of that copy in the office of the Pargana Registrar, all the other requisites provided by the rule having been otherwise complied with.

Their Lordships are of opinion, without going further, that the registration was effective, complete, and full; and that the deed ought not to be disturbed on that account.

There is said to be a contradictory provision at the conclusion of clause 2. Their Lordships do not find it necessary to express any [473] opinion upon that. Their Lordships understand that that rule has been superseded; but at any rate, they do not find it necessary to express any opinion on the question whether there is any contradiction between the two clauses. They are of opinion here that the registration was before the proper officer, and substantially a registration at the office of the Pargana District.

Their Lordships will, therefore, humbly recommend Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Barrow & Rogers.*
Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*
C. B.

NOTES.

[*See* also (1889) 11 All., 319, as regards when a provision in such cases is mandatory or directory; *see* also (1913) 24 M. L. J., 664, where defect of jurisdiction was held to render registration invalid.]

[16 Cal. 473]

PRIVY COUNCIL

The 19th and 20th November, 1888.

PRESENT.

LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, AND MR. STEPHEN WOULFE FLANAGAN.

Mohima Chunder Mozoomdar and others............Plaintiffs

versus

Mohesh Chunder Neoghi and others............Defendants,

[On appeal from the High Court at Calcutta.]

Limitation Act (XV of 1877), Sched. ii, Art. 142—Burden of proof—Date of dispossession or discontinuance of possession.

The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by art. 142* of sched. ii of Act XV of 1877) next preceding the suit.

That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to shift the burden of proof on the defence to show that the defendants were entitled to retain possession.

APPEAL from a decree (15th March 1886) of the High Court reversing a decree (10th June 1884) of the Subordinate Judge of Pubna.

On July 30th, 1883, the plaintiffs, now appellants, filed their plaint in the Court of the Subordinate Judge of Pubna, against 81 defendants, for the possession of land, of which the plaintiffs [474] alleged that they were wrongly dispossessed in Assin 1282, corresponding to September 1874. Of the defendants, numbers 1 to 27 were sued as claiming to be proprietors of the land as part of their own village of Machuakandi. Numbers 78 to 81 were *pro formâ* defendants, having an interest in the land if belonging to Rajapur. The remaining defendants were tenants under the first 27.

The question, which was practically decisive, on this appeal was whether the admitted dispossession of the plaintiffs took place at a period within, or beyond, twelve years before the 30th July 1883.

From the revenue records of 1822 it appeared that of the contiguous mauzahs Rajapur and Machuakandi, the latter was in 1844 diluviated by the

* [Art. 142 —

Description of suit.	Period of limitation.	Time from which period begins to run
For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years ...	The date of the dispossession or discontinuance.]

river Ichamatti, which had till then been the boundary between it and Rajapur. The river then went further in the same direction, eastward from its former channel, leaving land re-formed on the old site.

This was resumed by the Government, and was afterwards measured and assessed as part of Machuakandi. The proprietors of Rajapur, however, claimed the re-formation as part of their mauzah, and, on the 3rd August 1846, the whole of the lands, measured and assessed as appertaining to chur Machuakandi were re-leased to the proprietors of Rajapur as accretions to it. Some time before 1861, ryots were settled on this disputed land. According to the defendants' evidence, the cultivators and tenants all came from Machuakandi.

It was admitted by the plaintiffs that from the month of Assin 1282 (September 1874), the defendants had refused to acknowledge their rights as proprietors. No attempt was made to assert their title until May 1882, when some of the plaintiffs' tenants preferred a complaint to the Magistrate of Serajgunge, against some of the present defendants, alleging acts of violence to prevent their paying rent to the plaintiff proprietors. On the 12th July 1882 the Magistrate, proceeding under s. 530 of the Code of Criminal Procedure, found that the land in dispute was, and had been in the possession of the Machuakandi ryots, and not of the ryots from the [475] original Rajapur. This led to the present suit, in which the plaint was founded upon an alleged continuous title to the land in dispute as part of the mauzah Rajapur. It alleged dispossession in Assin 1282 (September 1874), complained of the Magistrate's order of 12th July 1882 claiming that the plaintiffs' title should be established, they be put into possession, and receive mesne profits.

The answer of the defendant proprietors asserted that the land belonged to Machuakandi and not to Rajapur, and set up limitation under art. 142 of sch. ii, Act XV of 1877. The issues raised the question of the plaintiffs' possession within the period of twelve years. The Subordinate Judge, upon the evidence, came to the conclusion that the plaintiffs had acquired title to the land in dispute, as accretions to their ancestral mauzah Rajapur, and were in possession of it from 1848; and their possession was upheld at the time of the survey measurement of the mehal Rajápur in 1852 and 1853. Then, it was to be seen whether the plaintiffs' claim was barred by limitation in consequence of their having been out of possession between the years 1870 and 1882. As to this, the Subordinate Judge found that it had been proved that although the plaintiffs and their old tenants were dispossessed from the greater part of the lands in dispute in 1875, yet they retained part of them, till ousted under the proceedings in 1882; and that, therefore, the plaintiffs' claim was not barred by limitation as to the whole of it. He accordingly decreed the claim in part.

Against this decree defendants 1 to 18 appealed to the High Court; the plaintiffs cross-appealing for what had not been decreed.

The judgment of a Division Bench (MCDONELL and BEVERLEY, J.J.) was that the decree of the lower Court was wrong, and that the suit should have been dismissed. The evidence, in the opinion of the Court, was unsatisfactory, the witnesses were tenants and interested, the absence of zemindary papers unexplained; and the judgment concluded as follows:—

"Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject [476] of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the

mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred."

Mr. *C. W. Arathoon*, for the Appellants, contended that, on the evidence, the Subordinate Judge's finding that these appellants had possession of part of the property in suit, within twelve years before the institution of the suit, was clearly right. The presumption then was that what had been shown to be the antecedent state of things continued; and this if not establishing the plaintiffs' possession within twelve years of the suit being brought, was sufficient, at all events. to throw the burden of proving when they were dispossessed on to the defence.

He referred to *Rao Karan Singh* v. *Bakar Ali Khan* (L. R., 9 I. A., 99; I. L. R., 5 All), and the Bengal Administration Report for 1872-1873.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the Respondents, argued that the decision of the High Court was right, the suit, having been barred by the law of limitation of art. 142 of sch. ii of Act XV of 1877.

Mr. *C. W. Arathoon* replied.

Their Lordships' **Judgment** was delivered by

Mr. Stephen Woulfe Flanagan—This is an appeal from a decree of the High Court of Bengal dated the 6th March 1886, reversing a decree of the lower Court of the 10th June 1884. The action in this case was brought to recover possession of certain lands which need not be particularly described. It is sufficient to say that they are lands in the possession of the respondents. A great deal of evidence has been given on the one side and the other as to the original title to these lands which were claimed by the plaintiffs as part of "Rajapur," and by the defendants as part of "Machuakandi." It appears to be unnecessary **[477]** to go into that title. The question is whether, assuming the plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th July 1883, was filed within 12 years, as required by the 142nd Article of the Limitation Act of 1877, from the date of their dispossession or discontinuance of possession.

It is conceded by the plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of eight or nine years prior to the bringing of this suit, and that the defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date.

Now the only question in this case being one of fact with reference to the Limitation Act, it will be well to turn to the judgment of the Judge of the lower Court and see upon what grounds he based his decision in favour of the plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas, (which, in their Lordships' opinion are not evidence of possession within the time in question) he goes to the substantial question upon which his decision is based. He says: "It is also to be observed that the title of the defendants Nos. 1, 3, 4, and 5, to the mauzah Machuakandi was created just after the agrarian disturbance in this district. This circumstance alone is sufficient to lead me to believe that the defendants took advantage of the opportunity to revive their lost right to the mauzah Machuakandi by inducing the ryots of the chur Rajapur to admit them as their landlords." Then he says: "It was argued by the defendants' pleader, that the plaintiffs failed to prove collection of rent from their alleged tenants, as they did not file any collection papers, and their loss is not properly accounted for. It is proved by the plaintiff No 1, and the plaintiffs' witnesses that in 1279 the plaintiffs' cutchery house was blown down by rain and storm, and

greater part of the papers were lost, and the defendants' witness No. 1 deposed that occasionally he and his brother Kali Komul used to take papers from their ijmali serishta, and he made over certain papers to his co-sharers at the time of instituting this suit."

[478] Now, merely making a short comment on the first passage which has been just read, it appears to their Lordships that the question for decision is not whether or not the title of the defendants was created just after the disturbance or otherwise, but when were the plaintiffs dispossessed or when did they discontinue possession? The plaintiffs by their own witnesses have admitted in fact that their possession was discontinued, at all events, in July 1875. By one of their witnesses,—their principal witness,—Gomashta Panaulla, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes: witnesses who either are or have been in the employment of the plaintiffs, or witnesses who have been tenants upon the lands - witnesses who in fact had been dispossessed by the respondents, whose evidence, therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the plaintiffs here, to show their possession or their receipt of rent for a period within 12 years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. The statement by the witnesses in reference to the cyclone in the year 1872 and the destruction of their house and the place where they alleged all the papers were kept, and the scattering of those papers, is certainly one which cannot be relied on in a case of this kind as proving that documentary evidence of value in support of their possession had ever existed, nor as affording a sufficient reason for its non-production. It is also a singular circumstance in reference to the destruction of their cutcherry house by the cyclone in the year 1872, that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the plaintiffs as distinguished from their possession are all forthcoming. How [479] it is that they were not destroyed with all the other papers in that cyclone is not explained, but it is a remarkable thing and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming, and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced and have been either in the possession of the plaintiffs, if they really existed, or in the possession of their tenants, but which have not been produced. These papers are, amongst others, the receipts for the rents alleged by the plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they alleged their possession was first determined; these, although alleged to exist, were not produced. The learned Judge then says: "When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain possession of these lands." That, as a proposition of law, is one which hardly meets with the approval of their Lordships.

This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession,

and *à fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed.

Now, turning from the judgment of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made reversing the decision **[480]** of the Court below and dismissing the plaintiffs' suit with costs, the Court says in reference to the Law of *Limitation* : "This suit was instituted in the month of Srabun 1290, and it was, therefore, for the plaintiffs to show that they had been in possession of the land in suit since Srabun 1278. Now, admittedly, according to the plaintiffs, they were ousted in the year 1282, that is, eight years before the institution of the suit. And we find from the evidence, and particularly from the evidence of their gomashta Panaulla, that virtually they admit having been dispossessed so far back as 1280." That would be the year 1873. "In that year, according to the evidence for the plaintiffs, their tenants first grew refractory; and it does not appear that the plaintiffs ever collected rent, or were in possession after that year. That being so, it appears to us that a very heavy onus lay upon them to prove that they were in possession during the two years previous, that is, from 1278." With that observation their Lordships entirely concur : "and we are further of opinion that they have not succeeded in proving this." In that observation their Lordships also concur. "The only documentary evidence adduced on this point is a chitta of the year 1280. This chitta purports to have been prepared by one Tamiz Sircar, who, though alive, has not been called." What its contents may have been it is impossible from the record here to collect, but, at all events, this chitta having been prepared by Tamiz Sircar, who appears to be alive, Tamiz Sircar was not produced. "His signature on the paper has been proved by the gomashta Panaulla. But whether the chitta was really prepared by Tamiz Sircar and under what circumstances and how far it would be evidence of possession, are matters upon which there is really no evidence. This being so, it may be said that, practically, there is no documentary evidence whatever of the plaintiffs' possession." Then the Court goes on to say: "No dakhilas, kabuliyats, or pottahs have been put in." Their Lordships have already made a comment as to the non-production of some of these documents. "The only evidence on the question of possession consists of certain oral statements made by the servants and tenants of the plaintiffs. These tenants admit that they are now holding the lands of **[481]** *usli* Rajapur and that they would benefit if the plaintiffs succeed in this suit. We think that very little reliance can be placed upon the evidence of such witnesses, unsupported, as they are, by a single scrap of documentary evidence." Then the learned Judges commenting on the manner in which the absence of documentary evidence is attempted to be accounted for, namely, by a reference to the cyclone and the suggestion that one of the defendants having become a lunatic, he had got possession of some material papers ; but why the papers, whether in his possession or that of his family, if the papers ever got in his possession, should not have been produced and proved has not been accounted for or explained in any way, say : "We think that neither of those reasons is satisfactory; and, in

the absence of better evidence, we think the plaintiffs have not discharged the onus that lay upon them." Then the Judges of the High Court go on to say: "Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred." It appears to their Lordships that the High Court, in making that observation in reference to the criminal proceedings, must have mistaken the decision of the Magistrate, because so far as appears from the judgment in that case, it would seem that in point of fact the Magistrate finds that for a period of at least four years prior to the institution of those proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of mauzah Machuakandi, and this finding, so far from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of Rajapur, is distinctly to the contrary. Upon the whole, in this case, their Lordships, without going further into the matter, or considering the [482] defendants' evidence, which is, however, cogent to show that they have in fact been in possession for more than 12 years prior to the filing of the plaint, are of opinion that the appeal from the decision of the High Court of Bengal should be dismissed, and the decree appealed from affirmed, and they will humbly advise Her Majesty accordingly.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondents: Messrs. *Oehme, Summerhays and Co.*

C. B.

NOTES.

[The two propositions are well-settled that in suits falling within Art. 142 of the Limitation Act (1877; 1908) the onus is on the party setting up possession and that in suits within Art. 144, the onus is on the party setting up *adverse* possession; and there may be cases where both these have application. The only practical difficulty has been to ascertain which of these Articles applies and when.

As regards onus being on the plaintiff in suits in ejectment to prove his right of possession, this case been followed in 10 C. W. N., 630; 14 All., 193; 28 All., 760: 20 All., 182; 12 C. W. N., 273: 27 Bom., 43; 16 Bom., 343; 20 M. L. J., 306: **(1910) 15 C. L. J., 281.**

As regards the latter proposition, *see* also 13 Bom., 424; 13 C. L. J., 625; **(1904) 9 C. W. N., 111**; (1907) 7 C. L. J., 414.]

[16 Cal. 482]

APPELLATE CIVIL.

The 14th February, 1889.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE BEVERLEY.

Bindessuri Pershad Singh and others............Defendants

versus

Jankee Pershad Singh............Plaintiff.*

Superintendence of High Court—Arbitration—Award—Application to file award, objection to—Decree on award, finality of—Private arbitration—Revisional powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 520, 521, 525, 526 and 622.

Certain disputes between parties were referred under a written agreement to an arbitrator, who, in due course, made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525† of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds :—

(1) That the value of the property in suit was Rs. 500 only, and therefore that the application should have been made in the Munsif's Court and not in that of the Subordinate Judge.

(2) That the agreement of submission was vague and indefinite and did not clearly set out the matters in dispute.

The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed [483] thereon. The plaintiff appealed. The defendants contended that no appeal lay, and that if it did, it lay to the District Judge and not to the High Court.

Held, that, assuming that on a proceeding under ss. 525 and 526‡, the Court has power to consider such objections as are mentioned in ss. 520§ and 521¶, the above objections did not

---

* Appeal from Order No. 362 of 1888, against the order of Baboo Upondra Chunder Mullick, Subordinate Judge of Bhaugulpore, dated the 18th of May 1888.

†[Sec. 525 :—When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Application to be numbered and registered.

The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.]

Notice to parties to arbitration.

‡[Sec. 526 :—If no ground such as is mentioned or referred to in section 520 or section 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.]

Filing and enforcement of such award.

§[Sec. 520 :—The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it thinks fit,

When award or matter referred to arbitration may be remitted.

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration;

(b) where the award is so indefinite as to be incapable of execution ;

(c) where an objection to the legality of the award is apparent upon the face of it.]

¶[Sec. 521 :—An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely)—

Grounds for setting aside award.

(a) corruption or misconduct of the arbitrator or umpire ;

fall under either section, but that the Subordinate Judge, before entertaining the application, was bound to satisfy himself that he had jurisdiction to entertain it, and for that purpose to take evidence regarding the value of the property; and that even if no appeal lay, the High Court could interfere under its revisional powers, because the Subordinate Judge had acted in the exercise of his jurisdiction illegally in assuming jurisdiction without taking such evidence.

Held, further, that as the second objection was well founded, inasmuch as the agreement to refer was vague and indefinite, and did not clearly lay down the power of the arbitrator in dealing with the subject-matter in dispute, and as it was not possible to make out what powers were intended to be conferred upon the arbitrator, the award should not be allowed to be enforced under the provisions of ss. 525 and 526.

THIS was an appeal from an order passed by the Subordinate Judge of Monghyr, upon an application to file an award, under the provisions of s. 526 of the Code of Civil Procedure.

Upon the application being made, the defendants (appellants) objected, and showed cause why the application should not be granted. Amongst other objections the defendants contended that the property was under Rs. 1,000 in value, and that the Subordinate Judge had no jurisdiction to entertain the application. The Subordinate Judge, however, held that the award should be filed and enforced as a decree.

The material portion of the judgment of the Subordinate Judge was as follows:—

"There is nothing to show that the claim has been undervalued, but there are reasons to believe that it has been properly valued, the land and buildings being the subject-matter of the award."

"The award has been read over, and I think that, considering the ability of Pandit Teknarain Das, it is sufficiently clear to decide the points in dispute. The arbitrator measured the lands and prepared plans and khusra by consent of parties. The petition of reference is, no doubt, not very happy and clear; but since the parties chose to leave the matter in general terms in [484] the hands and discretion of the arbitrator selected by them, it cannot now be said that the arbitrator has exceeded the bounds of his authority. I hold that the award, as it is, is valid. No other valid grounds have been made out against the filing of the award. I accordingly allow it to be filed, and under the peculiar circumstances of the case each party shall bear its own costs."

Against that order the defendants preferred this appeal to the High Court.

Mr. *C. Gregory* and Baboo *Rajendronath Bose* for the Appellants.

Mr. *Rash Behary Ghose* and Baboo *Nilkant Sahai* for the Respondent.

The nature of the grounds upon which it was contended that the order and decree of the lower Court should be set aside appear sufficiently for the

---

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit;

and no award shall be valid unless made within the period allowed by the Court.]

purpose of this report in the judgment of the High Court (MITTER and BEVERLEY, JJ.), which was as follows :—

This is an appeal from an order of the Subordinate Judge of Monghyr, directing an award to be filed under the provisions of s. 526 of the Code of Civil Procedure.

A preliminary objection has been raised on behalf of the respondent that no appeal against such an order will lie, and that, if an appeal be allowed, it will lie to the District Judge and not to this Court.

We are clearly of opinion that, under the provisions of the Code, no appeal will lie against the order directing the award to be filed.

But in the present case the award has been followed by a decree, and the question is whether, regarding this as an appeal against that decree, the appeal will lie.

There has been some conflict of authority in this Court as to the proper construction of ss. 525 and 526 of the Code, and the procedure which they are intended to lay down. On the one hand it has been held in the cases cited in the margin* that, if upon an application to file an award under [485] s. 525, any objection, such as is mentioned or referred to in ss. 520 and 521, is taken to the award, the Court is not at liberty to inquire into the validity of such objection, but should stay its hand, refuse to file the award, and leave the party aggrieved to enforce it by regular suit.

On the other hand, the cases cited in the margin† have ruled that when objections are preferred to the filing of an award under ss. 525 and 526, the Court is bound to inquire into those objections, and to decide whether or not the award should be enforced.

By s. 526 an award when filed, "takes effect as an award made under Chapter XXXVII," and s. 522 prescribes the mode in which effect is to be given to an award. "The Court shall proceed to give judgment according to the award," and "upon the judgment so given a decree shall follow." Then come the words : "No appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

In *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (8 B. L. R., 315), a Full Bench of this Court held, upon s. 327 of the old Code of 1859, that where there was no valid award, an appeal would lie against the decree made upon it; and a similar opinion was expressed in *Joy Prokash Lall* v. *Sheo Golam Singh* (I. L. R., 11 Cal., 37).

It would seem to follow, therefore, that there is an appeal against a decree made upon an award—

(1) when the decree is in excess of the award;

(2) when it is not in accordance with the award; or

(3) when there is no valid award.

* C (1) *Sree Ram Chowdhry* v. *Denobundhoo howdhry* (I. L. R., 7 Cal., 190) decided by PONTIFEX and FIELD, JJ.
(2) *Huronath Chowdhry* v. *Nistarini Chowdrani* (I.L.R., 10 Cal., 74) decided by GARTH, C.J., and MACPHERSON, J.
(3) *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry* (I. L. R., 9 Cal., 557) decided by WILSON and MACPHERSON, JJ. This view seems also to have found favour in a decision of a Full Bench of the Allahabad Court in *Bhola* v. *Gobind Dayal* (I. L. R., 6 All., 186).

† (1) *Dutto Singh* v. *Dosad Bahadur Singh* (I. L. R., 9 Cal., 575) decided by MITTER and O'KINEALY, JJ, following *Dandekar* v. *Dandekars*, (I. L. R., 6 Bom., 663) decided by MELVILL and PINHEY, JJ., The same view was taken in *Jones* v. *Ledgard* (I.L.R., 8 All., 340) by STRAIGHT, J. and apparently also by the Madras Court in *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (I.L.R., 4 Mad., 319) decided by TURNER, C.J., and MUTTUSAMI AIYAR, J.

Now the objections made to the award in the present case may be summarized as follows :—

(1) That the value of the property in suit was Rs. 500 only, and, therefore, that the application should have been made in the Munsif's Court and not in that of the Subordinate Judge.

(2). [486] That the agreement of submission is vague and indefinite and does not clearly set out the matters in dispute.

(3). That the award is indefinite and merely an expression of the arbitrator's opinion ; that there was in fact no decision.

(4). That the arbitrator took no evidence and proceeded in the absence of the objectors.

The Subordinate Judge found that the arbitrator had proceeded in accordance with the ikrarnamah in submitting the case to him for arbitration ; that he had not exceeded his authority ; and that his award was sufficiently clear to decide the points in issue. No ground, therefore, such as is mentioned or referred to in s. 520 or s. 521, having been shown against the award, he ordered it to be filed, and made a decree in accordance with it.

Assuming that in a proceeding under ss. 525 and 526, the Court has power to consider such objections as are mentioned in s. 520 or s. 521, of the objections summarized above the first and second do not fall under either section. The Subordinate Judge, before entertaining the application of the respondent, was bound to satisfy himself that he had jurisdiction to entertain it. If the value of the property be below 1,000 rupees, he would have no jurisdiction to entertain the application. With reference to this objection he was bound to take evidence before assuming jurisdiction. This he has not done. Therefore, even if no appeal lies, we can interfere with the decision of the lower Court upon this point, because it has acted in the exercise of its jurisdiction illegally in assuming jurisdiction without taking evidence. Having regard to the second objection, which seems to us to be well founded, we are of opinion that we ought to interfere under s. 622.* We have referred to the terms of the ikrarnamah, and it appears to us to be vague and indefinite in not clearly laying down the powers of the arbitrator in dealing with the subject-matter in dispute. The passage which was intended to define his powers is as follows:—

"We, the declarants (all three parties), in order to set the aforesaid disputes and quarrels at rest, do appoint Sri Pandit Teknarayan Dasji, disciple of Sri Motiram Dasji, inhabitant of mohullah Kamchha, city Kashiji, district Benares, as a panch [487] or arbitrator, and declare and give in writing that the said arbitrator would come to a decision in accordance with *kurrah* and with reference to possession ; in respect of such Dih lands as are occupied by dwelling-houses according to *kurrah* and such as are held possession of without reference to *kurrah* : as also in respect of the property claimed in the suit brought in the Court of the Munsif of Begu Serai."

We have not been able to make out what powers were intended to be conferred upon the arbitrator by this passage.

The agreement, therefore, not clearly defining the powers of the arbitrator, we are of opinion that the award should not be allowed to be enforced under

* [Sec. 622 :—The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity ; and may pass such order in the case as the High Court thinks fit.]

Power to call for record of cases not appealable to High Court.

the provisions of ss. 525 and 526 of the Civil Procedure Code. We, therefore, set aside the decree of the lower Court, and direct the application of the respondent to be dismissed. The agreement executed by both parties being vague and indefinite, the appellants are, in our opinion, not entitled to costs in either Court.

H. T. H *Appeal allowed.*

NOTES.

[Since this decision there have been some important pronouncements on this subject. The case of *Ghulam Jilani* v. *Muhammad Hussain* **(1901) 29 Cal., 167** was a decision of the Privy Council and in the C. P. C., 1908 the Legislature made some alterations, *See* also (1893) 21 Cal., 213 ; (1896) 20 Bom,, 596 ; 18 All., 414 ; (1897) 25 Cal., 141.]

[16 Cal. 487]

CRIMIMAL MOTION.

The 28th March, 1889.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

Abraham...... .....Petitioner

versus

Mahtabo and another...........Opposite-parties.*

Criminal Procedure Code (Act X of 1882) s. 551— "Unlawful detention for an unlawful purpose--Infant, Custody of.

A Hindu girl, under the age of 14 years, went of her own accord to a Mission House where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551† of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married ; that the other allegation was not established ; and that, although she went to and remained in the Mission House of her own free will, there was, under the **[488]** circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother

Held, upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her.

Held, also, that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves,

* Criminal Motion No. 25 of 1889, against the order passed by C. C. Quinn, Esq., Magistrate of Patna, dated the 6th of December 1889.

[†Sec. 551:—Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of fourteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.]

Power to compel restoration of abducted females.

might only become so when entertained towards a child in opposition to the wishes of its guardian, but that the purpose whether entertained towards a woman or a female child must be in itself unlawful.

Held, consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order.

Held, further, that, although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that, having regard to the circumstances of the case, there was nothing to justify such an order being passed.

THIS case arose out of an application made by Mahtabo and Radhakissen to the Magistrate of Patna, under s. 551 of the Criminal Procedure Code, for an order that Ellen Abraham, who was the Lady Superintendent of the Patna Zenana Mission, should restore to their charge the girl Luchminia.

Radhakissen claimed to be entitled to the custody of the girl as her husband, and Mahtabo, who was her mother, was quite willing that her daughter should be made over to him; throughout the proceedings the two petitioners were regarded as forming one party. On the application being made to the Magistrate, an order was passed on the 30th October, directing Miss Abraham to produce the girl in Court, and show cause why she should not be made over to her husband or mother, and thereafter cause was shown, both parties heard by the Magistrate, and several witnesses examined before him. On the 6th December, the Magistrate passed an order to the effect that the petitioners were entitled to the charge of the girl, and that, as they were willing that she should be made over to one [489] or other of them, she should be made over to the charge of the mother Mahtabo, which was accordingly done.

The facts of the case are fully stated in the judgment of the Magistrate, the material portion of which was as follows :—

"The admitted facts of the case are that the girl Luchminia had been living with Radhakissen, either as his wife or his mistress, for several months, and that on the night of the 16th October she left his house in the company of a woman named Sundari, who was the kept mistress of Radhakissen, and went to the Mission House where she is now living.

"There is, in my opinion, nothing to show that the girl was abducted in the sense in which 'abduction' is used in the Penal Code. To constitute such abduction the use of force or deceit is essential, and there is no reason to believe that either force or deceit was used in this instance I am also of opinion that if the word 'abduction' include 'kidnapping,' there is nothing in this case to justify the inference that the girl was kidnapped. I am satisfied that the girl went to the Mission House of her own free will, and that she remains there of her own free will.

"The only ground on which the provisions of s. 551 can be applied is that the girl is unlawfully detained. If, as is contended by the respondent, the girl has completed the age of 14 years, it is clear that under this section she must be regarded as a 'woman' and not as a 'child,' and the only order that I could pass would be an order to set her at liberty, and at the same time, it is evident from the girl's own statement, that she is already at liberty. If then the girl has completed the age of 14 years, the order cannot take effect and must be discharged, and it is, therefore, necessary to determine whether the girl has reached this age or not. I do not intend to discuss this question at length; I will only state that the mother and uncle of the girl who are good witnesses, if trustworthy, depose that she is between the age of eleven and twelve years; and that the pundit who prepared her horoscope deposes to the same effect, and has produced the horoscope itself, which bears out this

statement as regards her age. I should add, however, that there is no independent evidence that the horoscope was prepared [490] at the time alleged, and it is possible that it may have been fabricated for the purpose of this case. On the other hand there is the deposition of the girl herself, which, however, I do not consider to be very good evidence in a case of this kind, and I may add that though her statement, if relied on, shows that she must be more than 12 years of age, it does not clearly establish the fact that she has completed her fourteenth year. The only other evidence, if it can be considered evidence at all, is the testimony of Matangini Bose, that the girl's mother stated her age to be fourteen years. Assuming the evidence to be true, it is clear that, under the circumstances described, the mother had an object in exaggerating the girl's age and it might also be fairly inferred that the girl's appearance and demeanour were such as to suggest that she was younger than her mother represented her to be. Considering the whole evidence on this point, I have come to the decision that the girl is a female child under the age of 14 years. The next point is whether she is unlawfully detained for an unlawful purpose. It is argued that there is no detention whatever, because the girl is free to go or stay; but, in my opinion, a child who is kept or allowed to remain in any place, against the wish of his or her lawful guardian, is detained, the child having no voice in the matter as regards assent or dissent. The detention, however, must be unlawful and for an unlawful purpose. The term 'unlawful' is not defined, but a similar word 'illegal' is defined in the Penal Code and includes everything which furnishes ground for a civil action. I have no doubt that the detention of a child, by a person having no legal claim to the charge of such child, if maintained against the wish of the lawful guardian, would furnish ground for a civil action and I am also of opinion that the detention of a female child, under circumstances calculated to induce her to abandon the religion of her parents and family and to enter another community, which would involve her being outcasted, would be detention for an unlawful purpose. The truth or falsehood of the religion is a matter of which the law takes no cognizance and cannot affect the question. There is no doubt that if the girl remain in the respondent's charge, she will be instructed in the Christian religion and will be [491] encouraged to become a Christian, and I hold that the respondent cannot lawfully detain the girl against the will of her lawful guardian for such a purpose. The next point that has been raised is that Radhakissen is not entitled to the charge of the girl as he is not her lawful husband. It is, I think, fully proved that Radhakissen went through a form of marriage with the girl, which is recognized as a legal form of marriage by members of his caste, and that he subsequently lived with her and treated her as his wife, and it is not proved that the marriage was invalid by reason of the fact that the girl is of a superior caste and was a widow at the time of the marriage. I think that a good deal of time has been unnecessarily taken up in examining so called experts on this point, and I have declined to postpone the case in order to have further evidence of this kind produced; as regards the mother, the only ground on which any serious attempt has been made to dispute her right to the charge of her daughter is that she made over the girl to Radhakissen knowing that no lawful marriage had taken place, and that virtually the girl was made over to Radhakissen to live with him as his mistress, and that having acted in this immoral manner she has forfeited the right to have charge of her daughter. Even assuming, for argument's sake, that the marriage was invalid, there are in my opinion no grounds for inferring that the mother knowingly abetted in the celebration of a mock marriage and intentionally surrendered her daughter to a life of immorality.

"I cannot, therefore, hold that Mussammat Mahtabo has forfeited her natural rights.

"I am of opinion that both Radhakissen and Mussammat Mahtabo are entitled to the charge of Mussammat Luchminia, and as their pleader states that they are willing that the girl should be made over to one or other, I direct that she be made over to the charge of Mussammat Mahtabo."

On January 17th, Mr. *M. P. Gasper*, on behalf of Miss Abraham, applied to the High Court (MITTER and MACPHERSON, JJ.) for a rule calling on the Magistrate to produce the records in the case and to show cause why his proceedings and order should not be set aside and the girl Luchminia be allowed to return to the custody of Miss Abraham, if she were desirous of doing so.

[492] The application was made on a petition by Miss Abraham, the material portion of which was as follows :—

1st.—That your petitioner is the Superintendent of the Zenana Mission established at Patna and residing at Goolzarbah in that city.

2nd.—On the 16th day of October 1888, a woman named Luchminia, accompanied by another woman, Sundari by name, came to the Mission House. Both women had an interview with your petitioner, and having expressed a desire to reside in such Mission House were permitted to take up their residence there.

3rd.—On the 30th day of October 1888, one Mussammat Mahtabo, the mother of the said Luchminia, and one Radhakissen, alleging himself to be the husband of the said Luchminia, put in separate petitions to the District Magistrate of Patna, praying for the restoration of the said Luchminia to them under the provisions of s. 551 of the Code of Criminal Procedure. These petitions, on the face of them, are unverified documents, and, moreover, contain no allegation that the detention complained of was for an unlawful purpose. On the back of the petition, put in by the said Radhakissen, the District Magistrate made an order directing that a summons should issue on your petitioner to produce the said Luchminia before his Court on the 6th day of November 1888.

4th.—On the 6th day of November 1888 your petitioner, in obedience to the order contained in the said summons, appeared in the Court of the District Magistrate, accompanied by the woman Luchminia. On the same day the said Magistrate examined, under solemn affirmation, sundry witnesses, viz., Mussammat Mahtabo, the mother of the said Luchminia, Gurmukh Narain, Radhakissen, the said Luchminia, and the said woman Sundari. After taking the evidence of those witnesses, the Court adjourned the case to the 14th day of November for further evidence.

5th.—On the application made by Mr. Thompson, on behalf of your petitioner, a further adjournment was granted till the 23rd day of November 1888. During the interval which occurred pending this adjournment, and upon the application of the said Gurmukh Narain, the alleged uncle of the said Luchminia, it was arranged that the said Luchminia should, pending final orders to be passed in the case, be made over to the safe custody of Mr. **[493]** Sherfuddin, Barrister-at-law, practising in the Patna Courts, and, in accordance with this arrangement, your petitioner, on the 16th day of November 1888, handed over the said Luchminia into the custody of the said Mr. Sherfuddin, and the said Luchminia continued to reside in the house of the said Mr. Sherfuddin for one day. On the 17th day of November 1888, the said Mr. Sherfuddin being unable to continue to take further charge of the girl, the said Luchminia, with the permission of the Magistrate was handed

back to your petitioner, and thenceforward continued under her care till the 6th day of December 1888, when, under the order of the said Magistrate passed on that date, she was forcibly carried off from the precincts of the Court.

6th.—On the 22nd day of November 1888, during the interval between the adjournments of the case at Bankipur, an application was made on behalf of your petitioner to the High Court of Judicature in Calcutta, in its revisional jurisdiction, for a transfer of the case from the file of the said District Magistrate of Patna to the file of the High Court. This application was rejected by this Hon'ble Court on the same date.

7th.—On the 25th day of November 1888, the case coming on for further hearing before the said District Magistrate of Patna, it was ordered, as your petitioner understood, that the same should be adjourned and heard on some day after the 1st day of December 1888.

8th.- On or about the 26th day of November 1888, Mr. Thompson, on behalf of your petitioner, applied for summons for the attendance of three witnesses, Pundit Sukhobasi Tewari, Pundit Behari Singh, and Pundit Protap Narain, to be called for the purpose of supporting the case put forward by your petitioner, and, on the 28th day of November, an order, directing an issue of the said summons, was passed by the Magistrate ordering the attendance of the said witnesses for the 5th day of December.

9th.—On the 28th day of November, your petitioner is informed and believes that the said Magistrate took further evidence on behalf of the complainants, but such evidence was taken in the absence of your petitioner, who was informed by her legal adviser, Mr. Thompson, having regard to the order above-mentioned, that the case would not be proceeded with on that day.

[491] *10th.*—By an order dated the 28th of November 1888, the date of the further hearing of the case was fixed for the 5th day of December 1888.

11th.—On the 5th day of December 1888, a further hearing of the case was held by the same Magistrate, and sundry witnesses on behalf of the complainant in the case were re-called and further examined, as also were Matangini Bose and Pundit Sukhobasi Tewari and Pundit Behari Singh, the two last being two of the three witnesses summoned on behalf of your petitioner.

12th.—On the same day, it appearing that the said Protap Narain, a priest from Benares, already summoned on behalf of your petitioner was not present in Court, a petition was presented to the Court, on your petitioner's behalf, praying that a fresh summons should issue to the said witness, but the Court, by an order made on the back of the said petition, refused to grant a further postponement of the case and rejected the application.

13th.--Your petitioner submits that the said Magistrate in issuing a summons upon your petitioner, under the provisions of s. 551 of the Code of Criminal Procedure, upon the materials as set forth in the 3rd paragraph of this petition, acted illegally and without jurisdiction.

14th.—Your petitioner further submits that the Magistrate was in error in treating the proceeding as contentious, and the procedure adopted by him was not warranted by the words of the section.

15th.--Your petitioner further submits that upon the facts found by the Magistrate, as indicated in his judgment, he was in error in holding that the woman Luchminia was detained by your petitioner, and that such detention, if any, was unlawful or for an unlawful purpose, and that the said Magistrate in so holding acted without jurisdiction and in error of the proceedings contemplated under the provisions of s. 551 of the Code of Criminal Procedure.

16th.—Your petitioner further submits that the said Luchminia was a Hindu woman, a Khetri by caste, and the widow of one Durbari Lall, who died about 14 months before the alleged second marriage with Radhakissen, a man of inferior caste to [495] to herself. Upon these facts which appear in the depositions and which have since been accepted by the said Magistrate, your petitioner contended that the so-called second marriage could be no marriage at all, and relied chiefly upon the evidence of her witness the said Pundit Protap Narain, in support of her contention. The Court was in error, and, as your petitioner submits, acted in prejudice of the case she was desirous of setting up, in refusing to adjourn the case for the examination of the said material witness.

17th.—Your petitioner submits that the said Radhakissen had established no right to the custody of the said Luchminia, and that the said Mahtabo had no right, or, if she possessed such right, had forfeited her claims to such custody.

18th.—Your petitioner submits that the said District Magistrate ought to have held that the evidence adduced did not establish the fact that the said Luchminia was under the age of 14 years, or that she had been unlawfully detained by your petitioner, or that she had been so detained for an unlawful purpose.

Mr. *Gasper*, in applying for a rule pointed out that s. 551 was introduced into the Code for the first time in 1882 though it had previously found a place in the Presidency Magistrate's Act; that it dealt exclusively with women and female children under the age of 14, and that the inference this gave rise to was obvious. It did not deal with general detention, but only with unlawful detention for an unlawful purpose of women and female children; and it was, therefore, obvious that the class of cases to which it was intended to apply was not intended to include a case like the present. He further contended that the first complaint should have been made on oath, which, in the present case, had not been done. And that although the subsequent proceedings might have been on oath, this did not cure the defect. He also contended that the section contemplated a proceeding of a summary character to prevent an impending injury to a woman or female child, and not a long contentious proceeding like the present for the purpose of obtaining the custody of a minor for which other provisions of the law existed.

The Court stopped Mr. *Gasper*, intimating that the words "unlawful purpose," contained in the section, must probably be [496] taken to mean an "immoral purpose," and granted a rule against the Magistrate in the terms asked for.

On the 13th February the rule came on for argument before a Bench of the High Court consisting of MITTER and TREVELYAN, JJ.

Mr. *Gasper* and Baboo *Kali Churn Bonnerjee* in support of the Rule.

Mr. *Garth*, instructed by the Deputy Legal Remembrancer, for the Magistrate.

Mr. *Gasper*.—Section 551 contemplates that complaint should be made on oath to the District Magistrate, but here there was no such complaint. The Joint Magistrate examined the complainant, but he was not the proper person to do so, and the District Magistrate had no power whatever to delegate his power under the section to a subordinate. The whole proceedings are, therefore, irregular and bad. In the next place, the section contemplates summary action being taken and not the elaborate enquiry, which has been made in this case, when no less than 13 witnesses have been examined. No provision is made in the Code for the examination of any witnesses under this section, and the object of the section is plainly to prevent immediate and

irreparable mischief from being done to the persons of females. Then there was no unlawful detention, because the Magistrate has found that the girl was at perfect liberty to rejoin her people if she so desired. Nor was there any "unlawful purpose," for certainly the education of a girl in the principles of Christianity is not unlawful. [Mr. *Gasper* was then stopped by the Court.]

Mr. *Garth.*--The complaint made by the girl's husband and another to the Magistrate was sufficient, and this case comes within the provisions of s. 551. The words of the section are certainly not as clear as they might be, but there can be no doubt that "unlawful detention for an unlawful purpose" must be taken to mean for an illegal purpose.

[MITTER, J.--It seems to me that having regard to the fact that the section only refers to females, "unlawful purpose" must be taken as meaning an "immoral purpose."]

[497] Mr. *Garth.*—If that was so, the Legislature might easily have so enacted, but the word used is unlawful, and that cannot be read as meaning anything else but "illegal." In this case the girl was detained from the lawful guardianship of her husband and mother, in order that her religion might be changed, and that must surely be held to be unlawful detention for an unlawful purpose.

The decision of the Magistrate on this point is correct, and there can be no question as to his *bona fides*.

[TREVELYAN, J.—No one has raised any.]

Mr. *Garth.*—If the Court is of opinion that the Magistrate has not taken the right view of the matter, it is not for me to appear to press such view on your Lordships.

[MITTER, J.—The whole question seems to be this: Can the Court say that the detention was an unlawful detention in the first place, and, if it was, was it for an unlawful purpose? The Magistrate appears to think that unlawful detention means detention which furnishes ground for a civil action, and unlawful purpose as something which would furnish similar grounds; but could a guardian maintain a civil action only upon the ground that his ward was being instructed in the precepts of Christianity without his consent?]

Mr. *Garth.*—A civil action would lie for the custody of a child by its guardian against the person unlawfully detaining it.

During the argument the following cases were cited by Mr. *Garth*: *In the matter of Mahin Bibi* (13 B. L. R., 160) and *Dowlath Bee* v. *Shaik Ali* (5 Mad., H. C., 473).

[MITTER, J.--The only question we need decide in the case is whether there has been an "unlawful detention for an unlawful purpose" and upon that point we are with you Mr. *Gasper*.]

It then appeared that the rule had not been issued against or served upon the husband or the mother, but only on the Magistrate, the Court therefore intimated that it could make no order on the former as to the restoration of the girl to Miss Abraham. Mr. *Gasper* accordingly applied for a rule on them, and a rule was issued calling on Radhakissen and Mahtabo to show cause why **[498]** the proceedings should not be set aside, and why an order should not be made to the effect that the circumstances, which existed before the order complained of was made, be restored, or why an order should not be made directing them to produce the girl in the Court of the Magistrate of Patna for the purpose of restoring her to the custody of the petitioner; or why any such other order should not be passed as the facts of the case might warrant or justify. That rule came on to be heard before a Bench consisting of MITTER and MACPHERSON, JJ., on the 20th March.

Mr. *Gasper* and Baboo *Kali Churn Bonnerjee* for the Petitioner.

Baboo *Umbica Churn Bose* for the Opposite Party.

Baboo *Umbica Churn Bose* contended that the order of the Magistrate was right, but whether it was so or not, the girl having now gone to her lawful guardians, viz., her husband and mother, the Court could not interfere to deprive them of her custody. There was, moreover, no power given in the Code to compel the production of the girl, and the only course left was for the Court to say that it had no power to remove the girl from her lawful guardians, and that it had no power to grant that portion of the prayer of the petitioner.

Mr. *Gasper.*—There is no order made by a Subordinate Court which this Court, exercising its revisional powers, cannot set aside. The order of the Magistrate under s. 551 being illegal, this Court can set it aside and order the production of the girl. There can be no doubt that when an illegal order has been made this Court has the power, in setting it aside, to restore the *status quo ante* so that the party against whom the order has been made can be in no way injured thereby. *Rodger* v. *The Comptoir D'Escompte de Paris* (L.R., 3 P. C., 465).

[MITTER, J.—I have grave doubts whether under the circumstances of this case we can order the mother to produce the girl for the purpose of her being removed from her custody.]

Mr. *Gasper.*—There can be no doubt you Lordships have the power; the only question is, whether you should exercise it. For [499] that purpose we must look into the circumstances of the case. I am prepared to show from the evidence that the girl was, at the date of the Magistrate's order, in the Patna Zenana Mission House, a house of respectability, where she was cared for, both as far as her comforts and morality were concerned. From there she was taken to Radhakissen with whom her marriage was a sham, and she was being kept for an immoral purpose. The Court having the power, should exercise it and not permit the mere fact of the mother having the custody of the child to prevent that being done.

[MITTER, J.—Under such circumstances proceediugs might be taken under s. 100 * of the Criminal Procedure Code.]

Mr. *Gasper.*—On the facts it is clear that the mother has taken the child for an immoral purpose, in order to obtain a living by it.

[MITTER, J.—The evidence having been taken by an officer who had no jurisdiction, can we refer to it and take action on it? The matter must first surely be enquired into by a competent Court.]

Mr. *Gasper.*—But the evidence has been recorded, and if the facts are as I represent, this Court, having the power to undo the action of the Magistrate, can also restore the position of affairs to that which existed before the illegal order, and this should be done.

[MITTER, J.—The same object may be attained under s. 100. If the girl was unwilling to remain with her mother, it might be unlawful detention; and if she was being detained for an unlawful purpose, the mother would not be justified in detaining her.]

Mr. *Gasper.*—There might be difficulties in the way of such a course being adopted. All we desire is that, if the girl is being detained for an immoral purpose, the Court should direct that it be open to her to go to a place where she would be protected. C. A. V.

*[Sec. 100:—If any Presidency Magistrate, Magistrate of the first class or Sub-Divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.]

Search for persons wrongfully confined.

[500] The **Judgment** of the High Court (MITTER and MACPHERSON, JJ.) was delivered on the 28th March, and was as follows:—

Section 551 of the Criminal Procedure Code empowers a District Magistrate, upon complaint made on oath of the abduction or unlawful detention of a woman or of a female child under the age of 14 years, for any unlawful purpose, to make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and to compel obedience with such order, using such force as may be necessary.

In pursuance of an order made under that section, the girl Luchminia was taken from the petitioner, who is the Superintendent of the Patna Zenana Mission, and made over to her mother Mahtabo.

The case comes before us in the exercise of our revisional powers on a rule to show cause why that order should not be set aside, and why the girl should not be restored to the charge of the petitioner, or such other order made as the facts of the case may warrant and justify.

The rule was granted mainly on the ground that the order was made without jurisdiction, as the facts found did not disclose "an unlawful detention for an unlawful purpose."

The complainants are Mahtabo, the mother, and Radhakissen, the alleged husband, of the girl. They made separate complaints, but they are really acting together. Their case is that the girl is under 14 years of age; that she was legally married to Radhakissen, with whom she lived; and that she was taken away by the petitioner and others and detained in the Mission House.

The facts are undisputed to this extent that the girl had lived with Radhakissen for a period of 9 or 10 months, and that on the 18th October she left his house and went to the Mission House, where she remained.

It also appears that while she was living with Radhakissen she was visited by and received instruction from the petitioner and a native teacher attached to the Mission.

On the part of the petitioner, it was denied that the girl was under 14 years of age, and that she was legally married to Radhakissen, and it was alleged that she was practically being brought up, with the connivance of the mother, to a life of prostitution.

[501] The Magistrate took evidence and found that the girl was under 14; that she was legally married: and that, although she went to and remained in the Mission House of her own will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that no facts were established which would disentitle the husband or the mother to the charge of the girl. An order for restoration was accordingly made, and, with the consent of Radhakissen, the girl was made over to her mother. There is no reason to suppose that the facts have been wrongly determined by the Magistrate. There is ample evidence to support his conclusions, and the only question which we have to consider in connection with the order is whether, on the facts found, there was an unlawful detention for an unlawful purpose. Obviously the Magistrate is only empowered to act when the detention and the purpose are both unlawful.

Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this keeping and the refusal to give her up amounted to detention which was unlawful.

The question whether the purpose was unlawful is, however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate, finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words "unlawful detention for an unlawful purpose" as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. It might seem at first sight that the detention of a child, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would come within the meaning of the words as well as within the mischief which they were intended to provide against.

[502] But we think it is not so; and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

The purpose of forcing a woman to sexual intercourse would certainly be unlawful; the purpose of having sexual intercourse with a girl under 14, even with her consent, would, I take it, be equally unlawful within the meaning of this section, because the girl's consent would be immaterial. But it cannot be said that the purpose of enabling or persuading an adult woman to become a Christian would be in itself unlawful. If it is not unlawful in the case of an adult woman, it could only be unlawful in the case of a child by reason of its being done without the guardian's consent. But we think it is impossible to construe the section so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian.

The section was not enacted for the protection of children only or of children generally. It applies to women and to female children only, and this combination and the exclusion of male children, goes to show not only that some definite purpose, unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. This view is supported by the earlier legislation on the subject. The sections of the earlier Acts, corresponding to s. 551 of the Procedure Code, empowered the Magistrate to act when a woman or female child was detained for specified purposes; viz., adultery, concubinage, prostitution, deflowering or disposing of her in marriage. The words "any unlawful purpose" were first substituted in Bengal Act IV of 1866 for the specified purposes mentioned in the previous Acts, and those words have been used in all the subsequent Acts, but the Magistrate's power has always been restricted to the case of women and female children. It may be that the effect of the alteration was to extend the scope of the section and to include some purposes other than those which were before distinctly specified, but it is unnecessary to consider whether this is the case; it is enough to say that the purpose which [503] is here found to have been entertained is not an unlawful purpose within the meaning of the section.

It follows that the Magistrate had no power to make the order which he did. The question remains whether, in setting it aside, we should undo what was done in giving effect to it and replace the girl in the charge of the person from whom she was taken. We have no hesitation in saying that if the Magistrate had the power which he supposed he had, he in our judgment exercised it very properly on the facts before him. It does not, therefore, follow that,

because we now find he had not the power, we should, as a matter of course, restore the state of things which existed when the order was made.

We are in fact asked to take this child from the charge of her mother or husband, in the custody of one or other of whom she is, and either of whom the law regards as her natural and proper guardian, and make her over to a stranger whose detention of the child, against the will of her husband or mother, would be, *primâ facie*, unlawful. It is, we think, very questionable whether we have the power to do this: but, assuming that we have the power, we could only with propriety exercise it if the proper guardian is shown to be in some way disqualified, or if, at the least, the guardian's character is so bad and mode of life so immoral that it would not be proper to leave the child in his or her charge. Nothing of the sort is established. It is not even alleged that the mother has led or is now leading an immoral life. All that is charged is that, by giving her daughter to a man to whom she was not married, she abandoned her and left her to lead a life of prostitution. The truth of this charge depends upon the fact whether there was or was not a marriage. The Magistrate has found, on ample evidence, that there was a marriage, which would be valid if the parties were not incapable of contracting, and that there is no ground for holding that they were incapable. The marriage is said to be illegal because, according to caste custom, widows are not allowed to marry, and because one of the parties is of higher social status than the other. It is only necessary to point out that widow marriages are now legalised, and that, although a marriage may be improper according to caste custom, it is not on that account illegal.

[504] But the whole charge of immorality against the mother falls to the ground when it is found, as the Magistrate has found, that even if there was any legal defect in the marriage, this was unknown to the mother and Radhakissen, both of whom believed that a valid marriage had taken place.

With the religious aspect of the case we have, of course, nothing whatever to do. It matters not whether the case is one of a Hindu child leaving her parents and being received and detained against their will in a Christian institution in order that she may become Christian, or of a Christian child leaving her parents and being received and detained against their will in a Mahomedan institution in order that she may become a Mahomedan.

There are no circumstances which would justify us in ordering that the child should be made over to the petitioner, and the rule must, so far as it relates to this, be discharged.

H. T. H. *Rule made absolute in part.*

NOTES.

[*See* also 4 Bom., L. R., 609 ; 9 C W. N., 1030.]

[16 Cal. 504]

APPELLATE CIVIL.

The 18th March, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE GHOSE.

Hukum Chand Oswal.............Plaintiff

versus

Taharunnessa Bibi and others............Defendants

Civil Procedure Code, 1882, s. 257-A—Agreement for, or to give, time for satisfaction of judgment-debt—Agreement without sanction of Court—Illegal contract—Contract Act (IX of 1872), s. 23—Consideration.

The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and *T*, his father, by which they both became liable for the amount of the decree with interest at 18¾ per cent. In a suit on the bond, it was contended that the bond was void under s. 257-A of the Civil Procedure Code, as being an agreement to give time for the satisfaction of the judgment-debt made for no consideration and without the sanction of the Court, and also without such sanction providing [505] for payment of a sum in excess of the amount due under the decree; that it was void within the meaning of s. 23† of the Contract Act as being forbidden by, or of a nature to defeat the provisions of, s. 257-A of the Civil Procedure Code; and that, consequently, the suit on it was not maintainable.

Held, that s. 257-A of the Code was not applicable. That section was framed to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, *in execution of the decree*, but was not intended to take away the right of parties, of entering into a fresh contract, either for payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than may be covered by the decree, if it be for a proper consideration. In this case the consideration for the bond was a lawful consideration: it could not be said that, because satisfaction of the decree was not certified to the Court, there was no consideration.

Held, also, the bond was not void under s. 23 of the Contract Act. *Semble*: The words "any law" in that section refer to some *substantive* law, and not to an adjective law, such as the Procedure Code is.

THE plaintiff obtained a decree against defendant No. 1, as widow of one Munshi Darwar Buksh, and, under that decree, the judgment-debtor was liable to pay the decretal amount by certain instalments specified in the decree, and interest was given by the decree at 4 per cent. per annum. She failed to pay, and the decree-holder then accepted a bond executed by Munshi Tarikulla, the father of the judgment-debtor, under which he became security

* Appeal from Appellate Decree, No. 2510 of 1887, against the decree of J.R. Hallet, Esq., Judge of Rungpore, dated the 1st of September 1887, affirming the decree of G. Dalton, Esq., Subordinate Judge of Julpaigooree, dated the 11th of February 1887.

†[Sec. 23:—The consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.]

What considerations and objects are lawful and what not.

for the ultimate payment of the amount of the decree. The decree was not satisfied, and in lieu of enforcing the bond against Munshi Tarikulla, the decree-holder eventually, on the 18th Bhadro 1289 (2nd September 1882), accepted a fresh bond executed by Munshi Tarikulla and his daughter, defendant No. 1, jointly, under which both became liable for the balance of the decree remaining unpaid and for interest at the rate of Rs. 1-9-0 per mensem or of Rs. 18-12-0 per cent. per annum. The defendants Nos. 2 to 10 were the other heirs of Tarikulla who was dead.

The main defence was that the bond of the 18th Bhadro 1289 was contrary to the provisions of s. 257-A of the Civil Procedure Code, and that the suit to enforce it was not maintainable; and on this ground the suit was dismissed by both the lower Courts.

The plaintiff appealed to the High Court.

[506] Baboo *Rash Behari Ghose* and Baboo *Bhubun Mohun Dass* for the Appellant.

Baboo *Mohesh Chunder Chowdhry* and Munshi *Seraj-ul-Islam* for the Respondents.

The **Judgment** of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

A decree was obtained by the plaintiff against the defendant No. 1, as the legal representative of one Darwar Buksh, in respect of a certain sum of money. The decree provided that the amount was payable in instalments with interest at a certain rate. The defendant No. 1, however, failed to pay in accordance with the terms of the decree; and the plaintiff thereupon accepted a bond executed by the father of defendant No. 1, viz., Tarikulla, as surety for the debt. But nothing apparently came out of this transaction, and eventually a bond was executed on the 18th Bhadro 1289, both by defendant No. 1 and Tarikulla, making themselves jointly liable for the balance of the decretal money with interest at Rs. 18-12-0 per cent. per annum. The original decree is not forthcoming, but there does not seem to have been any dispute between the parties in the lower Courts as regards its terms, excepting however in one particular, viz., as to the rate of interest decreed. The Lower Appellate Court, upon the evidence, has found that the interest payable under the decree was Rs. 4 per cent. per annum, whereas that covenanted to be paid under the bond of the 18th Bhadro 1289 was, as already mentioned, Rs. 18-12-0.

The present suit is brought upon the bond of the 18th Bhadro 1289 both against defendant No. 1 and the heirs of Tarikulla, he having in the meantime died.

The suit has been dismissed by both the Courts below, upon the ground that under s. 257-A of the Code of Civil Procedure the agreement entered into by the bond, providing for the payment of a larger interest than that payable under the decree, is void, the bond having been executed without the sanction of the Court which passed the decree.

We think that the lower Courts have not taken a right view of the law. It seems to us that it is only in the event of an application [507] being made to enforce the agreement entered into between the parties under the bond, in the course of the *execution of the decree*, that an objection like that now raised could have been successfully made. Section 257-A finds its place in the Procedure Code in the chapter headed, "Of the execution of decrees" under division E "Of the mode of executing decrees," and there can, therefore, be no reasonable doubt that what the Legislature had in view in framing that section was simply to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, in execution of the decree;

but it could never have been intended to take away a right which parties certainly possess of entering into a fresh contract, either for the payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than what may be covered by the decree, if it be for a proper consideration. In the present case the creditor agreed to give to the debtor more time for the payment of the decretal money than what the decree actually allowed; and the larger rate of interest agreed to be paid was evidently the consideration for the giving of such time. This consideration was certainly lawful and there can, therefore, be no valid objection to the agreement being enforced.

It was however contended, on the part of the respondent, that, under s. 23 of the Contract Act, the consideration for the agreement was not lawful, because it was forbidden by law, or was of such a nature that, if permitted, it would defeat the provisions of s. 257-A of the Code of Civil Procedure. We are unable to accept this contention. In the first place, we are not aware of any law by which such a consideration, as there was for the bond in this case, is forbidden; and, in the second place, we do not think that "if permitted" it would defeat the provisions of s. 257-A. The words "any law" as mentioned in s. 23 of the Contract Act, we are inclined to think, refer to some *substantive* law, and not to an adjective law such as the Procedure Code is. But whether this is so or not, we fail to see how the object, with which s. 257-A was framed, would be defeated, if the contract in question were enforced, that object being, as it seems to us, simply to avoid the inconvenience [508] and delay which would arise if parties were allowed to bring, before the Court executing a decree, matters not covered by it and which had not become part of the decree itself by express sanction of the Court.

It was further contended on behalf of the respondent that, inasmuch as the satisfaction of the decree was not certified to the Court, there was no consideration for the bond, and it would still be open to the decree-holder to enforce the decree. There is nothing on the record showing whether satisfaction of the decree was certified or not; but assuming that it was not, we do not think that it can be rightly said that there was no consideration for the contract; and it seems to us that if, notwithstanding the acceptance of the bond by the creditor in lieu of the decree, he enforces the decree, there is a remedy in the hands of the debtor to recover back from the creditor the money realized in execution of the decree with such damages as he might have sustained by reason of the wrongful act of the creditor.

The view that we take of this case is supported by the cases of *Jhabar Mahomed* v. *Modan Sonahar* (I.L.R., 11 Cal., 671), *Sellamayyan* v. *Muthan*, (I. L. R. 12 Mad., 61), *Ramghulam* v. *Janki Rai* (I. L. R., 7 All., 124), and *Gunamani Dasi* v. *Prankishori Dasi* (5 B. L. R., 223), and we may say that we are not prepared to follow the view which the Bombay High Court has laid down on the subject.*

We accordingly are of opinion that the suit will lie, and that, therefore, it must be returned to the Court of First Instance to be tried on the merits. The plaintiff is entitled to his costs in this Court and the Lower Appellate Court, and he is entitled also to a refund of the stamp-fee on the petitions of appeal to this Court and to the District Judge.

J. V. W. *Appeal allowed.*

NOTES.

[Sec. 257A has been omitted in the C.P.C., 1908.

* See *Pandurang Ramchandra Chowghule* v. *Narayan* (I. L. R., 8 Bom., 300); *Ganesh Shivram* v. *Abdullabeg* (I. L. R., 8 Bom., 538); *Davlat Sing* v. *Pandu* (I. L. R. 9 Bom., 176); and *Vishnu Vishwanath* v. *Hur Patel* (I. L. R., 12 Bom., 499).

There was a conflict of case-law on this subject previously, as to which see (1896) 18 All., 485; (1898) 22 Bom., 693; (1907) P.L.R., 61; 4 O.C., 284; 16 Bom., 618; 21 Bom., 808; 25 All., 317.

As regards the point of consideration, *see* also (1893) 17 Mad., 382; (1898) 23 Bom., 394; 1900 P.R., 16; (1908) 12 C.W.N., 674 : 35 Cal., 870.

In (1902) 26 Mad., 19 this case was deemed to be erroneously decided on the ground that there was, in it, no agreement by the judgment-creditor to surrender his rights under his decree.]

---

[509] APPELLATE CIVIL.

The 15th March, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

Topa Bibi...........Defendant

versus

Ashanulla Sardar...........Plaintiff.*

Registration Act (III of 1877), s. 77—Suit to compel registration of document not compulsorily registrable.

Under the Registration Act of 1877, a suit lies by a purchaser to compel registration of his kobala in a case in which the value of the property conveyed is under Rs. 100, and in which, therefore, the registration of the deed is not compulsory.

THIS was a suit brought under s. 77† of the Registration Act to compel registration of a kobala or deed of sale alleged to have been executed by the defendant in favour of the plaintiff. The defendant denied execution and the Registrar consequently refused to register the deed. The only question material to this report was, whether or not the suit would lie. The Munsif came to the conclusion that the defendant had not executed the kobala, and therefore dismissed the suit. This decision, however, was reversed by the Judge, who gave the plaintiff a decree for the registration of the deed.

The defendant appealed to the High Court.

Baboo *Debendra Mohun Sen*, for the Appellant, contended that the suit would not lie and cited an *Anonymous Case* (6 Mad., H. C. Ap., 9) and *Ahsuna* v. *Begum Kheerun Singh* (10 W. R., 360).

Baboo *Mukunda Nath Roy*, for the Respondent, contended that such a suit would lie, and referred to ss. 17, 18, 50 and 77 of the Registration Act 1877, and para. 3 of s. 54 and cl. (*d*) of s. 55 of the Transfer of Property Act.

---

* Appeal from Appellate Decree No. 517 of 1888, against the decree of J. R. Hallet, Esq., Judge of Rungpore, dated the 3rd of December 1887, reversing the decree of Baboo Gopal Chander Banerjee, Munsif of Gaibandah, dated the 14th of February 1887.

† [Sec. 77 :—Where the Registrar refuses to order the document to be registered under section 72 or section 76, any person claiming under such document, or his representative assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office, if it be duly presented for registration within thirty days after the passing of such decree; and the provisions contained in the second and third paragraphs of section 75, shall, *mutatis mutandis*, apply to all documents so presented, and notwithstanding anything contained in this Act, the document shall be receivable in evidence in such suit.]

Suit in case of refusal.

The **Judgment** of the Court (PRINSEP and WILSON, JJ.) was delivered by

Wilson, J.—The only question argued before us, and the only one properly open upon second appeal, is, whether a suit will lie on the part of a purchaser to compel registration of his kobala in a [510] case in which the value of the property conveyed is under one hundred rupees, and registration is therefore not made compulsory by the Registration Act.

We think it clear that under the present Registration Act III of 1877 the suit lies. Section 17 of the Act says, "that certain documents shall be registered." Section 16 says, "that certain other documents *may* be registered." Section 32 says that "every document to be registered . . . . . whether such registration be compulsory or optional, shall be presented . . . . . by some person executing or claiming under the same." The effect seems to be that any person therein described may exercise the option given by s. 18.* The following sections lay down rules as to whose presence is ordinarily necessary to justify registration. And ss. 36 to 39 provide for compelling the attendance of such persons as well as of witnesses. Part XII of the Act, dealing with the mode of refusal to register and its consequences, with appeals against such refusal, and in the last resort a suit in a Civil Court, is perfectly general in its terms.

Two cases were cited as authorities for a contrary view—*Ahsuna Begum* v. *Kheerun Singh* (10 W. R., 360) and an *Anonymous case* (6 Mad. H. C. Ap., 9) from the Madras High Court Reports. As to those cases it is enough to say that the Judges had in them to deal with a different Act from that now before us, and especially different in this, that it did not expressly give a right of suit as the present Act does. Under the present Act we entertain no doubt that the suit lies. Any other conclusion would lead to very grave consequences; for since the passing of the Transfer of Property Act the omission to register documents of the kinds mentioned in s. 18 of the Registration Act may lead to much more serious results than before. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[*See* also 16 Cal., 622 which was overruled by 19 Cal., 623 F.B.]

Documents of which registration is optional. * [Sec. 18—Any of the documents next hereinafter mentioned may be registered under this Act (that is to say).

(*a*) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property:

(*b*) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest:

(*c*) Leases of immovable property for any term not exceeding one year, and leases exempted under s. 17:

(*d*) Instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property:

(*e*) Wills:

(*f*) All other documents not required by s. 17 to be registered:]

[511] APPELLATE CIVIL.

The 19th March, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

Kristo Gobind Majumdar............Judgment-debtor

versus

Hem Chunder Chowdhry............Decree-holder.

Krishna Gopal Majumdar............Judgment-debtor

versus

Hem Chunder Chowdhry............Decree-holder.*

Execution of decree—Personal decree against person having life interest—Decree for arrears of rent—Hindu law.

A decree for arrears of rent was obtained by *H* against *B*, a daughter in possession for a life estate of property inherited from her father *R*. On the death of *B*, this property was taken by her two sons as heirs of her father *R*. The decree was for arrears which had accrued during the lifetime of *B*, and the sons had been substituted for *B* as judgment-debtors.

On an application for execution of the decree: *Held*, on the principle laid down in *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (I. R., 2 I. A., 275; I. L. R., 1 Cal., 133), that the debt was a personal debt, payment of which could be enforced only against the property left by *B*. The decree, therefore, could not be executed against the property inherited by the sons from *R*.

Hurry Mohun Rai v. *Gonesh Chunder Doss* (I. L. R., 10 Cal., 823) distinguished.

IN these cases Hem Chunder Chowdhry had obtained a decree for arrears of rent against (among others) one Brojosundari Dassia, the daughter and heiress of one Rama Kanto Majumdar. Brojosundari having died, her two sons, Krishna Gopal Majumdar and Kristo Gobind Majumdar, succeeded to the property of Rama Kanto, their maternal grandfather, in which Brojosundari, their mother, had had a life interest, and were substituted as judgment debtors in place of Brojosundari. In execution of his decree, Hem Chunder applied for attachment and sale of a taluk other than that in respect of which the arrears had accrued. Krishna Gopal and Kristo Gobind objected to the sale of a four-anna share of the taluk, being the portion to which they had succeeded as heir of Rama Kanto.

It was found by both the lower Courts, that the arrears of rent in respect of which the decree was obtained against Brojosundari, [512] had accrued during her lifetime. The Subordinate Judge held that the four-anna share was not liable to be sold.

On appeal however the Judge, relying on the Full Bench case of *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (I. L. R, 10 Cal., 823), held that the portion of the taluk held by Krishna Gopal and Kristo Gobind was liable to be sold in execution of the decree.

From this decision Krishna Gopal and Kristo Gobind brought separate appeals to the High Court.

---

* Appeals from Orders Nos. 415 and 421 of 1888, against the orders of H. Peterson, Esq., Judge of Mymensingh, dated the 26th of July 1888, reversing the orders of Baboo Koruna Moy Banerjee, Subordinate Judge of Mymensingh, dated the 10th of April 1888.

Baboo *Mukunda Nath Roy* and Baboo *Jadub Chunder Seal* for the Appellants.

Baboo *Mohini Mohun Roy* and Baboo *Jogesh Chunder Roy* for the Respondent.

Baboo *Mukunda Nath Roy* for the appellants.—The decree against Brojosundari was a personal decree against her. The reversioners were not parties to the suit in which the decree was obtained. The debt was purely a personal debt of their mother, and a purely personal decree was obtained. The cases of *Kristo Moyi Dossee* v. *Prasanna Narayan Chowdhry* (6 W. R., 304), *Mohima Chunder Roy Chowdhry* v. *Ram Kishor Acharj Chowdhry* (15 B. L. R., 142 note; 23 W. R., 174), *Nogendro Chunder Ghose* v. *Kaminee Dossee* (11 Moore's, I. A., 241), and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (L. R., 2 I. A. 275; I. L. R., 1 Cal., 133), were cited.

The Full Bench case of *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (I. L. R., 10 Cal., 823), is not applicable to the present case.

Babo *Mohini Mohun Roy*, for the respondent, contended that the property of the reversioners was liable to be sold in execution of the decree, and cited *Teluck Chunder Chuckerbutty* v. *Muddon Mohun Joogee* (15 B.L.R., 143, note; 12 W. R., 504) and *Anund Moyee Dassee* v. *Mohendro Narain Dass* (15 W. R., 264).

[513] The **Judgment** of the Court (PRINSEP and WILSON, JJ.) was as follows:—

Decrees for arrears of rent were obtained against Brojosundari, a Hindu widow, which are now put into execution after her death against properties forming her father's estate in which she had only a life interest. The question raised on these appeals is, whether they are decrees merely against her personally, and, therefore, to be satisfied out of whatever she left at her death, or whether the estate which has passed to the next heirs, is liable.

We are of opinion that the principle laid down by their Lordships of the Privy Council in the case of *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (L.R., 2 I. A., 275; I. L. R., 1 Cal., 133) should be adopted, and that the debt cannot be regarded as other than a personal debt, payment of which can be enforced only against the property left by the widow. The case decided by the Full Bench of this Court—*Hurry Mohun Rai* v. *Gonesh Chunder Doss* (I.L.R., 10 Cal., 823)—is not in point, as the debt of the Hindu widow was contracted under different circumstances, such as were held by the majority of the Judges to bind the ancestral estate. We accordingly set aside the order of the lower Courts with costs.

J. V. W. *Appeals allowed.*

NOTES.

[*See* also (1891) 16 Bom., 233; (1895) 22 Cal., 974; (1898) 26 Cal., 285; (1902) 15 C. P. L. R., 85; **(1912) 17 C. W. N., 337.**]

[16 Cal. 513]

CRIMINAL MOTION.

The 13th March, 1889.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACPHERSON.

Abhayessari Debi............Petitioner

versus

Shidhessari Debi............Opposite Party.*

Criminal Procedure Code Act X of 1882, s. 145—Dispute as to right to collect rents—Tangible immoveable property.

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code, and the operation of that section cannot be limited by any rule which would depend upon the area of the property in dispute.

[514] Where, in such a dispute, which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses, on the ground that the enquiry would extend to an inordinate length and be extremely expensive, and passed an order under the section—

Held, that even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers.

Held, further, that a payment of rent for a short time to the petitioner, even if proved, would not amount to dispossession of the opposite party. *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (I. L. R., 15 Cal., 527) followed.

THIS application arose out of a proceeding under s. 145 of the Criminal Procedure Code, instituted in the Court of the Deputy Commissioner of Goalpara, between the two Ranis of the late Raja of Bijni, the property in dispute consisting of two pergunnahs, Habraghat and Khotaghat, in which there were several hundred villages with a population of over 100,000 persons, and of which the assessment at one time appeared to have been about two lakhs of rupees. The pergunnahs formed a substantial portion of the Bijni Estate, and each of the Ranis claimed to be entitled to succeed thereto and to possession thereof to the exclusion of the other. The late Raja died on the 9th March 1883, and these proceedings were instituted on the 23rd May 1887.

Considerable delay took place owing to various applications being from time to time made to the High Court, and owing to a Receiver of the whole estate having been appointed by the Court of First Instance in a civil suit filed by the second party. Ultimately an appeal was preferred to the High Court against the order appointing a Receiver, and, as the hearing of that appeal was delayed and numerous Police reports as to the likelihood of a breach of the peace occurring were made, the Deputy Commissioner ordered these proceedings under s. 145 to be continued. Ultimately after other applications to the High Court, the Deputy [515] Commissioner on the 29th of December 1888

* Criminal Motion No. 19 of 1889, against the order passed by G. Godfrey, Esq., Deputy Commissioner of Goalpara, dated the 29th of December 1888.

passed an order declaring Rani Shidhessari Debi to be in possession of the two pergunnahs and entitled to retain such possession until ousted by due course of law, and forbidding any disturbance of her possession, and ordering the second party to pay the costs. The main facts of the case and the various proceedings had in the matter are sufficiently stated in the judgment of the High Court. The material portion of the judgment of the Deputy Commissioner delivered when the order was passed, was as follows :—

"The case was instituted on the 23rd May 1887, and proceedings have been delayed on account of references to the High Court, on account of a Receiver having been appointed by the Judge, and the inability of the Magistrate to go on with the case pending final orders regarding that appointment. The delay in a case, which by its very nature requires a prompt order, is very extraordinary and very anomalous.

"I am asked by the first party, Rani Shidhessari, or the elder Rani, to find that she was in exclusive possession of the pergunnahs on the date of institution of these proceedings, and I am asked by the second party, Rani Abhayessari or the younger Rani, to find that she was in exclusive possession of the estate with the exception of a very few villages, in which possession was divided, and of a few villages in which the first party's possession is admitted. Possession I take to be in the main the enjoyment in whole or in part of the profits arising from the soil, notably the rents paid by cultivators. Evidence of receipt of rents has been adduced by both parties, and there is no doubt, that, when these proceedings were instituted, many of the ryots paid rent to the first party, and many paid rent to the second party, and many of course paid no rents at all to any one.

"I have nothing to do with the means by which possession was obtained by the second party, or whether that possession was wrongful or not, so long as it was a peaceable possession.—*Ambler* v. *Pushong* (I. L. R., 11 Cal., 365) and *Bunwari Lall Misser* v. *Raja Radha Pershad Singh* (1. C. L R., 136).

"Both parties have adduced the evidence of witnesses as to the payment of rents and both have filed masses of counterfoil cheque [516] receipts, *amdanis*, and other papers in support of their respective contentions, and I have no reason for discrediting the papers that have been filed. Supposing the dispossession of the first party to have been followed by peaceable possession on part of the second party, that is, supposing the first party could be regarded as having been dispossessed at all—it would be necessary to ascertain the fact of possession in all the holdings and mouzahs comprised in the two pergunnahs. Such an inquiry would be impracticable and hopeless.

"Assuming then, for the sake of argument, that dispossession in part followed by peaceable possession has taken place, I should have to look to the question of title in order to guide me to a decision, because it is quite impossible to ascertain who was *de facto* in possession of each mouzah and holding in the estate, or else I should have to attach the whole estate under s. 146.

"I will refer to the question of title later on, suffice it to say, that I cannot find the second party to have any title to possession, still less to exclusive possession. It is true that the first party cannot apparently recover rents from the cultivators that fell due after 1st July 1886, when the Assam Land and Revenue Regulation came into force, because she is not registered under that Regulation but only under Regulation VIII of 1800.—*Brojo Nath Chowdhry* v. *Birmoni Singh Monipuri* (I. L. R., 15 Cal., 527). Still she is able to sue for rents that were due on the 30th June 1886, and so she had the legal right to recover rents for two years when these proceedings commenced. The second party had no such right at all. So far, therefore, as this right to recover rents

is an index of title and of possession, it certainly lies with the first party and not with the second party. The fact of non-registration under Regulation I of 1886 is not, I think, tantamount to an absence of possession, which is clearly something more than the legal right to recover rents due from cultivators. I have shown that such a right does vest, to some extent, in the first party, and I do not think that I should be justified in the circumstances to proceed to attachment of the two pergunnahs.

"It is admitted that, when this case was instituted, the first party was the sole registered proprietor; that all suits for or against [517] the Bijni estate were carried on in her name; that she paid the Government revenue on the estate and the local rates: that, prior to February 1887, all the business of the estate was managed by her alone, she appointed and dismissed the officers of the estate, issued parwanas in her own name and bearing her own seal, and that the name of the second party did not enter into any of these proceedings, and that she alone was in receipt of rent from the ryots; also, that when these proceedings commenced she was in possession of the Rajbari, of all the moveable property left by the deceased Raja, and of all the old tahsil cutcherries of the estate. The second party set up her right to exclusive possession in February 1887, and without doubt many of the ryots went over to her and paid her rents and presented her with *nuzzurs;* but these ryots had up to that time been paying rent to the first party and the first party has never acquiesced in the change. All kinds of disturbances arose in consequence of the subversion, as far as it went, of the existing order of things; so that such possession, as the second party obtained, cannot be called a peaceable possession.

"On behalf of the second party the contention is raised that she and the first party were joint proprietors; that they were actually joined as one party in the case under s. 145, Criminal Procedure Code, of *Empress* v. *Chandra Narayan Subha* (first party) and *Rani Sidhessari Debi* and *Rani Abhayessari Debi* (second party); that therefore the second party had a joint interest in all the law suits in which the Estate was concerned; that all collections of rent were made on her behalf jointly with the first party; that in fact the first party was acting merely as manager or head of the family, and that she cannot be presumed to have been acting in her own sole interest or to have a sole interest in the estate; and that, therefore, the possession of the second party was a lawful and proper possession, and it is immaterial whether the first party acquiesced in it or not.

"On the other hand, there are the facts already referred to in support of the position that the first party was the sole proprietor; and it may be stated that the first party has always admitted the second party's interest in the estate to the extent of a right to maintenance out of the funds of the estate, but she has never [518] admitted the position that the secord party is a co-sharer. The point was not raised, and was not in issue in the case of *Chandra Narayan Subha* above referred to, and so it cannot be taken to be *res judicata.* The two Ranis were at that time living amicably together, and so far as the younger Rani's claim to maintenance went of course she had an interest in the estate. It is quite probable that the elder Rani and her advisers never supposed that the fact of the two names being joined as one party would ever give rise to a claim of co-ownership. Of course there is the well-known presumption of Hindû law that the status of a Hindu family must be presumed to be joint till the contrary is proved, but in this case the family is that of a Raja. The registration of name was effected by the Rani Sidhessari as Pat Rani. She alone has been recognised by Government as the proprietor of the estate. She has for years appeared before the public in that capacity and Rani Abhayessari

has, so to speak, been a mere outsider. In view of all these circumstances, I am unable to presume that the interest of the second party in the Bijni estate was that of a co-owner, and I cannot find that she had any right to possession as against the first party. To sum up, the possession of the first party has been disturbed by the second party, but that disturbance of possession has not been acquiesced in by the first party, and I am not bound to recognize the sort of dispossession that has taken place. But even if the second party has acquired partial possession, as indicated by the enjoyment of rents paid by cultivators, I cannot find that the second party has any title. I find that, so far as rents are concerned, the first party was in possession exclusively up to February 1887; that she alone was in possession on the date of the institution of these proceedings so far as the right to recover rent at all may be disputed between the parties, that is, she alone could recover the rents that fell due before the 1st July 1886. I also find that, so far as recognition by Government and the payment of Government dues, the possession of the Rajbari and of all the old tahsil cutcherries are an index of possession, the first party was in possession when these proceedings commenced.

"Lastly, I may say that the fact of ryots of the first party going over to the second party, without the consent and against the will [519] of the first party does not constitute an adverse possession, that as the first party never acquiesced in this attornment of her ryots her possession never in fact ceased.—*Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (I. L. R., 15 Cal., 527)".

Rani Abhayessari Debi, the second party, being dissatisfied with that order, accordingly applied to the High Court, under s. 439 of the Criminal Procedure Code, to send for the record and to set aside the order upon numerous grounds the nature of which appear sufficiently for the purpose of this report in the judgment of the High Court.

Upon this application a rule was issued which now came on for hearing.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *M. M. Ghose*, Mr. *A. M. Bose*, Baboo *Durga Mohun Dass*, Baboo *Ambika Charan Bose*, Baboo *Boikanta Nath Dass*, and Baboo *Chandra Kanto Sen*, for the Petitioner.

The Advocate-General (Sir *G. C. Paul*), Mr. *H. Bell*, Baboo *Iswar Chunder Chuckerbutty*, and Baboo *Kretanto Kumar Bose* for the Opposite Party.

The nature of the arguments advanced at the hearing of the rule appear sufficiently for the purpose of this appeal from the **Judgment** of the High Court (MITTER and MACPHERSON, JJ.) which was as follows :—

This rule arises out of a proceeding under s. 145 of the Criminal Procedure Code instituted in the Deputy Commissioner's Court of Goalpara, between the two Ranis of the late Koomood Narain Bhoop, Raja of Bijni.

It appears that the aforesaid Raja died on the 9th March 1883, when the second party, junior Rani, was about 19 years of age. The elder Rani, the first party, was allowed by the authorities to assume management of the estate left by the Raja, which consisted of two very extensive pergunnahs, viz., Habraghât and Khotaghat, comprising over 300 villages. It is admitted that the first party remained in sole possession of the said two pergunnahrs from the death of the Raja to the month of February 1887 by receipt of rent from the tenants of the said pergunnahs. [520] The second party lived in the Rajbari with the first party till August 1886. About that time there having arisen a serious difference between the two Ranis, the second party left the Rajbari.

It is alleged by the second party that the first party, for certain reasons to which it is not material in these proceedings to refer in detail, has no title

to the Raj, which, by the law of inheritance, vested in her alone upon the death of the late Raja.

It is further alleged by the second party that she, being alone entitled to the whole Raj, took measures from the month of February 1887 to assume exclusive possession of the aforesaid two pergunnahs.

On the second party attempting to take possession of the two pergunnahs, the first party made an application to the Deputy Commissioner of Goalpara, to institute proceedings under s. 145 of the Criminal Procedure Code, alleging that there was a likelihood of a serious breach of the peace in consequence of the endeavours of the *amlas* of the junior Rani to collect rents forcibly from the tenants. The statement regarding probability of the breach of peace was confirmed by many police reports. Thereupon the Deputy Commissioner instituted the present proceeding on the 23rd of May 1887.

The second party moved this Court on the 28th May 1887 to set aside the order of the 23rd May, on the ground that there was no valid reason stated in it for initiating proceedings under s. 145 of the Criminal Procedure Code. A rule was issued by this Court upon that application, but it was discharged on the 28th June 1887 on the ground that, upon the materials then before the Court, there was nothing to show that the Magistrate had no authority to take proceedings under s. 145 of the Criminal Procedure Code.

On the 19th July 1887 the parties filed their written statements. The second party in her written statement, amongst other things, alleged that she had instituted a civil suit regarding the Raj, and that on her application, dated the 15th July a rule had been issued upon the first party to show cause why a Receiver should not be appointed to collect the rents and otherwise manage the estate left by the late Raja. She further [521] stated that she was in exclusive possession of almost the whole of the Pergunnahs Habraghat and Khotaghat, the tenants having of their own accord and without any coercion paid rent to the *amlas* appointed by her.

It appears that the rule regarding the appointment of a Receiver was disposed of by the lower Court by an order appointing a Receiver as prayed for by the second party. Against that order an appeal was preferred to this Court. The Deputy Commissioner being of opinion that the appointment of a Receiver would do away with the necessity of the continuance of this proceeding, by an order dated 13th of August 1887, suspended all further proceedings in it till the disposal of the appeal against the order appointing a Receiver. But the appeal not having been heard, in consequence of frequent applications for postponements and the parties having in the meantime attempted to collect rents, the Deputy Commissioner on receipt of police reports of the likelihood of a breach of the peace occurring, by an order dated 7th of May 1888, directed that the case under s. 145 of the Criminal Procedure Code, be proceeded with. Against that order the second party made an application to this Court on the 26th May 1888. About that time, the second party also made another application to this Court praying that the proceeding, under s. 145 of the Criminal Procedure Code be wholly set aside, as she had instituted a regular suit for the establishment of her title to the Raj. Both these applications were unsuccessful and this Court directed the Deputy Commissioner to proceed with the trial of the proceding under s. 145 of the Criminal Procedure Code.

The proceedings being resumed, both parties cited numerous witnesses to prove their respective allegations of possession over more than 300 villages. But the Deputy Commissioner being of opinion that it was the intention of the Legislature that a proceeding like this, instituted for the maintenance of peace,

should be speedily terminated, declined to examine more than a limited number of witnesses on each side. He decided on the evidence taken by him in favour of the first party. This rule was issued on the application of the second party to set aside the order of the Deputy Commissioner of Goalpara on various grounds.

[522] The questions argued before us, and which in our opinion are sufficient to dispose of this rule, are as follows: —

1st.—That a single proceeding under s. 145, Criminal Procedure Code, was not intended to be applicable to a case like this in which the question of disputed possession related to more than 300 distinct villages.

2ndly.—That on the date fixed for the filing of written statements, the second party was desirous of adducing evidence to prove that there was no likelihood of a breach of the peace, but such evidence was illegally excluded.

3rdly.—That the lower Court acted illegally in declining to examine more than a limited number of witnesses on the question of possession.

In dealing with these questions it is to be borne in mind that the inquiry, if it had not been limited in the way in which it was limited by the Deputy Commissioner, would have lasted for a very long time, and would have been extremely expensive to both parties. That in all probability the civil suit would have been decided before the termination of this proceeding. That even if it had been decided before the disposal of the civil suit, very little advantage would have been gained thereby, as the decree in the civil suit would have made the decision on the question of possession quite ineffectual.

It seems to us, therefore, that even if it be established that the lower Court's action in excluding evidence was illegal, it would by no means follow that we should be justified in exercising our revisional powers on the ground of illegality.

But apart from this consideration, the objections noticed above are not, in our opinion, such as would warrant our interference with the order of the lower Court.

With reference to the first two objections, it is sufficient answer to them, that in more than one application, which was made by the second party to this Court, in order to set aside the proceeding of the lower Court, these objections were not taken, and the last order made by this Court directing the lower Court to proceed with the trial of this case precludes her from raising them now. It has been decided by this Court that a proceeding under s. 145 is not limited to disputed possession [523] between parties in immediate occupation of a tangible immoveable property, but is intended to apply where the disputed possession consists of receipt of rent from tenants in actual possession. That being so, we cannot limit its operation by any rule which would depend upon the area of the property in dispute.

It remains now to notice the third objection. It seems to us that, having regard to the admission made by the second party, that the first party was in possession of the two disputed pergunnahs till the month of February 1887, by receipt of rent from the tenants, it would not have affected the decision of the case at all, if it had been established that the second party, as alleged by her, had succeeded in inducing the tenants of almost the whole of the pergunnahs of Habraghat and Khotaghat "to attorn to her by payment of rent to the officers appointed by her between the month of February 1887 and the following month of May, when the present proceeding was instituted." Such payment of rent for a *short* time would not amount to dispossession of the first party.

In this view we are supported by *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (I. L. R., 15 Cal., 527).

We are, therefore, of opinion that this rule must be discharged, and it is accordingly discharged.

H. T. H. *Rule discharged.*

NOTES.

[As regards guiding principles to limit scope of inquiry, see 20 Cal., 155.

As regards possession by receipt of rents, see 27 Cal., 892; 9 C. W. N., 887.

As regards the obligation to examine all the witnesses tendered, *see* also 31 Cal., 685 24 All., 315.

See also 23 Cal., 80; 6 C. W. N., 206.]

[16 Cal. 523]

ORIGINAL CIVIL.

The 18th March, 1889.

PRESENT:

SIR W. COMER PETHERAM., KT, CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Gopal Chunder Sreemany...........Plaintiff.

versus

Herembo Chunder Holdar and others...........Defendants.*

Mortgage—Priority of mortgage—Intention of preserving a prior security presumed—Mortgagee—Mortgagor.

On the 29th November 1882. *H* mortgaged to the plaintiff his one-third share in a house and garden to secure Rs. 1,000 with interest at 12 per cent.

On the 3rd January 1884, *H* mortgaged his one-third share in the same house to a third person to secure Rs. 1,000 with interest at 18 per cent.

[524] On the 14th May 1884, *H* and his two brothers mortgaged to the plaintiff the entirety of the said house and garden to secure Rs. 3,400 with interest at 18 per cent.

This last mortgage recited the mortgage of the 29th November 1882, and a further loan of Rs. 100 by the plaintiff to *H*, and contained the following clause, " Now in order to liquidate the said debt, and on account of our necessity, we three brothers do this day mortgage to you whatever right, title and interest we have in the said two premises and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt; therefore, for interest of the said money, we are paying at the rate of Re. 1-8 per month."

Held, that the transaction of the 14th May 1884 did not amount to payment of the original debt, but was in reality a further advance and a fresh security for both the old debt and the fresh advance, on different terms as to interest, the old debt remaining untouched; but that even had the original debt been satisfied thereby, that fact would not have necessarily destroyed the security, the presumption being, unless an intention to the contrary were shown, that the plaintiff intended to keep the security alive for his own benefit.

Gokaldas Gopaldas v. *Puranmal Premsukhdas* (I. L. R., 10 Cal., 1035), followed in principle.

ON the 29th November 1882, Herembo Chunder Holdar mortgaged to Gopal Chunder Sreemany, under a Bengali instrument of mortgage, an undivided one-third share in the house and premises No. 15, Nimoo Gossain's Lane in the town of Calcutta, and of, and in, a certain rent-free garden in the 24-Pergunnahs, to secure the repayment of Rs. 1,000 with interest

* Original Civil Appeal, No. 29 of 1888, against the decree of Mr. Justice TREVELYAN, dated the 21st of August 1888.

at 12 per cent. per annum. On the 3rd January 1884, Herembo Chunder Holdar granted a mortgage of his one-third share in the said house to Bindobashinee Dossee to secure the repayment of Rs. 1,000 with interest at 18 per cent. per annum. Bindobashinee Dossee brought a suit on this last mortgage against Herembo Chunder Holdar alone, and obtained therein, on the 26th November 1886, a decree directing the repayment of the sum secured with interest and costs, and in default directing the mortgaged premises to be sold.

Prior to the 14th May 1884 (at which date Gopal Chunder Sreemany had received no notice of the mortgage to Bindobashinee Dossee), Herembo Chunder Holdar, being unable to repay to Gopal Chunder Sreemany the amount due upon his first mortgage, applied to him to continue the said loan and to make further advances, which the said Gopal Chunder Sreemany agreed to do, provided that Sarat Chunder and Benayak Chunder Holdar, [525] the owners of the remaining two-third shares in the said properties, would join in giving to him the security of their shares; and on the 14th May 1884, Herembo Chunder, Sarat Chunder and Benayak Chunder Holdar, mortgaged to Gopal Chunder Sreemany their shares in the said house and garden to secure the repayment of Rs. 3,400 with interest at 18 per cent. per annum.

This latter mortgage (which was a Bengali mortgage) after reciting the mortgage of the 29th November 1882, and the fact that a further advance of Rs. 100 had been made to Herembo Chunder, ran as follows: "In order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt." The mortgage of the 29th November 1882, however, was never in reality paid off, and it remaind uncancelled in the hands of Gopal Chunder Sreemany.

On the 11th September 1888, Gopal Chunder Sreemany brought a suit on the mortgage of the 14th May 1884, making Herembo Chunder Holdar, his two brothers and Bindobashinee Dossee, defendants, praying that the mortgage of the 14th May 1884 might be declared to have priority over the mortgage of Bindobashinee Dossee, and that an account might be taken of what was due to him under the two mortgages of the 29th November 1882 and the 14th May 1884, and that Bindobashinee Dossee might be restrained from proceeding under the decree obtained by her.

The Holdar defendants put in written statements, which, however, set up no real defence; and Bindobashinee Dossee contended that, upon the proper construction of the mortgage of the 14th May 1884, the prior mortgage of the 29th November 1882 was extinguished; and she contended that her mortgage should have priority over the mortgage of the 14th May 1884.

Trevelyan, J.—The only real question in this case is whether by taking a subsequent mortgage the plaintiff has lost his security under his first mortgage. (Here followed the facts as set out above).

[526] The plaintiff is taking a new security from his original mortgagor and others; the interest charged is different. The new mortgage states that the debt has been paid off. The old deed remains with the mortgagee, but only as one of the title deeds: this is clear from the schedule of title deeds which includes it, and describes it as being paid in full. A comparison of this schedule with the schedule of the first mortgage, shows that this is one of the bonds described in the schedule of the second mortgage as having been paid in full.

This suit is brought for the purpose of declaring that the plaintiff's mortgage has priority over the mortgage of Bindobashinee.

Mr. *Sale*, for the plaintiff, has cited several cases, all of which I have considered. They are mostly cases of third mortgagees or purchasers of the equity of redemption, paying off the first mortgagees. As pointed out in the case of *Gopee Bundhoo Shantra Mohapattur* v. *Kallypudo Banerjee* (23 W. R., 338), the question is one of intention ; in that case the Judges relied upon the fact that the original bond remained in the hands of the creditor, but in this case it only remained as one of the title deeds. It seems to me quite clear the parties intended that the first mortgage should be wiped out altogether by the subsequent mortgage in favour of the plaintiff.

If that was their intention, they could not have expressed it in clearer language. There is the statement that the new loan is taken to liquidate the former debt. There is the statement that the old debt has been paid, and we find the old bond in the list of the title deeds, with a statement that it has been paid in full. In this state of facts it is impossible to say that the original security remained. A new contract of an entirely different description, and with a different rate of interest, was made with new persons. I think the intention is clear, and must declare that the plaintiff's first mortgage has no priority over the defendant Bindobashinee's mortgage. I must dismiss this suit, and the plaintiff must pay Bindobashinee's costs.

The plaintiff appealed.

Mr. *Phillips* and Mr. *Sale* for the Appellant.

[527] Mr. *Bonnerjee*, Mr. *Garth* and Mr. *Pogose* for the Respondents.

Mr. *Phillips*.—The question is whether the first mortgage is extinguished. There is no evidence of express intention either one way or the other. I submit the first mortgage was kept alive. The plaintiff made further advances and naturally required a better security ; and the fact of taking a second mortgage did not show that he meant to lose any advantage he might have had under his first mortgage. There is a broad distinction between the case of a purchaser of an equity of redemption and a mortgagee. Slight evidence suffices to keep on foot the prior charge *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (I. L. R., 10 Cal., 1035)

The nearest case on the facts is that of *Golaknath Misser* v. *Lalla Prem Lal* (I. L. R., 3 Cal., 307), but the present case is even stronger than that, as the plaintiff's interest was raised, whilst in that case it was diminished.

The case of *Adams* v. *Angell* [L. R., 5 Ch. D., 634 (641)] is not so strong as the present case, as it was a case of a mortgagee purchasing the equity of redemption. The rule applicable to such case as the present is laid down in Dart's Vendors and Purchasers, 1041 : *Phillips* v. *Gutteridge* (4 De G. and J., 531) ; *Gangadhara* v. *Sivarama* (I. L. R., 8 Mad., 246) ; *Dullabhdas Devchand* v. *Lakshmandas Sarupchand* (I. L. R., 10 Bom., 88).

The Court below has not only disallowed priority to the plaintiff's mortgage but has dismissed the suit altogether, which is clearly wrong as regards the mortgagors, and has also refused the plaintiff an account.

Mr. *Bonnerjee*, for the respondents, contended that the second mortgage clearly showed the intention of giving up the first security, and cited *Averrall* v. *Wade* [L. & G. (temp Sug.), 252].

The **Judgment** of the Court (PETHERAM, C.J., and WILSON, J.) was as follows :—

This suit has been brought to have it declared that two mortgages, dated the 29th of November 1882 and the 14th May 1884, **[528]** in favour of the Plaintiff, have priority over a mortgage, dated 3rd of January 1884, in

favour of the defendant, Bindobashinee Dossee, and to realize such two mortgages by bringing the mortgaged property to sale.

The facts are as follows: On the 29th of November 1882, Herembo Chunder Holdar, one of the defendants, mortgaged his one-third share of a house in Calcutta and a garden in the 24-Pergunnahs to the plaintiff to secure Rs. 1,000 and interest at 12 per cent.

On the 3rd of January 1884, Herembo Chunder Holdar mortgaged his one-third share of the Calcutta house to the defendant Bindobashinee Dossee to secure Rs. 1,000, with interest at 18 per cent.

On the 14th of May 1884 the defendants, Herembo Chunder Holdar, Surut Chunder Holdar, and Benayak Chunder Holdar, mortgaged the whole sixteen annas of the two properties, included in the mortgage of the 29th November 1882, to the plaintiff, to secure Rs. 3,400 and interest at 18 per cent.

This last mortgage recites the mortgage of the 29th November 1882, and a further loan by the plaintiff to Herembo Chunder Holdar of Rs. 100, and proceeds, " Now in order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we will pay at the rate of 1-8 per mensem, and within 12 months from this day's date, we will repay the whole amount in full, principal as well as interest."

Upon these facts, Mr. Justice TREVELYAN has dismissed the suit altogether, holding that by the transaction of May 24th, 1884, the debt of November 29th, 1882, was paid off, and the security created by the deed of that date satisfied and cancelled. It has been argued before us that, looking at the real nature of the transaction, it did not amount to payment of the original debt, but was in fact a further advance and a fresh security, and that even if the effect of the transaction was that the original debt was paid, that did not necessarily destroy the security, the real [529] test being what must the plaintiff be presumed to have intended to do under the circumstances if he had known all the facts.

It was also contended that if the defendants' contention was correct, the suit should not have been dismissed, as the plaintiff must be entitled, in any case, to some relief in the suit. In our opinion, all these arguments are valid and must be given effect to, and we are unable to agree with Mr. Justice TREVELYAN in the conclusion at which he has arrived.

Looking at the construction of the deed of May 1884, we do not think the transaction amounted to payment of the original debt; but looking at what was done in fact, and not mere words, we think that it was in reality a fresh advance upon fresh security being given for both the old debt and the fresh advance, and upon a fresh arrangement being made as to interest, but that the old security for the old debt remained untouched. Even if this were not so, and the old debt was paid by the new transaction, the cases of *Phillips* v. *Gutteridge* (3 De G. and J., 531), *Adams* v. *Angell* (L. R., 5 Ch. D., 634), *Gokaldas Gopaldas* v. *Puranmal Premsukdas* (I. L. R., 10 Cal., 1035), and *Goluck Nath Misser* v. *Lalla Prem Lal* (I. L. R., 3 Cal., 307) show that that would not necessarily destroy the security: but that if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection. We can see nothing in this case to indicate a contrary intention on his part, and we think that the plaintiff here must be presumed to have had such an intention, and that in either view the security of November 29th, 1882, is still subsisting, and the plaintiff is entitled to a declaration that notwithstanding what has taken place, his

mortgage of November 29th, 1882, has priority over that of January 3rd, 1884, in favour of the defendant Bindobashinee Dossee.

An account will be taken of what is due for principal and interest under the mortgage of November 29th, 1882, and of what is due for principal and interest under the mortgage of May 14th, 1884, and it will be declared that the amount due under the first mortgage is a first charge upon the property mentioned in that mortgage, and that the amount due on the mortgage [530] of May the 14th, 1884, is a charge upon the whole of the property mentioned in that mortgage, subject to a charge in favour of the defendant Bindobashinee Dossee for the amount due for principal and interest under her mortgage upon Herombo Chunder Holdar's one-third share of the house in Calcutta, and that the plaintiff do sell the properties not included in such last mentioned mortgage first.

In taking the accounts as between the mortgagors and the mortgagee, the amount found to be due under the mortgage of November 29th, 1882, minus the interest from November 29th, 1882, and May 14th, 1884, must be deducted from the amount found to be due under the mortgage of that date in order to arrive at the sum now due from the mortgagors, the Holdars, to the plaintiff, and for which he is entitled to bring the mortgaged properties to sale.

The plaintiff will be entitled to add his costs to his mortgage and, under the circumstances of the case, the costs of the defendant, Bindobashinee Dossee, should also be added to her mortgage.

Appeal allowed.

Attorney for the Appellant: Baboo *N. C. Bural.*
Attorney for the Respondents: Mr. *C. N. Manuel.*
T. A. P.

NOTES.

[The presumption to keep the security alive for one's protection in the absence of anything to the contrary was drawn also in these cases: (1896) 20 Mad., 274 : (1905) 29 Mad., 37; (1891) 13 All., 432; 581; (1904) 1 A. L. J., 288; (1901) 29 Cal., 154; (1905) 1 C. L. J., 531; (1896) 23 Cal., 790; (1907) 5 C. L. J., 611; 36 Cal., 193.]

[16 Cal. 530]

FULL BENCH.

The 21st March, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE MITTER, MR. JUSTICE PRINSEP, MR. JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

Joggobundhu Mitter............Plaintiff

versus

Purnanund Gossami and another...........Defendants.*

Limitation Act (XV of 1887), Sch. ii, art. 142—Symbolical possession.

On the 7th November 1868, certain property was purchased by one Gopal Dass Banerjee at a sale held in execution of a decree obtained against one Jogodanund Gossami. On

* Full Bench on Appellate Decree, No. 2321 of 1887, against the decree of H. Mathews, Esq., Officiating District Judge of Nuddea, dated the 5th August 1887, reversing the decree of Babu Nuffer Chunder Bhutto, Subordinate Judge of that district, dated the 22nd September 1886.

the 8th January 1873, the purchaser obtained a [531] sale certificate, and, on the 10th August 1873, was put into symbolical possession of the property through the Court.

On the 3rd March 1875 the plaintiff, in execution of a decree obtained against Gopal Das Banerjee, purchased this property, symbolical possession of the property being given to him by the Court on the 31st March 1875.

On the 7th August 1885, the plaintiff brought this suit to recover possession of this property, alleging that he had been dispossessed therefrom on the 13th July 1885 by the defendant No. 2, who had taken an izara of the property from the son of Jogodanund. The defence set up was limitation.

Held, that on the principle laid down in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584) the suit was not barred.

Krishna Lal Dutt v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402) overruled.

THIS was a reference to a Full Bench made by PETHERAM, C. J., and TREVELYAN, J., on the 9th March 1889; the REFERRING ORDER was as follows :—

"The land in dispute originally belonged to one Jogodanund Gossami. In execution of a decree against him, it was sold on the 7th November 1868 to one Gopal Das Banerjee. Gopal Das Banerjee obtained a sale certificate on the 8th January 1873, and on the 10th August of the same year obtained through the Court, what is called symbolical possession, that is, delivery was made in accordance with s. 319 of the Civil Procedure Code. The land was then, and has since been, in the possession of tenants. Neither Gopal Das nor the plaintiff have obtained possession of the property in any other way. On the 3rd March 1875, the plaintiff purchased this property at a sale held in execution of a decree obtained against Gopal Das, and on the 31st March 1875, obtained symbolical possession.

"This suit is brought on the 7th August 1885, against Purnanund Gossami, the son of Jogodanund, who has died, and a person who has taken an izara from Purnanund.

The Lower Appellate Court, relying on the authority of the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402), has held that the suit is barred by limitation under the provisions of Article 138* of the second schedule of the Limitation Act, and has not considered the other questions in the case.

[532] " As we have doubts as to the correctness of the decision in the above cited case, we refer to the Full Bench the question whether the suit is barred ?

"The following cases were also cited to us: "*Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584), *Lokessur Koer* v. *Purgun Roy* (I. L. R., 7 Cal., 418), *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (I. L. R., 11 Cal., 93), and *Uma Shankar* v. *Kalka Prasad* (I. L. R., 6 All., 75)."

* [Art. 138 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale.	Twelve years ..	The date of the sale.]

Babu *Mohesh Chunder Chowdhry*, for the Appellant, contended that the suit was not barred, referring to *Jugaobundhu Mukerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584), *Lol.* .. *Koer* v. *Purgun Roy* (I. L. R., 7 Cal., 418), and *Shama Charan Chatter* v. *Madhub Chundra Mookerji* (I. L. R., 11 Cal., 93).

Babu *Hem Chunder Banerjee*, for the respondents, contended that neither the plaintiff nor his predecessor in title had ever enjoyed possession of the property, and therefore the suit was barred; that the symbolical possession given to Gopal Das and the plaintiff would not disturb the possession of Jogodanund; and referred to *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402) and *Uma Shanker* v. *Kalka Prasad* (I. L. R., 6 All., 75).

The **Opinion** of the Court (PETHERAM, C. J., MITTER, J., PRINSEP, J., WILSON J., and TOTTENHAM, J.) was as follows :—

The question referred to the Full Bench is stated in these words : "Is this suit barred by limitation ?" And the reason for the reference is that the learned Judges doubt the correctness of the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402), followed by the Lower Appellate Court in the present case.

The suit was brought to recover possession of a 4 annas' share of Mouzah Mukannagur, upon the allegation that the defendant No. 2 had dispossessed the plaintiff on the 31st of Assar 1292 (which was some day in July 1885); and the suit was instituted on the 7th of August following. The plaintiff's case was that he had purchased the property at auction in execution of his own decree against one Gopal Das Banerjee on the 3rd of March 1875 ; that he had obtained possession through the Court, and had enjoyed possession by the receipt of rent until disturbed and ultimately ousted by the defendant No. 2.

[533] Gopal Das Banerjee had, it was alleged, acquired the property by purchase at auction in execution of a decree against Jogodanund Gossami on the 8th of January 1873, and had obtained possession through the Court on the 10th of August of that year.

Among the pleas raised by the defendants was that of limitation ; for it was contended that the plaintiff, who had purchased the property in 1875, had never enjoyed any possession of it ; and that his predecessor in title, Gopal Das Banerjee, had likewise failed to obtain any real possession. The defendants are two in number, the first being the son of the Jogodanund Gossami, whose interest in the property was sold in execution of a decree in 1868 ; and the second being a person claiming possession as *izaradar* under him.

On the point of limitation the defendants' case is that the possession of Gossami was never disturbed by the execution proceedings either against Jogodanund, or against Gopal Das Banerjee. The Courts below have negatived the plaintiff's allegation that he ever had *substantial* possession of the property.

The question, therefore, whether the present suit is barred by limitation or not depends upon the legal effect to be given to the *symbolical* possession, as it is called, obtained on the 10th of August 1873 by Gopal Das Banerjee as against the father of defendant No. 1. For this suit was instituted within 12 years of that date.

The symbolical possession, obtained by the plaintiff in 1875, would not affect the defendants who were not parties to the execution proceedings against Gopal Das Banerjee.

We are of opinion that the rule laid down in the Full Bench case of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584), is

applicable to this case, and that its application saves the suit from the bar of limitation. That was a suit in which the assignee of a decree for possession of certain immoveable property had been put in formal possession by process of execution under s. 224* of Act VIII of 1859, and had then sold his interest to the plaintiffs, who had since been unable to obtain possession, and sued to recover it from the original defendant. The Full Bench held that the symbolical possession obtained by the plaintiffs' vendor was effective as against the judgment-debtor, defendant, and that [534] the suit brought against him within 12 years of that event was not barred by limitation.

In the present case the Court of First Instance held,—and we think rightly held—that the principle there laid down as to symbolical possession obtained by the decree-holder under his decree, is equally applicable to the case of a purchaser at auction in execution of a decree. It is the only mode in which the Court can give the purchaser possession, and as against the judgment-debtor it is effective for all purposes.

The case noticed by the Division Bench which referred this question to the Full Bench, *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402), was decided without reference to the earlier Full Bench case which was apparently not brought to the notice of the Judges.

By applying the principle laid down by the Full Bench in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584), we find that the judgment-debtor was actually in possession on the 10th August 1873, and was entitled to be in possession again from that or any subsequent date when he was dispossessed by the previous owner.

The present suit having been instituted within 12 years of the 10th of August 1873, our answer to this reference must be that the suit is not barred by limitation.

The result is that the decree of the Lower Appellate Court must be set aside and the case must go back to be determined on the merits.

T. A. P.

NOTES.

[Symbolical possession is tantamount to actual possession and gives a fresh starting point of limitation as against the judgment debtor; 24 Cal., 715; 4 C. W. N., 297; 25 Bom., 358; 25 Bom., 275; 19 All., 499; 22 Bom., 667, but see (1912) 36 Bom., 373 : 14 Bom., L.R., 115 where the Full Bench overruling 25 Bom., 275; 358, held that symbolical possession, under the C. P. C., does not take the place of real possession except for the purposes specified in the C. P. C.; but this is not the case as against third parties, 16 Bom., 722; 18 Bom., 37; 19 Bom., 620; 21 All., 269; 6 C. L. J., 472; 12 C. L. J., 378 though the case may be different when such third party was himself present at the time, 27 Mad., 262. *See* also 27 Cal., 714; 18 Cal., 520.

The assignee of the execution-purchaser has the same rights, 15 Mad., 331; 18 Mad., 144; 31 Cal., 681 overruling 23 Cal., 49; 23 Bom., 246.]

---

* [Sec. 224 :—If the decree be for land or other immoveable property in the occupancy of ryots or other persons entitled to occupy the same, the Court shall order delivery thereof to be made by affixing a copy of the warrant in some conspicuous place on the land or other immoveable property, and proclaiming to the occupants of the property by beat of drum, or in such other mode as may be customary at some convenient place or places, the substance of the decree in regard to the property.]

How it is to be delivered when in the occupancy of ryot.

[535] APPELLATE CIVIL.

The 28th March, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Baijnath Sahai............Petitioner

versus

Moheep Narain Singh and others............Objectors.*

Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 293—Question for Court executing decree—Defaulting purchaser answering for loss by resale—Description of property at sale and re-sale, Difference of—Regular suit.

An appeal will lie against an order made under s. 293 † of the Code of Civil Procedure—*Sree Narain Mitter* v. *Mahtab Chund* (3 W. R., 3), *Sooruj Buksh Singh* v. *Sree Kishen Doss* (6 W. R., Mis., 126), *Joobraj Singh* v. *Gour Buksh* (7 W. R., 110), *Bisokha Moyee Chowdhrain* v. *Sonatum Doss* (16 W. R., 14), *Ram Dial* v. *Ram Das* (I. L. R., 1 All., 181), followed.

The sale contemplated by s. 293 of that Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293.

Semble:—That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit and not by an application under s. 293.

THIS was an appeal by a decree-holder against an order rejecting an application made by him under s. 293 of the Code of Civil Procedure, for the recovery from a defaulting purchaser, the respondent, of a certain sum of money as deficiency of price on a re-sale of certain properties sold in execution. The circumstances under which that application was made were as follows: Originally eleven properties had been advertised for sale, but as the price bid for five of them was sufficient to satisfy the decree, the remaining six were not put up for sale. The purchaser paid [536] twenty-five per cent. of the price as required by law, but made default in paying the balance, and a re-sale was thereupon ordered. At the first sale no encumbrance, upon the properties sold, was notified. But before the re-sale, the decree-holder put in a petition asking the Court to notify to intending purchasers two encumbrances upon the said properties, one in favour of a third party under a mortgage bond, and the other in favour of the decree-holder himself under a security bond, by which the

---

* Appeal from Order, No. 365 of 1888, against the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 2nd June 1888.

† [Sec. 293: —The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default and all expenses attending such re-sale, shall be certified to the Court by the officer holding the sale,

Defaulting purchaser answerable for loss by resale.

and shall, at the instance of either the judgment-creditor or the judgment-debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money.]

said properties were charged as security for arrears of rent of a certain tenure. Both these bonds were of dates long anterior to the date of the first sale, and the encumbrance under the former was fully subsisting at that date. As regards the latter, the amount of the encumbrance notified had not fully accrued due until about a month after the date of the first sale, but in the absence of evidence to show that the rent which constituted the charge was payable only at the end of the year, it may, under s. 53 of the Bengal Tenancy Act, be presumed that it was payable by four instalments, and that three of these had accrued due before the former sale. The two encumbrances were notified at the re-sale, and the price bid for the first five properties was considerably below what they fetched on the former occasion. The other six properties were then sold, and the decree-holder sought to recover from the defaulting purchaser the deficiency in the price of the five properties re-sold diminished by the amount realized by the sale of the other six.

The Nazir who held the sale did not certify the deficiency of price to the Court as required by s. 293. The Subordinate Judge of Shahabad, before whom the application under s. 239 came on for hearing, dismissed the application, holding that there was nothing in s. 293 which directed a Court to enter into these questions summarily, and that they ought to form the subject of enquiry in a regular suit; he also held that it was unnecessary for the Nazir to give the certificate required by law unless 'the properties sold on the last occasion were, according to description, the same as were sold on the first.'

The decree-holder appealed to the High Court, urging that the lower Court had jurisdiction to go into the question of the correctness of the Nazir's report, and that the property being the [637] same, and the second purchaser not being the appellant, the lower Court should have passed an order in his favour leaving the respondent to contest the matter in a regular suit. On the other hand, the defaulting purchaser, the respondent, contended—*firstly*, that there was no appeal against the order of the Court below; *secondly*, that by reason of the difference in the descriptions of the property at the two sales, the second sale could not be regarded as a re-sale within the meaning of s. 293 of the Code of Civil Procedure; *thirdly*, that the Nazir who held the sale, having refused to certify the deficiency of price, the decree-holder could not recover anything; and, *fourthly*, that the decree-holder, having proceeded against other properties of the judgment-debtor, was not entitled to proceed under s. 293.

Moulvie *Mahomed Yusuf* for the Appellant.

Mr. *C. Gregory* for the Respondent.

The **Judgment** of the Court (TOTTENHAM and BANERJEE, JJ.) (after stating the facts) proceeded as follows:—

The first point should, we think, be decided in favour of the appellant. Section 293 of the Code of Civil Procedure enacts, amongst other things, that the deficiency of price happening on a re-sale shall be recoverable by the decree-holder from the defaulting purchaser under the rules contained in Chapter XIX for the execution of a decree for money. Questions like the one disposed of by the Court below in this case, must, therefore, be taken to be of the nature of questions arising between the decree-holder and the judgment-debtor relating to the execution of decrees, such as are contemplated by clause (*c*) of s. 244. And as an appeal is allowed from the decision of any of these questions, there is no reason why an appeal should not lie against the decision of the Court below in this case. This view is in accordance with the decisions of this Court in the cases of *Sree Narain Mitter* v. *Mahtab Chund* (3 W. R., 3), *Sooruj Buksh Singh* v. *Sree Kishen Doss* (6 W. R., Mis., 126), *Joobraj Singh*

v. *Gour Buksh* (7 W. R., 110), *Bisokha Moyee Chowdhrain* v. *Sonatun Doss* (16 W. R., 14), and with the Full Bench ruling of the Allahabad High Court in the case of [538] *Ram Dial* v. *Ram Das* (I. L. R., 1 All., 181), with reference to the corresponding provisions of Acts VIII of 1859 and XXIII of 1861. It is true that the point has been considered open to doubt in two later cases —*Huree Ram* v. *Hur Pershad Singh* (20 W. R., 397) and *Ramdhani Sahai* v. *Rajram Kooer* (I. L. R., 7 Cal., 337); but in both these cases the appeal was heard and dismissed upon other grounds: and we see no reason to dissent from the earlier rulings by which an appeal is expressly allowed.

The second contention raised by the respondent is, however, in our opinion, perfectly valid, and this appeal must, therefore, fail. We think the re-sale contemplated by s. 293 of the Code of Civil Procedure must be a sale of the same property that was first sold, and under the same description and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by s. 287 to enable intending purchasers to judge of the value of the property, should disentitle the decree-holder to recover the deficiency of price under s. 293. No doubt it is quite possible that, between the two sales, the value of the property may be changed by causes such as diluvion and the like, which are beyond the control of anybody; and, in such cases, it might fairly be urged that the decree-holder should not suffer for the purchaser's default. But in the first place that is not the case here. In this case the two encumbrances notified at the re-sale were in existence, either wholly or partially, at the time of the first sale; and one of them must have been known to the decree-holder since it was in his favour; and the other he was bound to enquire into, as the rules made by this Court under s. 287 of the Civil Procedure Code throw upon him the duty of ascertaining and notifying to the Court the encumbrances upon any property advertised for sale in execution of decree. In the second place, even if the difference of description were due to any such cause as is above referred to, although the decree-holder may, under certain circumstances, be entitled to recover damages from the defaulter, that must be by a regular suit and not by an application under s. 293. A claim to recover the deficiency of price [539] by way of compensation would involve inquiry into difficult questions which must be decided before the proper amount of damages could be ascertained; and, the Legislature by leaving it to the officer holding the sale (who is generally a ministerial officer) to certify to the Court the amount that is to be recovered under s. 293, has sufficiently indicated that cases involving questions like these were never intended to be covered by that section, and that the only cases to which that section was intended to apply, are cases where the same property is sold under the same description at both the two sales. In the present case, after the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at the re-sale, it would be allowing him to take advantage of his own neglect of duty. That would be so manifestly inequitable that we are unable to hold that the Legislature could have ever intended such a result.

As the appeal fails upon this ground, it is unnecessary to say anything upon the other two points raised by the respondent.

As regards one of the five properties (it is one of very small value), it was urged that the encumbrances were not notified at the re-sale, just as they had not been notified at the first sale, and that the appellant was consequently entitled to succeed in regard to that property in any case. But the decree-holder's petition, before the re-sale, stated that that was subject to the same

encumbrance as the other four, and so, practically, there was no difference between the case of that property and that of the other four.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[As regards the proposition that re-sale to be binding should be identical with the previous sale, *see* also (1911) 36 Bom., 329.

As regards appeal, the Madras and Calcutta Courts view an order under C.P.C., 1908, O. 21, r. 71 as a decree, (1895) 18 Mad., 439; (1898) 25 Cal., 99; 2 C. W. N,, 411; but not the Allahabad High Court, (1892) 14 All., 201 following (1890) 12 All., 397.

See also (1899) 23 Mad., 73.]

[540] APPELLATE CIVIL.

The 5th April, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Bunseedhur............Defendant

versus

Sujaat Ali and another............(Plaintiffs.)*

Decree—Form of decree—Construction of mortgage bond—Liability of property other than that mortgaged.

Under a mortgage bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor.

Held, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties.

Narotam Dass v. *Sheopargash Singh* (I. L. R., 10 Cal., 740) referred to.

SUIT to recover Rs. 7,346, as principal and interest on an ordinary mortgage bond.

So far as is necessary for the purposes of this report, the facts are as follows:—

The plaintiff sued on a mortgage bond, dated the 6th January 1880, to recover the above-mentioned sum, asking for sale of the properties, the subject of the mortgage, and, if they should be insufficient to meet the amount due, for a decree against the person and other properties of the mortgagor. The mortgage was admitted, the only contention necessary to mention, raised by the defendant, the mortgagor, being, that the plaintiff was not entitled, under the terms of the mortgage, to obtain a decree against the person and other properties of the mortgagor.

The mortgage bond, after reciting that certain sums were due and owing to certain persons, and that the mortgagee had borrowed a certain sum from the mortgagor for the purpose of meeting these liabilities, stated that the mortgagor promised to pay and liquidate the principal amount so borrowed

* Appeal from Original Decree, No. 59 of 1888, against the decree of Babu Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 12th December 1887.

in the month of Jeyt 1291 F.S., and interest amounting to Rs. 45 per month in the month of Assin, year by year; that if such [541] interest was not paid then, the mortgagee should be at liberty to recover the same by suit; that until repayment of such principal and interest, the mortgagor pledged and mortgaged certain properties; that if ever the mortgaged property should be sold by auction for arrears of Government revenue or any other reason, then the mortgagees, their heirs or representatives might recover the loan, principal and interest, in any manner they might consider feasible, either from the person or other moveable or immoveable property of the mortgagor; and that if the principal was not paid by Jeyt 1291 F. S., then the mortgagee might institute a suit to recover from the mortgaged property.

The Subordinate Judge (after stating that it was contended before him that, inasmuch as the bond did not contain any stipulation for the recovery of the money from the person and mortgaged properties of the mortgagor, except in the case of an auction sale of the mortgaged properties, and provided for its recovery in other cases from the mortgaged property, therefore, the plaintiffs have no right to recover the money from the person or other properties of the mortgagor, save as above mentioned) was of opinion that the plaintiff had a right to recover either from the mortgaged properties, the person of the mortgagor, or his other properties; and that if the parties had intended such a state of things as contended for by the mortgagor, the mortgage bond would have contained a proviso to that effect; but, no such proviso being in existence, he gave the plaintiff a money decree for the principal and interest due, to be paid within six months, and, in default of such payment, for sale of the mortgaged properties, and, on their proving to be insufficient, the plaintiff to be at liberty to recover the balance from the person and other properties of the mortgagor.

The defendant appealed to the High Court on, amongst other grounds, the ground that the plaintiff was not entitled to a decree against the person or other properties of the mortgagor save in the event of the unmortgaged property being sold as in the bond provided for.

Mr. *Das*, Moulvi *Mahomed Yusuf* and Babu *Durga Mohun Das* for the Appellant.

[542] Mr. *Amir Ali* and Moulvi *Serajul Islam* for the Respondents.

Mr. *Das*, on the question of the mortgagor's right to a personal decree, referred to *Narotam Dass* v. *Sheopargash Singh* (I.L.R., 10 Cal., 740).

Mr. *Amir Ali* (on this point) contended that it was a vicious principle to attempt to construe one document by another which was not before the Court and which was not even fully set forth in the report. The personal liability of the borrower arose from the transaction independently of the loan which was created by the contract. Unless it distinctly appeared that the mortgagor had abandoned the right to proceed against the person, the Court should not take away that right.

The **Judgment** of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by—

Tottenham, J.—This is an appeal against a decree made by the lower Court upon a mortgage bond. The decree is made in favour of the plaintiff for the sum claimed, with costs and interest. The decree provides that should the defendant No. 1 fail to pay up the amount of the decree within six months from the date thereof, the mortgaged properties shall be sold; and if they be insufficient to satisfy the decree, then the plaintiffs shall be at liberty to recover the balance from the person or other property of the defendant No. 1.

The defendant No. 1 has appealed against this decree upon various grounds. There is no dispute as to the execution of the bond, but it is contended, on his behalf, that the Court was wrong in making the debtor or his other property liable for the debt; for it is contended that the mortgage bond itself limits the plaintiffs' means of relief to the mortgaged property, excepting in the event of the mortgaged property having been sold by auction on account of arrears of Government revenue or for any other reason.

The main point in this appeal is, that the lower Court has misconstrued the mortgage bond and has wrongly made the defendant personally liable for the amount as well as other property not covered by the mortgage.

[543] We have given our best attention to the document and the arguments advanced on both sides by learned Counsel. The lower Court, while admitting that certain clauses of the deed do support the contention of the defendant, was on the whole of opinion that the intention of the parties was not in accordance with that contention. The Subordinate Judge says: "The bond in suit is an ordinary mortgage bond taken by creditors in this country to secure their money. It contains, as usual, a promise to re-pay and a hypothecation of property in the form of a security. The holder of such a bond has ordinarily the right to recover his money either from the mortgaged property or from the person or other properties of the mortgagor. That right, I think, is not taken away by covenant, which merely provides that the mortgagees will be at liberty to recover their money from the person and other properties of the mortgagor if the mortgaged properties are sold for arrears of revenue, and also to recover it from the mortgaged properties if the mortgagor fails to re-pay the money within the time fixed. These clauses do not lay down that, in the latter case, the mortgagee will not be at liberty to recover any portion of the money from the person and unmortgaged properties of the mortgagor even if the mortgaged properties be insufficient. The bond does not make any provision for such a contingency."

Our attention has also been drawn to s. 90 of the Transfer of Property Act, which provides that, in the event of the sale of the mortgaged property not satisfying the decree given upon the bond, a decree may issue against the person and other property of the debtor. We think, however, that the case brought to our notice, *Narotam Dass* v. *Sheopargash Singh* (I.L.R., 10 Cal., 740) being a judgment of the Judicial Committee of the Privy Council, in a case, which, as reported, seems extremely similar to this, compels us to take a view different from that of the lower Court. In that case a Taluqdar in Oudh had executed a deed by which he hypothecated his taluq as security for a debt of Rs. 4,103. The deed also contained a promise that he would re-pay the principal with interest within a term of two years. The Privy Council held that this was a mortgage of the [544] estate and nothing else; that there was no personal contract on the part of the debtor to pay the debt out of his personal estate; that it was a mere contract to pay out of the hypothecated estate, and as the hypothecation for other reasons was invalid the plaintiff's suit was dismissed. In the present case, the bond contains very much the same provisions as in that case; but, if anything, its wording is more strongly in favour of the debtor than it was in that case. Here also we have the promise of the debtor to re-pay and liquidate the principal amount in full in one lump sum in Jeyt 1291, together with interest to be paid in a lump in each year. If a similar clause in the bond given by Sheopargash Singh in the case cited did not amount to a contract to pay out of his personal estate, we hardly see how it can be held to amount to such a contract in this case. Here, however, there is something more in favour of the judgment-debtor's contention;

provision is made that if the mortgaged property is sold by auction for arrears of Government revenue, or for any other reason, then it shall be competent to the creditors or their heirs to recover the loan, principal and interest, in any manner that may be considered feasible, either from the person or from the moveable and immoveable property of the debtor; and the last clause of the bond provides that if, according to agreement, the principal cannot be re-paid in 1291 F, then it shall be competent to the Maharajah to recover, by suit, from the mortgaged property, but it is quite silent as to any further relief.

Therefore upon the clauses of the bond and upon consideration of the decision of the Privy Council in the case mentioned, we are of opinion that we must hold that the defendant is not liable in his person and other property to satisfy the decree on the bond.

The result is that the decree of the lower Court will be modified to this extent, that while we maintain the amount of that decree, the means of satisfying it must be limited to the sale of the mortgaged properties.

T. A. P. *Decree varied.*

NOTES.

[Dr. Rash Behari Ghose in his *Mortgages* IV Edn. (1914) Vol. II p. 962 says, "No decree can be made under this rule where the mortgagor is under no personal liability, compare (1889) 16 Cal., 540 with (1892) 14 All., 513. But the mere fact that there is no express personal covenant to pay is no bar to the mortgagee obtaining a personal decree, (1906) 4 C. L. J., 246; (1908) 13 C. W. N., 138; (1908) 30 All., 388.

But no such decree can be made against a purchaser of the mortgaged property even where he retains a part of the purchase-money undertaking to pay the amount to the mortgagee (1911) 34 All., 63 affirming 31 All., 352; (1912) 17 C. L. J., 120; nor against a puisne mortgagee (1904) 26 All., 507; (1912) 16 C. L. J. 394.

See also (1901) P. L. R., 155 where this case was dissented from (1906) 4 C. L. J. 510 (1896) 5 C. L. J., 287.]

[545] CIVIL REFERENCE.

The 29th March, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Mahabeer Sing............Plaintiff

versus

Rambhajjan Sah and others...........Defendants.

Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Res judicata—*Cause of action*—*Damages.*

In September 1886 the plaintiff sued in a Munsif's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. This suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision.

In March 1887 the plaintiff sued these defendants in the Munsiff's Court for possession of 5 biggahs 6 cottahs of land and for mesne profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne profits; possession of the one biggah, the subject of the suit of 1886, being included in the 3 biggahs 6 cottahs decreed. He subsequently sued the same defendants in a Small Cause Court for damages for the paddy

* Civil Reference No. 1A of 1889, made by Baboo Menu Lal Chatterjee, Judge of the Court of Small Causes, Chupra, dated the 13th of February 1889.

out and carried on the 23rd December 1885: *Held*, that such suit was not barred by either s. 13 or s. 43* of the Civil Procedure Code.

REFERENCE from a Provincial Court of Small Causes.

This was a suit brought in the Small Cause Court of Chupra to recover Rs. 46 and interest for the price of certain paddy and straw which the defendants on the 23rd December 1885 forcibly cut and took from off one biggah out of 3 biggahs 16 cottahs of land held by the plaintiff.

The plaintiff alleged in the plaint that he had brought, on the 7th September 1886, a Suit No. 50 of 1886, against these same defendants in the Munsif's Court, for possession of this one biggah of land on which the said paddy had been grown, and for the price of the paddy which had been forcibly carried away; but that such suit had been dismissed by the Munsif, who held that the taking of the paddy did not amount to an act of dispossession, and that as to the price of the paddy the plaintiff should have brought his suit in a Court of Small Causes. [546] No appeal was filed against this judgment. He further alleged that, in August 1886, after that decision, the defendants had dispossessed him from 5 biggahs 1 cottah of land, and that he had brought, on the 21st March 1887, a Suit No. 26 of 1887 against them for possession and mesne profits, and had obtained a modified decree for possession of 3 biggahs 16 cottahs only, with mesne profits, of which lands the one biggah referred to above formed part.

The defendants contended the suit was barred by ss. 13 and 43 of the Civil Procedure Code.

The Judge of the Small Cause Court held that, if the Munsif had jurisdiction to take cognizance of the suit for recovery of possession, he could have dealt with the claim for the price of the paddy, and that the plaintiff having allowed the Munsif's judgment to pass unappealed, it was final; that the plaintiff having brought Suit No 26 of 1887 for possession and mesne profits with partial success, had waived his claim for the price of the paddy, said to have been taken on the 23rd December 1885, because at the time of bringing his suit for possession on the 7th September 1886, his cause of action for forcible deprivation of the paddy had already arisen on the 23rd December 1885; and that the terms "mesne profits" and "value of produce cut and carried away" were controvertible and in reality meant the same thing: he therefore held that the suit was barred both by ss. 13 and 43 of the Civil Procedure Code, but, on the request of the plaintiff, made his judgment contingent on the opinion of the High Court as to whether the suit was barred by either s. 13 or s. 43 of the Code.

No one appeared for the Plaintiff.

Babu *Kali Kristo Sen* for the Defendants.

* [Sec. 43:—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include whole claim.

If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Relinquishment of part of claim.

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies: but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

Omission to sue for one of several remedies.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.]

The **Opinion** of the Court (TOTTENHAM and BANERJEE, JJ.,) was delivered by—

Tottenham, J.—The question referred to us by the Judge of the Small Cause Court of Chupra is, whether or not that Court was right in deciding that the suit before it was barred by s. 13 and by s. 43 of the Code of Civil Procedure?

The suit was brought to recover damages in respect of the crop cut by the defendants and carried away from the plaintiff's **[547]** land in the month of December 1885. It seems that the plaintiff, in 1886, brought a suit in the Munsif's Court to recover from the defendants possession of the land of which the crop had been cut and also for the value of the crop. The Munsif held that there had, in fact, been no dispossession, and that the act of cutting the plaintiff's crop and carrying it away did not disturb him in his possession of the land. He, therefore, dismissed the suit and referred the plaintiff to the Small Cause Court for recovery of the damage which he had sustained. Subsequently, in the month of August 1886, the plaintiff was actually dispossessed of the land in question, together with some larger area; and, in 1887, he brought a suit against the defendants, being the same parties as he had sued before, to recover from them possession of the land of which they had dispossessed him in August 1886, together with mesne profits. In that suit he obtained a decree as respects part of the land in that suit with mesne profits. The present suit was brought, in the Small Cause Court of Chupra, to recover the damages alleged to have been sustained in December 1885.

The Judge of the Small Cause Court was of opinion that the suit was barred as *res judicata* by s. 13, and also barred by s. 43 of the Code of Civil Procedure. He thought that it was barred as *res judicata* by s. 13, because the plaintiff had made no appeal against the Munsif's decision in 1886 by which his suit for possession and for the value of the crops was dismissed. He considered, therefore, that the plaintiff had allowed the Munsif's decision to become final and that it finally disposed of the present question. And as regards s. 43, he thought that that section barred the suit, because the plaintiff, when he sued for possession on a subsequent cause of action accruing in August 1886, did not include, in his claim for mesne profits, the damages which had accrued in December 1885. The Small Cause Court Judge, therefore, dismissed the suit contingently upon the opinion of this Court on the question referred under s. 617* of the Code.

The plaintiff is not represented before us. Baboo *Kali Kisto Sen* has appeared for the defendants in support of the view of the Judge of the Small Cause Court, but he has not been able to show us any reason why s. 43 should apply to this case. It appears to us clear that that section has been erroneously applied to **[548]** it. We fail to see how the plaintiff could have included in a claim for mesne profits arising out of an act of dispossession committed against him in August 1886, a demand for compensation in respect of damage said to have been done to him when he was still in possession of the land in December 1885. "Mesne profits" are defined in s. 211 of the Code of Civil Procedure, to be those profits

*[Sec. 617:—If before or on the hearing of a suit or an appeal in which the decree is final, or if in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.]

Reference of question to High Court.

which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such mesne profits. Mesne profits, therefore, could only be recovered from the date of dispossession, and not in respect of any period anterior to dispossession. Section 43 provides that every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. The cause of action in the present suit was a totally different one from that in the suit of 1887. The cause of action in this case accrued in December 1885, whereas the cause of action in the other suit accrued in August 1886. Section 43, therefore, does not in our opinion bar the suit.' Nor, we think, does s. 13. As regards the present claim the Munsif did not deal with it. He thought he had no jurisdiction to deal with it being merely a claim for damages. If there was no dispossession of the plaintiff, we think that the Munsif was right in so finding, and in declining to go into the other question. Up to this time there has been no adjudication of the plaintiff's claim for damages in respect of the crop cut in December 1885. We do not think the plaintiff was bound to appeal against what was obviously a proper decision; and that decision did not touch his present claim. That being so we think that our answer to this reference must be that in our opinion the Judge of the Small Cause Court was wrong in dismissing the suit upon the grounds stated. As the plaintiff has not appeared there will be no costs in this reference.

T. A. P. *Judgment for plaintiff.*

---

[549] APPELLATE CIVIL.

The 2nd April, 1889.

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Jitu Lal Mahta............Defendant

versus

Binda Bibi............Plaintiff.*

Succession Act (X of 1865), s. 96—Hindu Wills Act (XXI of 1870), ss. 2, 3—Lapsed Legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act (V of 1881), s. 131.

A testator, by his will dated the 22nd April 1878, gave a legacy of Rs. 5,000 to his son's daughter Jodha, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia.

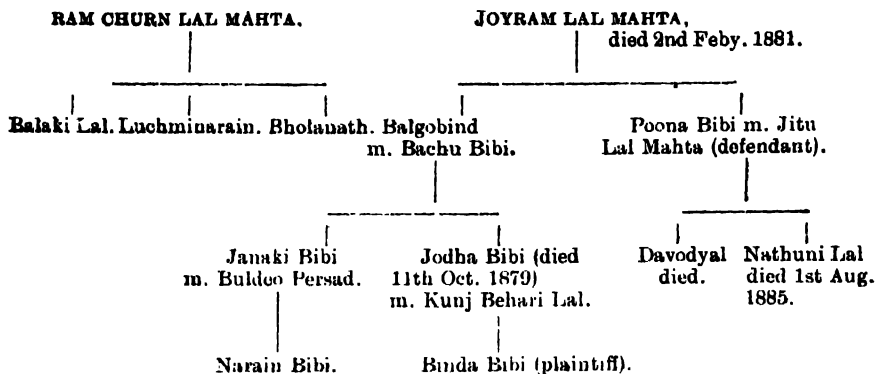
The testator died on the 2nd February 1881, and Jodha in October 1879; the money due by the Rajah of Bettia was realized on the 7th December 1884. Jodha left an only child Binda, who was born before the death of the testator.

* Appeal from Original Decree, No. 97 of 1888, against the decree of Baboo Grish Chunder Chatterjee, Subordinate Judge of Tirhoot, dated the 15th of February 1888.

Binda sued to recover the legacy left to her mother; the defence was that the legacy had lapsed. *Held*, that Jodha was in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator, because a lineal descendant of her's survived the testator.

ONE Joyram Lal Mahta, by his last will and testament, dated the 22nd April 1878, gave his property to the two sons of his daughter Poona Bibi, subject to a bequest of Rs. 5,000 to Jodha Bibi, the second daughter of his deceased son, Balgobind Mahta. Jodha Bibi died in 1879, and the testator on the 2nd February 1881.

The following is a genealogical tree of the families of Joyram Lal Mahta and his brother:—



[550] The testator's will contained, amongst others, the following clause: "As a matter of favour, I made up my mind to give some cash to the following men and women; but at present being ill and short of money, I am unable to realize my desire, which I therefore express here, and strictly enjoin my daughter's sons that, upon realization of the principal and interest due to me from the Maharajah of Bettia under a bond, they should first liquidate the debts due from me, and then, after paying these debts, they should pay to the following persons the sums fixed by me for them as shown against their names: –

(1)	To Ram Churn Lal Mahta, elder brother, if he be living, and, if he be dead, to his sons and grandsons, on consideration of their being heirs of the said Ram Churn Lal Mahta	... Rs. 7,000.
(2)	To Bachu Bibi, widow of my son	... Rs. 6,000.
(3)	To Janaki Bibi, wife of Buldeo Persad, my eldest grand-daughter	... Rs. 6,000.
(4)	To Jodha Bibi, my younger grand-daughter and wife of Kunj Behari Lal	... Rs. 5,000.

The bond debt, referred to in the testator's will, was realized by Jitu Lal in full, on the 7th December 1884.

Davodyal predeceased the testator; Binda Bibi being born previous to the 2nd February 1881.

Binda Bibi, not having been paid the sum of Rs. 5,000, which was expressed to have been given by the testator to her mother, through her guardian, Kunj Behari Pershad, on the 23rd November 1887, gave notice to Jitu Lal that if the principal with interest were not paid within five days, she would bring a suit to recover the sum. No payment having been made on the expiration

of the period mentioned, she brought, by her next friend, Kunj Behari Pershad, the present suit for recovery of Rs. 6,780 against Jitu Lal.

The defendant contended that the legacy had lapsed, Jodha Bibi having died before the testator.

The Subordinate Judge held that it was the intention of the testator to make an absolute gift of the sum of Rs. 5,000 to Jodha Bibi, and that the exception to the general rule, as to [551] lapsed legacies, laid down in s. 96 of the Succession Act applied, and that, therefore, the plaintiff being a lineal descendant of the testator was entitled to recover. A decree was, therefore, given in favour of the plaintiff for the sum of Rs. 5,000 with interest at 6 per cent.

The defendant appealed to the High Court.

Mr. *Evans* with him Baboo *Mohesh Chunder Chowdhry* and Baboo *Taruck Nath Palit*, for the Appellant.

Mr. *Woodroffe* (with him Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee*), for the Respondent.

Mr. *Evans.*—Even supposing s. 96 of the Indian Succession Act to apply to the case, it being clearly the intention of the testator, inferable from the entire will, that the legacy to Jodha Bibi should lapse in the event of her predeceasing him, the decree of the Judge was wrong; though s. 2 of the Hindu Wills Act makes s. 96 of the Succession Act applicable to the will of Hindus generally, yet, having regard to s. 3, s. 96 cannot operate so as to prevent a lapse of the legacy. If it did, it would be contrary to the rule laid down in the *Tagore case* (9 B. L. R., 377.) —See *Alangamonjori Dabee* v. *Sonamoni Dabee* (I. L. R., 8 Cal., 637). The effect of applying it would be to make it possible that a gift by will should take effect at the death of the testator in favour of a person not then in existence, and to enable the heir of the deceased donee or a creditor of the deceased donee to claim it as assets of the donee who was not in existence when the gift took effect.

According to the principle laid down in *Alangamonjori's Case* (I. L. R., 8 Cal., 637) this cannot be done.

It cannot be contended that Binda Bibee, the daughter of the donee, takes direct. It is clear that the creditors (if any) of the donee would have a right to have the money applied as part of the original donee's estate, in preference to creditors of Binda, or that the Official Assignee of Jodha, the original donee (if she was insolvent), would get it. "Existence in contemplation of law," spoken of in the *Tagore Case*, means existence in contemplation of Hindu law, either special texts, or on general principles.

[552] Having regard to s. 3, it is a *petitio principii* to contend that the donee was alive in the contemplation of the law as laid down in s. 96; for the question is whether s. 3 does not prevent s. 96 operating so as to enable a Hindu, who could not take apart from that section under the principles of Hindu law, to take by virtue of it.

Mr. *Woodroffe* for the Respondent.—As to the appellant's argument on the intention of the testator—such intention would have been invalid if s. 96 applies, there would have been no necessity for providing for the grand-daughter's descendants, but there would have been necessity for providing for the brother's descendants. The case of *Alangamonjori Dabee* v. *Sonamoni Dabee* (I. L. R., 8 Cal., 637) does not apply, it deals with the case of an unborn person, and decides that gifts to unborn persons, which are invalid under Hindu law, have not been made valid by s. 99 of the Succession Act. The question here is not as to such a person, but is as to a gift to a person who dies

before delivery is given. Hindu law does not necessarily require the donee to be a sentient person, or rather it treats as sentient beings some who ordinarily would not be so treated; for it recognizes gifts to idols; *Kumara Asima Krishna Deb* v. *Kumara Krishna Deb* [2 B. L. R. O. C., 11 (47)] and *Krishnaramani Dasi* v. *Ananda Krishna Bose* [4 B. L. R., 231 (258)]; the offering of pindas and water to the deceased proceeding upon the principle that the will of the donor, not the acceptance of the donee, is the cause of property (*Jimuta Vahana's Dayabhaga*, ch. 1, ss., 21, 22). Further it provides for the case of the completion of gifts either to one who is dead, but erroneously supposed to be living, or to one who is living, but dies before acceptance; *Colebrooke's Digest*, Bk. V. ch. I. s. I: *Jaganatha's* (Madras Ed.) 190. A corporation is not a sentient being, but yet gifts may be made to a municipality. The rule in the *Tagore Case* does not require the donee to be a sentient person; see *Jotindra Mohun Tagore* v. *Ganendra Mohun Tagore* [9 B. L. R., 377 (400)] and *Jaganatha's Digest* (Madras Ed.), 191. There is here a statutory existence, as the person is in contemplation of law in existence by virtue of **[553]** s. 96, and in this way the uncompleted gift is called into effect in conformity with Hindu law.

The **Judgment** of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by

Banerjee, J.—The defendant is the appellant in this case. The facts are shortly these: One Joyram Lal Mahta executed a will on the 22nd April 1878, whereby amongst other things, he bequeathed a sum of Rs. 5,000 to his son's daughter, Jodha Bibi, to be paid to her out of a certain sum of money that was due to him from the Maharajah of Bettia. The testator died on the 2nd February 1881, and Jodha predeceased him, having died in October 1879. The plaintiff Binda Bibi, who is the daughter of Jodha Bibi, was, of course, born before the death of Joyram Lal; and the money out of which the legacy to Jodha Bibi was to be paid was realized from the Maharajah of Bettia on the 7th December 1884.

That being the state of things, the plaintiff, Binda Bibi, brought this suit to recover the sum of Rs. 5,000, with interest, upon the ground that she was the sole heir of Jodha Bibi.

The defence was that the bequest had failed by reason of Jodha Bibi having predeceased the testator.

The Court below overruled this objection, and gave the plaintiff a decree according to the provisions of s. 96 of the Indian Succession Act which applies to wills of Hindus, holding that as the bequest was in favour of a lineal descendant of the testator, and as that lineal descendant died leaving issue, the bequest did not lapse.

The defendant has appealed and the two objections urged on his behalf are, first, that even if s. 96 of the Indian Succession Act was applicable to this case, still, there being a clear intention in the will, inferable from other provisions in that document, that the legacy to Jodha Bibi should lapse in the event of her predeceasing the testator, the Court below was wrong in giving the plaintiff a decree; and, in the second place, that though s. 2 of the Hindu Wills Act makes s. 96 of the Succession Act applicable to wills of Hindus, generally, yet, having regard to the provisions of s. 3, it must **[554]** be held that s. 96 cannot operate in favour of the plaintiff so as to prevent the lapsing of the legacy.

With regard to the former of these two contentions, we think there is nothing in it. The provision of the will to which reference was made, as indicating a contrary intention, is a bequest in favour of one Ram Churn Lal, the brother of the testator, that provision being to the effect that the legacy is

bequeathed to Ram Churn Lal, and, in case of his death, to his sons and grandsons. It has been contended that as there is no similar provision in the case of the bequest to Jodha Bibi, we must take it that the bequest to Jodha Bibi was for her personal benefit alone. We do not think that any such inference follows. In construing this will, we must take it, that the testator knew the law that governed his case; and if, under that law, s. 96 of the Succession Act would prevent a lapse in the case of a bequest to a lineal descendant, it was not necessary for the testator to have made any provision in the case of the bequest to Jodha Bibi, such as he has made in the case of the bequest to Ram Churn Lal, in whose case there is not a similar rule for preventing the legacy from lapsing. Therefore, the question of a contrary intention, being inferable, depends upon the other question, viz., whether s. 96 applies to this will.

This brings us then to the second contention raised by the learned Counsel for the appellant. That contention is sought to be supported in this way. It is urged that the parties being Hindus, and it being a settled rule of Hindu law as laid down in the *Tagore case*, that none but a person in existence, either in fact or in the contemplation of law, can take a bequest under a will, to allow s. 96 to have operation in this case in enabling Jodha Bibi to take a bequest at a time when she was dead, would be in direct contravention of that rule. And, in support of this contention, the case of *Alangamonjori Dabee* v. *Sonamoni Dabee* (I. L. R., 8 Cal., 637) is referred to. That case no doubt puts a comprehensive meaning upon the language of the last clause of s. 3 of the Hindu Wills Act, and would apparently lend some support to the appellant's contention. But the facts of that case were not the same as the facts in the present case, and all we need, [535] therefore, say about that case is that it cannot be taken as governing the one now before us.

In the present case the mode in which the bequest to Jodha Bibi has been construed by the Court below and has to be construed under the provisions of s. 96 of the Indian Succession Act, is one that comes, in our opinion, within the rule in the *Tagore case* (9 B. L. R., 377) which is laid down in these terms: 'A person capable of taking under a will, must, either in fact or in contemplation of law, be in existence at the death of the testator.' Now, Jodha Bibi was, in the contemplation of law as provided in s. 96, a person in existence at the time of the testator's death, because a lineal descendant of hers survived the testator. That being so, we do not think that by giving effect to this bequest, the rule in the *Tagore case* is in any way contravened.

It was urged that when that rule speaks of a person being in existence in the contemplation of law, the law referred to must be taken to be the Hindu law. We do not think that that is so, for in the judgment in the *Tagore case* we find that their Lordships, when speaking of a person in embryo as being a person in existence, referred to general principles of jurisprudence for coming to that conclusion and not to any specific rule of Hindu law.

We may also observe that the effect of our upholding this bequest is to make the legacy vest in Binda Bibi, a person who was in existence at the time of the testator's death, so that, in fact, the application of s. 96 does not lead to the creation of any estate which the testator could not have created under the Hindu law. We think, therefore, the Judgment of the Court below upon this point ought to be upheld.

An objection was taken that the Court below was wrong in allowing interest upon the legacy; but we do not think that objection to be of any weight, having regard to the provisions of s. 131 of the Probate and Administration Act.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

[556] PRIVY COUNCIL.

The 9th and 14th November and 1st December, 1888.

PRESENT:

LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR R. COUCH AND MR. STEPHEN WOULFE FLANAGAN.

Bhasba Rabidat Singh............Plaintiff

versus

Indar Kunwar and others............Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates' Act (I of 1869), s. 13, sub-section 1—Meaning of "intestate" as there used—Written but unregistered authority to adopt—Registration Act (III of 1877), s. 17—Invalid agreement relating to the estate of the adopted son—Conditional adoption.

The Oudh Estates' Act, 1869, requires the registration of the writing by which an authority to adopt is exercised; but not the registration of the authority, which is required by the Act to be in writing.

The Indian Registration Act III of 1877, which does require authorities to adopt to be registered, expressly excepts authorities conferred by will.

The word "intestate," in s. 13, sub-section 1, of the Oudh Estates' Act, 1869, means intestate as to the talukhdari estate; and the use of the word does not exclude from the exception in that sub-section a son adopted under an authority conferred by a talukhdar's unregistered will.

A talukhdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riasat*. This power having been exercised, the following objections to the adoption were disallowed: *1st*, one founded on the will not having been registered, and consequently, the authority not having been registered. *2ndly*, one founded on the erroneous argument that the adopted son was not within the class excepted in s. 13, sub-section 1, and therefore could not take under an unregistered will.

The adoption was also questioned on the ground that the widow had agreed, with the natural father of the adopted son, that she should retain the whole estate during her life. *Held*, that this had not rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void, without invalidating the adoption.

APPEAL from a decree (27th March 1886) of the Judicial Commissioner, affirming a decree (19th May 1885) of the District Judge of Faizabad.

The suit out of which this appeal arose was brought to obtain a declaration of the plaintiff's title as heir to the talukhdari and [557] other estate of the

late Maharaja Sir Digbijai Singh, K. C. S. I., talukhdar of Bulrampur in Oudh, should the plaintiff survive the widows of the deceased ; also, a declaration that the adoption by the late Maharaja's senior widow, the Maharani Indar Kunwar, the first defendant, whereby she had purported, under an authority from her husband in his will, to adopt Udit Narain Singh, a minor sued as under her guardianship, was invalid. The junior widow, the Maharani Jaipal Kunwar, was also made a party defendant.

The late Maharaja died on 27th May 1882, having made a will, dated 15th March 1878. He left no issue ; but conferred an authority to adopt upon the elder of his two widows. That he did so was decided in the appeal *Indar Kunwar* v. *Jaipal Kunwar* (L. R., 15 I. A., 127 ; I. L. R. 15 Cal., 725). To that suit the present plaintiff was not a party.

The will appears in the judgment of their Lordships on that appeal.

The relationship of the parties was as follows :—

BHAIYA FATEH SINGH.

Anup Singh.	Pahar Singh.
Kakolat Singh.	Tejan Singh.
Nawal Singh.	Bakht Bali Singh.
Arjun Singh.	(By adoption.) Rabidat Singh. (The plaintiff.)
Sir Digbijai Singh, K. C. S. I. (The last male talukhdar.)	

The elder widow adopted Udit Narain Singh on the 8th November 1883.

A deed of adoption, dated 15th December 1883, executed in the presence of witnesses, and reciting that she had, in accordance with the written permission of her deceased husband, adopted on Kahk Sudi, 8th Sambat 1940, corresponding to the 8th November 1883, Udit Narain Singh, minor son of Guman Singh, with due ceremonies, was registered on 5th December 1883.

At that time Guman Singh, the father, had signed an agreement in which, after stating that he gave his son to be adopted, he added :—

"The Maharani Sahiba shall have full control during her life-time over him, and also over the property, moveable and immoveable, left by the [558] Maharaja now in heaven, and she will be at liberty to punish him, and, if need be, to eject him and adopt in his place some one else from the family of the Maharaja Saheb."

This was dated the 26th October 1883. Afterwards, the Maharani executed and registered another document, dated 28th March 1884, in which she stated the adoption made, adding :

"I further state by this writing that I made this adoption on the express condition and understanding that the said will, executed in my favour, would subsist and remain in force, and that after my demise, or at the time of my death, the said Udit Narain Singh would succeed to the talukhdari estate, *i.e.*, the immoveable property, which was formerly in the possession of my late husband, and which is now in my full proprietary possession."

After stating other particulars, the Maharani declared the deed, dated 5th December 1883, to be null and void, and this document of 28th March 1884 to be "a *sanad*."

The District Judge upheld the adoption. He was of opinion that the document executed as his will by the late Maharaja operated, though unregistered, in favour of the Maharani, his widow, because she was one of the class of those persons contemplated in s. 22, Act I of 1869. He held to be untenable the argument that Udit Narain having been one of those persons who could not have come in under s. 13, sub-section 1, the document required

registration within one month of its execution in order to operate in his favour, and not having been registered, could not be rendered available for authorizing his adoption.*

[559] An appeal from this judgment was dismissed. The Judicial Commissioner held that a son, adopted as Udit Narain had been, under an authority on a will, did not take as a devisee or a donee, but as an heir. "It must be recollected" said the judgment, "that the adopted son, as such, takes by inheritance not by devise. See *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (10 Moore's I. A., 279 (311))." The Indian Registration Act (III of 1877), s. 17, was referred to. As regards the effect of the agreement between the widow and Guman Singh, the terms signed by the latter, at any rate the latter part, he held to be illegal. The adoption, however, had, as an act completed, taken place before the documents, signed and registered by the widow, were made. The judgment continued thus :—

"An adoption once made is by Hindu law indefeasible, and after the adoption of Udit Narain Singh, the Maharani's power of adoption was, during Udit Narain Singh's lifetime, exhausted (West and Bühler, 3rd Edition, Volume II, page 1152, and Mayne's Hindu Law and Usage, s. 101). There remains the agreement that the Maharani shall, during her lifetime, have full power over the Maharaja's estate. As regards this agreement I observe that the learned Counsel for the appellant has admitted that the adoption ceremonies were duly performed, and in those ceremonies there is no place for a condition of this kind and I am not prepared to admit that a condition of the kind can invalidate the adoption; and that, following the analogy of the Full Bench ruling of the Allahabad High Court in *Hanuman Tewari* v. *Chirai* (I. L. R., 2 All., 164), I am of opinion that in any case it must be held that *factum valet*. It is doubtful whether the agreement would bind the son when he comes of age. *Ramasami Aiyan* v. *Venkata Ramaiyan* (L. R., 6 I. A., 196 (208) ; I. L. R., 2 Mad., 91]."

After referring to the English law relating to the subject of powers under deeds of settlement, the Judicial Commissioner concluded as follows :—

"Nor am I able to find in the agreement anything repugnant to the terms of the Maharaja's will. It appears to me to have been the Maharaja's intention that till such time as Government should undertake the management of his property his widows should hold it. I can find no fraud upon the power or the will in the matter of the adoption of Udit Narain Singh."

On this appeal, Mr. *J. H. W. Arathoon*, for the Appellant, contended that the authority to adopt was invalid. The ordinary Hindu law was not that which regulated this adoption. The provisions of the Oudh Estates Act I of 1869 had superseded in [560] regard to succession to a talukdari estate in virtue of adoption the ordinary law. To have fulfilled the requirements of the Act was essential, but there had not been a registration of the authority to adopt, nor of the will, which purported to contain it. He referred to the Law of Registration, as required both by the above Act and by the Indian Registration Acts VIII of 1871 and III of 1877. Again, a further objection

* Section 13 of the Oudh Estates' Act I of 1869 enacts :—

"No talukhdar or grantee, and no heir or legatee of a talukhdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such talukhdar or grantee, heir or legatee, had died intestate; or (2) a younger son of the talukhdar or grantee, heir or legatee, in case the name of such talukhdar or grantee appears in the third or the fifth of the lists mentioned in s. 8, except by an instrument of gift or a will executed and attested not less than three months before the death of the donor, or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution."

was to be found in the fact of the boy whom the widow had purported to adopt not being within the line of succession upon intestacy recognised by the Act I of 1869. For the purpose of deciding this question, the Hindu law could not be invoked, and it could not be said that, because the boy was adopted, he was therefore within the meaning of the clause that he who takes by an unregistered will must be a person who would have succeeded upon an intestacy. As the son of Guman Singh he was outside the line of succession.

[LORD WATSON observed that without regarding the Hindu law as entirely regulating the succession, it might yet indicate to whom the estate would descend after the exercise of a power to adopt.]

The argument was that whatever the validity of the authority to adopt by Hindu law, still in regard to the special provisions of s. 13, sub-section 1, considering the distant connection of the boy's father with the testator, and the fact of the will not having been registered, the adoption was, as a result, unauthorized by the law governing the descent and devise of talukdari estates.

* The strongest point against the validity of the adoption was, however, the fact that the widow, purporting to adopt under authority from her deceased husband, had entered into an agreement for her own benefit, with the father of the boy whom she purported to adopt. The terms of the agreement of 26th October 1883 indicated this; and not only in regard to the nature of the act of adoption by a Hindu widow, but in reference to the general rules of law on the subject of the execution of powers, the conduct of the widow must be held to have vitiated the alleged adoption. He referred to *Ramasami Aiyan* v. *Venkata Ramaiyan* (L. R., 6 I. A., 196; I. L. R., 2 Mad., 91), *Nilmoni Singh* v. *Bakranath Singh* (L. R., 9 I. A., 104; I. L. R., 9 Cal., 187), *Vallanki Vellata* **[561]** *Krishna Rao* v. *Venkata Rama Lakhsmi Narayan* (L. R., 4 I. A., 1; I. I. L. R., 1 Mad., 174.) *Shoshinath Ghose* v. *Krishna Soondari Dasi*(L. R., 7 I. A., 250; I. L. R., 6 Cal., 381). *Duke of Portland* v. *Topham* (11 H. L. C., 32,) *Ganga Sahai* v. *Lekhraj Singh* (I. L. R., 9 All., 256,) and to Farwell on Powers, Edition 1874.

Sir *Horace Davey*, Q. C., and Mr. *R. V. Doyne*, with whom was Mr. *C. W. Arathoon*, for the Respondents, were not called upon.

On a subsequent day (1st December) their Lordships' **Judgment** was delivered by.—

Lord Macnaghten.—It appears to their Lordships that this case is free from difficulty.

The will of the late Maharaja of Bulrampur, Sir Digbijai Singh, was recently under the consideration of this Board on the occasion of a claim by his junior widow to joint proprietary rights in his estate. Their Lordships then expressed their opinion that, according to the true construction of the will, the Maharaja conferred upon his senior widow (who is the first defendant in the present suit), and upon her alone, a life estate in all his property, and authority to select and adopt such minor male child of his family as she might think fit. The adoption which she was not only authorized but required to make was to be "according to the custom of the family and according to the Hindu law," and the adopted son was to "be in place of an actual son the owner of the entire *riasat*, and the assets moveable and immoveable," the widow taking a provision for her maintenance.

The senior widow selected for adoption a minor male child of the Maharaja's family. It has been admitted in this suit that "the ceremonies of adoption were duly performed." They took place on the 8th of November 1883. On the 5th of December following, the senior widow executed a deed of adoption, which was duly registered, by which she declared that, in accordance with the written permission of her deceased husband, she had

[562] adopted Udit Narain Singh (who is the second defendant to this suit), and that he would be the proprietor of the Maharaja's estate and property, both moveable and immoveable, like a real son.

The appellant, who is a distant relative of the late Maharaja, and the person upon whom, according to the rules of intestate succession prescribed by the Oudh Estates' Act, 1869, in default of any widow of the Maharaja, or any son adopted by her as provided by the Act, or any male lineal descendant of such son, the Maharaja's talukhdari estate would descend, brought this suit for the purpose of having it declared that the adoption of the second defendant was invalid, fraudulent and void.

Three grounds of objection to the validity of the adoption were urged before their Lordships.

In the first place it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son is exercised to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III of 1877, s. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far at any rate as regards the talukhdari property, because the adopted son was not a person who could take the talukhdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in the manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good, the appellant has to establish the proposition that the adopted son is not within the exception contained in s. 13, sub-section 1 of the Act, that he is not a person who, under the [563] provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the talukhdari estate or to an interest therein if the Maharaja "had died intestate." The appellant endeavoured to support that proposition by arguing that if the Maharaja had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh. But the word "intestate" in sub-section 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act, the talukh or immoveable property to which alone the Act is declared to extend. This is plain on consideration of s. 13 taken by itself, but it is made still plainer, if possible, by reference to s. 22, which is closely connected with s. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word "intestate" by the addition of the words "as to his estate."

The last point urged on behalf of the appellant was described by the learned counsel who appeared in support of the appeal as his strongest point. It was this: The senior widow seems to have been unwilling to disregard her husband's injunctions. but at the same time, she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document, dated the 26th of October 1883, in which it was declared that she should have full control during her lifetime

over the property left by the late Mahàràja. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th of December 1883. But some months afterwards, on the 28th of March 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death.

On these facts it was argued that the adoption was a fraud upon the authority to adopt, and therefore void

This point seems to their Lordships equally untenable.

[564] The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose, or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. *Arathoon*, that the child of Guman Singh was selected in preference to the child of the appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. *Arathoon* appealed, would rather suggest that, even in that case, the adoption would have been valid and the condition void.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Young, Jackson & Beard.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

NOTES.

[In **(1912) 37 Bom., 251,** the question referred to the Full Bench was, whether the terms of an agreement entered into between the natural and adoptive parent as conditions of the adoption are binding upon and can be enforced against the adopted son; but the Full Bench limiting itself to the particular case, held that in the circumstances of the case, a settlement of immoveable property by an adopting widow in favour of her daughter to take effect upon the daughter attaining majority, assented to by the natural father of the adopted boy at the time of adoption, could not be enforced by the daughter against the adopted son who repudiated it on attaining majority.

In (1913) 16 Bom. L. R., 57, the widow made at the time of adoption an agreement with the natural father of the boy that she was to retain all the rights she had of managing her husband's property as long as she lived, and that the adopted boy was to get those rights only after her death; and this was deemed to be neither fair nor unreasonable and was not therefore enforced.

In **(1904) 27 Mad., 577,** where the subject was fully discussed it was held that such agreements when fair and reasonable might be enforced.

These cases are distinguished from agreements made to bring about adoption which as offending public policy are deemed to be void, whether in favour of the natural father (1905) 29 Mad., 161; or of others (1914) 27 M.L.J., 416, though the adoption in such cases might be valid; (1896) 22 Bom., 199; (1892) 16 Mad., 400.]

[16 Cal. 564]

PRIVY COUNCIL.

The 7th and 9th November and 1st December, 1888.

PRESENT :

LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Bhugwan Das............Plaintiff.

versus

The Netherlands India Sea and Fire Insurance Company of Batavia............Defendants.

[On appeal from the Court of the Additional Recorder of Rangoon.]

Insurance—Marine insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.

An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order [565] that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped :

Held, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendants' agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy.

APPEAL from a decree (23rd July 1886) of the Additional Recorder of Rangoon.

The suit out of which this appeal arose was brought by the appellant for the specific performances of a contract alleged to have been made by the respondents, through their agents to issue to the plaintiff a policy of insurance on cargo shipped from Rangoon to Calcutta, there having been a refusal to issue the policy, and the ship having been lost on the voyage.

The plaint, filed 18th August 1885, alleged that on the preceding 8th March, the plaintiff agreed with Mr. James Macrory of Rangoon for a charter from the latter as owner of the ship *Copeland Isle* from Rangoon to Bombay, the latter undertaking to obtain insurance for such goods as the plaintiff should ship by her; that the plaintiff required Macrory to obtain insurance for Rs. 15,000 upon 1,000 bags of rice which he intended to ship, and disbursements on account of the vessel; and that Macrory applied to the agents of the defendant company at Rangoon to take an insurance risk to that extent, which the agents agreed to do, and in due course issued an open cover for the same. This open cover Macrory endorsed and made over to the plaintiff, in accordance with custom, and the plaintiff thereupon executed a charter-party. He afterwards shipped 1,000 bags of rice on the *Copeland Isle*, and disbursed on her Rs. 4,000, writing on 31st March 1885 to the agents requesting them to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000; also on the disbursement of the vessel from Rangoon to Bombay, Rs. 5,000; and enclosed the premium. The [566] plaint further alleged that the defendants refused

to issue the policy; and lastly, the total loss of the *Copeland Isle*, and claimed specific performance.

The defendants by their answer denied that the open cover was given to Macrory as such, but alleged that it was given in answer to his question whether the Company was prepared to insure rice by that ship, and in order to be shown to other insurance agents as indicating that they considered the ship a fair risk. The form was not signed by the agents, nor registered by them in the Company's books, as it would have been had it been issued as a preliminary to granting a policy. They further alleged that the plaintiff was informed of the facts before the sailing of the ship; and that the open cover made no mention of disbursements: also that the endorsement and transfer took place without their knowledge, or notice to them; and they denied the alleged custom as to transfer of open covers: stating that Macrory had no insurable interest in the rice shipped, and that the Company was not liable for the amounts claimed.

Issues were fixed raising the principal questions whether the open cover was a contract which the plaintiff could claim to have specially performed; under what circumstances it was granted to Macrory; and whether it was transferable or assignable by him.

The Additional Recorder found that what took place at the issue of the open cover was the following:—

"Macrory wanting to get a charter for his ship applied to the plaintiff who entered into negotiations with him and approved of the terms of the proposed charter-party: the plaintiff, however, made one essential stipulation, before concluding the charter-party; and that was that Macrory should produce to him something to show that insurance risks would be taken by the insurance companies on the cargo shipped by the vessel. In order to satisfy this stipulation Macrory went to various insurance offices starting with the agents of the defendant Company, and obtained the document sued upon, and four other open covers, which he endorsed over to the plaintiff, who then executed the charter-party. What happened seems to have been done in pursuance of a practice which has been followed by other local shipowners like Mr. Macrory, who, according to the evidence of [567] Mr. Borland, apply to insurance agents here for open covers in order to be able to show them to persons whom they may ask to charter their vessels as a guarantee that cargo shipped by them will be insured."

The facts attending the plaintiff's application to Messrs. Gladstone, Wyllie & Co., as the defendants' Agents, to declare policies of insurance on the rice, and on disbursement, and their refusal, with the material part of the correspondence thereupon,—are set forth in their Lordships' judgment.

The Additional Recorder was of opinion that the contract to issue a policy had never been enforceable, by reason of Mr. Macrory's not having had any insurable interest in the rice shipped in the *Copeland Isle*. He had no doubt that the giving of the open cover might initiate a contract for insurance. But of that contract one of the most essential principles was that the assured should have at the time of the making of the contract an insurable interest in the subject-matter insured, and no such interest existed at the time. He was also of opinion that no custom in variation of this general principle, admitting the transferee who ultimately might become the shipper, to stand in the place of a person receiving the open cover, had been proved to prevail in Rangoon. Nor in his opinion did the relation of agency between the plaintiff and Macrory exist, it being the fact that at the time when Macrory was effecting the arrangements which he made with the insurance agents, it was uncertain

whether the plaintiff would ship any rice on board the vessel. For these reasons he dismissed the suit with costs.

Mr. *J. Gorell Barnes, Q.C.*, and Mr. *A. Agabeg*, for the appellant, argued that the judgment was incorrect in holding that the case turned on the absence of an insurable interest in Macrory at the time when he received the open cover. It had been settled for a century past that it was sufficient for the party assured to have an interest at the date of the contract. This the plaintiff had when he accepted the offer of insurance previously made in the open cover. The contention on his behalf was that he accepted the terms offered to any shipper who should ship under charter with Macrory, which terms, in effect, were those of the open cover. It was further contended for the appellant that [568] when he signed the charter-party, which he did upon the faith that he could have the policy referred to in the open cover, there was an adoption by the appellant of the terms, and thereupon a completed contract between him and the respondents who had offered those terms. The Court below had erred in holding that the evidence as to the mercantile usage regarding the issue of open covers was insufficient and in not holding that the plaintiff as principal was entitled to enforce the contract on which he sued.

They referred to Arnould on Insurance, 6th Edition, Part 10, Chapter III; *Sutherland v. Pratt* (11 M. & W., 296); *Irving* v. *Richardson* (1 Mood. and Rob., 153; 2 B. and Ad., 193): *Routh* v. *Thompson* (11 East, 433; 13 East, 279); *Fisher* v. *The Liverpool Maritime Insurance Company* (L. R., 8 Q. B., 469; 6 L. R., Q. B., 425): The Specific Relief Act, 1 of 1877, s. 22 *; Fry on Specific Performance.

Mr. *A. Cohen, Q.C.*, and Mr. *R. G. Arbuthnot*, for the respondent Company, argued that the suit had been rightly dismissed. Macrory could not, by assigning the so-called open cover, confer greater rights on another than he had in himself; nor had the supposed custom, to issue open covers by the insurance agents to serve as an offer to any shipper subsequently coming forward to accept them, been proved to prevail in Rangoon. There were doubts how far such a custom would be enforceable. Again, it was argued that there was ground for the finding that there had been no relation of principal and agent between the appellant and Mr. Macrory in the obtaining the open cover; as to which it was open to doubt whether the document had been given as an open cover at all. Its effect might be considered to have been only that the Company regarded the shipment as a fair risk. Lastly, as to the acceptance, without which the case for the appellant must fail, to whom could it be said to have been addressed; and when was it complete. In regard to these points, the evidence did not enable the plaintiff to recover. They cited *Dickenson* v. *Dodds* (L. R., 2 Ch. D., 463), *Mackenzie* v. *Coulson* (L. R., 8 Exch., 368).

[569] Mr. *J. Gorell Barnes, Q.C.*, replied, arguing that there had been a complete acceptance by the plaintiff of a previous offer, made through and by means of the open cover, in which there was no necessity for persons to be named. He cited *Weidner* v. *Hoggett* (L. R., 1 C. P. D., 533), *Ionides* v. *Pacific Insurance Company* (L. R., 6 Q. B., 674), *Great Northern Railway*

---

*[Sec. 22 :—The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

Discretion as to decreeing specific performance.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance :—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part etc.]

Company v. *Witham* (L. R., 9 C. P. D., 16), *Morrison* v. *Universal Marine Insurance Company* (L. R., 8 Exch., 40), *Lishman* v. *Northern Maritime Insurance Company* (L. R., 8 C. P., 216; L. R., 10 C. P., 179).

Their Lordships' **Judgment** was afterwards (1st December) delivered by

Sir R. Couch—The appellant in this case brought a suit against the respondents, for specific performance of a contract of insurance. The Recorder of Rangoon, in whose Court it was brought, dismissed the suit with costs, and this appeal is from that judgment.

In March 1885, one John Macrory, a ship-builder and owner of a vessel called the *Copeland Isle* then lying in Rangoon river, applied to the plaintiff, a merchant carrying on business at Rangoon, and also at Calcutta and Bombay, to charter that vessel. The evidence of the plaintiff, who was examined as a witness, was as follows :—

"I said to Macrory that if an open cover were given to me free of particular average, I would charter the vessel. When the charter-party was drawn and brought to me by Macrory and Sutherland (one of the brokers who arranged the charter) I said : 'Where is the open cover ?' Then Mr. Macrory gave me this open cover, with these five others. When I got these the charter-party was signed by me. I shipped goods on the *Copeland Isle*. I shipped my own goods, 6,220 bags of rice. This is a copy of the charter-party. Subsequently I went to Messrs. Finlay Fleming, Messrs. Strang Steel, and Messrs. Gladstone Wyllie's, for policies on the covers. I got policies from all, except from Messrs. Gladstone Wyllie. I went to Gladstone Wyllie's **[570]** and saw Mr. Bertram. I went three times to them before I wrote to them. Once I saw Mr. Bertram, and twice Mr. Gordon. I showed Bertram the open cover, and asked him for policies for Rs. 1,0,000 for 1000 bags of rice, and Rs. 5,000 for disbursements. Mr. Bertram said : 'We have given a policy to a Chetty.' That was, I believe, for Rs. 17,500. I said : 'I have no concern with the Chetty's policy. I want the policy for my goods.' Bertram said he would not give one. I then went to Gordon, who was the then Manager of Gladstone Wyllie's. Gordon said: 'I cannot give a policy, go to Mr. Macrory.' I went that day or the next day with Macrory to Gordon. Macrory asked Gordon to give the policy, as the ship was to be cleared. He spoke for a long time, and so did I. We both pressed Gordon to give one, but he said he would not. Then I said : 'If you do not give one I will send the customary notice.' Afterwards I addressed a letter to Gladstone Wyllie as the agents of the defendants' company."

The open cover was in these terms :—

"*Rangoon, 9th March 1885.*

"NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

"Dear Sir,

"We hereby consider you insured under an open cover to the extent of rupees fifteen thousand only, on rice per *Copeland Isle*, Captain,— Rangoon to Bombay.

"Premium, 2 per cent.

"Free of war risks.

"Average f. p. a.

"Policy to be applied for before the ship sails, and vessel to be towed by steamer to sea.

"Yours faithfully,

"GLADSTONE WYLLIE & CO.,

"J. R. BERTRAM,

Agents in Rangoon.

"To R. MACRORY, ESQ."

(On the back :) "J. MACRORY."

The letter to Gladstone Wyllie as the defendants' agents above mentioned was dated the 31st March 1885, and requested them [571] to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000, and on disbursements of the vessel from Rangoon to Bombay Rs. 5,000, and it enclosed Government promissory notes for Rs. 300 for the premium. Gladstone Wyllie & Co. replied by letter, dated the 1st April 1885, saying: "As we did not grant you an open cover by the *Copeland Isle*, we regret we cannot issue a policy, and we return Rs. 300 in Government currency notes which you sent us." On the 1st April the plaintiff again wrote, stating that Macrory had transferred the open cover to him, and enclosing it with the Government notes, to which Gladstone Wyllie & Co. replied on the 2nd April that they could not recognize the transfer by Macrory of the open cover and that they never entered into any engagement to grant the plaintiff a policy for Rs. 15,000.

Although the plaintiff at the interviews with Bertram and Gordon, and in his letter of the 31st March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the defendants' agents did not take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the defendants cannot say that the plaintiff was not willing to take a policy on rice for Rs. 15,000. Whether upon such a policy he could recover the disbursements or the Rs. 4,000 advanced on account of freight it is not now necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the defendants' agents refused to issue a policy to the plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in Rangoon and Bombay, but did not succeed. The *Copeland Isle* proceeded on her voyage to Bombay on or about the 1st April 1885, and was totally lost in a cyclone on the following 10th of June

To return to the evidence. About the open cover, Macrory said (omitting passages which it is not necessary to read) :--

"I remember this open cover. I got it for the charterer, Bhugwandas. I was to see if an insurance could be effected on the cargo before he would sign the charter-party. I made it over to Bhugwandas, and endorsed it * * I made all the [572] covers over to him on his signing the charter-party * * * I saw Mr. Gordon when I first got this open cover. * * I asked Mr. Gordon if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to show to other Companies, and not as an undertaking to issue a policy. * * * Mr. Bertram was present in Gordon's room when I had the conversation with Mr. Gordon, and immediately after I got the open cover * * I went out of Gordon's room with Bertram. I got the open cover from Bertram in his room. I talked to Bertram there about the ship and the money I had expended on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned Bhugwandas as the charterer. * * I asked Gordon whether he would insure a part of the cargo, or as much as he could take. When he said he could take up to Rs. 15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put the stamp on."

Mr. Gordon was not examined as a witness, and there was a satisfactory explanation of this omission. Mr. Bertram was examined and said :—

"I am an assistant in the firm of Messrs. Gladstone, Wyllie & Co., in Rangoon. The firm are the agents of the defendants' Company in Rangoon. I saw Macrory on the 9th March 1885 with reference to the vessel, the *Copeland Isle*. He came to me personally at half-past two. . . . He asked me for a chit to show the other insurance offices that we were prepared to take insurance on the *Copeland Isle*; of course that had reference to what had previously taken place when the matter was arranged by Mr. Gordon. . . . I heard Gordon tell Macrory that he would be willing to take a risk up to Rs. 15,000 on the vessel for the defendant Company. . . . At this second interview Macrory asked if we would give him a letter to show to Steel's and to Finaly's, so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to show to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me [573] to fill up this form than to write an open letter. . . . We said that we were prepared to accept a risk on the *Copeland Isle* to the extent of Rs. 15,000. Nothing was said about giving an open cover or a policy. Gordon said this. . . . We knew at the time Macrory had no rice to ship."

Mr. John Anderson, a witness for the plaintiff, whose firm are agents for several Marine Insurance Companies in Rangoon, said:—

"An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us notwithstanding the open cover had been issued in another person's name." On cross-examination he spoke to the same effect.

Mr. John Borland, another witness for the plaintiff, whose firm at Rangoon also are agents for several Marine Insurance Companies, said: "If we issued an open cover to *A*, and afterwards *B* shipped the cargo, we should have no objection to issuing the policy to *B*." And on cross-examination: "I have many times issued an open cover to a man who has not an insurable interest. If Macrory came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper."

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to Macrory in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When he handed it to Bhugwandas it was a subsisting proposal capable of being accepted by him, and when Bhugwandas went to Gladstone Wyllie's and showed Bertram the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with Bhugwandas to insure and issue a policy in terms [574] of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as Bertram absolutely refused to give any policy.

The letter of the 1st April 1885, refusing to issue a policy, and of the 2nd April, refusing to recognize the transfer to Bhugwandas of the open cover, have been noticed. It is to be observed, that neither in the interviews with Bhugwandas, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Indeed, in the letter of 2nd April it is

so called. It was argued by the learned Counsel for the appellant that the contract became complete when the charter-party was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by Bhugwandas was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Bramall and White.*

Solicitors for the Respondents: Messrs. *Freshfield and Williams.*

NOTES.

[In *Thompson* v. *Adams*, (1889) 23 Q. B. D., 361 a slip initialled by a broker with a view to prepare a policy, it was said, might create a binding contract.

As regards enforcement by specific performance of an agreement to issue a policy *see* also *Royal Exchange Assurance Corporation* v. *Tod*, (1892) 8 T. L. R., 669, notwithstanding fire having taken place, *Bhugwandas* v. *Netherlands* etc., 16 Cal., 564.

In *Porter's* LAW OF INSURANCE V, Edn. (1908) 25 it is said, "The proper mode of obtaining the benefit of an agreement to insure would seem to be either to sue for a proper policy, or claim damages for breach of contract to grant one, or to seek relief on the footing of a proper policy having been issued. The latter course has been adopted in Canada and the United States."]

[16 Cal. 574]

ORIGINAL CIVIL.

The 18th March, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Sowdamini Dassi............Plaintiff

versus

Broughton and others............Defendants.*

Hindu Law—Widow—Accumulations—Period up to which accumulations may be dealt with—Intention to accumulate.

Under the will of *N. C. M.* the testator left his estate to his brother provided that, within a term of eight years, no son should be born to such brother, capable of being adopted as a son of the testator, in accordance [575] with certain conditions made in the will. These conditions failed, and on the expiration of the term of eight years, the estate vested in the brother. The will made no provision for disposal of the rents and profits of the estate during the period the succession thereto was in abeyance. Disputes having arisen between the widow of the testator and his brother, as to the right to such rents and profits, the brother eventually agreed to pay, and did pay over to the widow a large sum by way of settlement of these disputes, for which sum the widow executed a release.

The widow invested the sum so received in Government Securities, and twenty years afterwards created, with this fund, a trust in favour of one *G. C. R.*, and appointed *B.* trustee thereof. On the death of the widow, the daughter of the testator tried to set aside this trust, claiming the funds as a portion of their father's estate with which the widow had

* Appeal No. 1 of 1889, from the decision of Mr. Justice TREVELYAN, dated 12th August 1887, in suits numbered 53, 64 and 141 of 1887.

no right to deal: *Held*, that, as the accumulations were handed over to the widow by the person entitled to the reversion after the estate had vested in him, and a release had been entered into between them, no presumption arose that the fund in question had been accumulated by the widow for the benefit of other heirs of the testator, and that there being no such presumption, the facts of the case must be looked at to ascertain the intention of the parties regarding this fund; *held*, as to this, that the conduct of the widow evidenced no intention to accumulate the sum received by her for the benefit of any person but herself, or that she ever intended to give up the power of disposing, expending, or dealing with it in any way.

THIS was an appeal against the judgment of Mr. Justice TREVELYAN, dated the 12th August 1887.

The case in the Court below is to be found reported in I. L. R., 14 Cal., 861, under the name of *Grish Chunder Roy* v. *Broughton*. That report purports, on the face of it, to be solely a report of one case brought by Grish Chunder Roy against Mr. Broughton, Surut Kumari and Sowdamini Dassi to enforce the trusts set out in the deed of trust and deed of settlement executed by Badam Kumari Dassi, on the 12th July 1886; but, at the hearing of the suit before Mr. Justice TREVELYAN, two other cases were heard with it, *viz*, a suit brought by Sowdamini Dassi against Mr. Broughton and Grish Chunder Roy and Surut Kumari Dassi to have the trust deed of the 12th July 1886 set aside, and an application for probate of the will of Badam Kumari Dassi; for the sake of convenience, one of these cases only was reported in the lower Court; the appeal from this judgment of Mr. Justice TREVELYAN, which gives a judgment in all three of the above cases, was appealed against by Sowdamini alone.

[576] It will only be necessary to state so much of the facts of these cases as refer to the one question, as to whether Badam Kumari had power to deal with, under the deeds of the 12th July, the sums of money paid to her by Shama Charan, or whether such sum had become a portion of the corpus of her husband's estate, which she could not so deal with according to Hindu law.

One Nobo Kumar Mullick died on the 16th March 1856, having made his will, and leaving him surviving, his brother Shama Charan, his widow Badam Kumari and four daughters, amongst which latter were Surut Kumari Dassi and Sowdamini Dassi referred to above.

By his will Nobo Kumar appointed his widow and his brother executrix and executor. The 9th clause of the will was as follows: "Should my executor, Shama Charan, my younger brother, have more than two sons, within eight years from this date, in that case such son shall be made my adopted son; should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother within the specified time of eight years, power is reserved for adopting up to the extent of a third time: should my brother have no more than two sons, or the adopted sons should die one after the other, in that case the share belonging to me of Company's Paper, and lands, and houses, and gardens, and so forth, the whole, real and personal estate will be received by my younger brother Shama Charan."

Under the events which happened, the residuary estate referred to fell to Shama Charan. No provision was made by the testator for the disposal of the rents and profits of the estate during the period, eight years, above referred to, during which the succession to the property remained in abeyance.

Disputes having arisen between Badam Kumari and Shama Charan as to their respective rights to the income accrued, due during the aforesaid period of eight years, Shama Charan, in August 1866, in settlement of these disputes, paid over to Badam Kumari a sum of Rs. 2,89,000, and she thereupon

executed, in favour of Shama Charan, a deed of release, in which release she described this sum of money as being the accumulations of the property of Nobo Kumar Mullick.

[577] After dealing with portion of this sum, and investing interest accruing on the principal in the same way in which the principal was invested, viz., in Government Paper, she, on the 12th July 1886, made over to Mr. Broughton a sum of Rs. 2,69,500 in Government Paper to be held by him as trustee for the benefit of her grandson, Grish Chunder Roy, executing on that day a deed carrying these trusts into effect. On the 7th September 1886, Badam Kumari died. The suits above referred to were in 1887 filed for the purpose mentioned, and this was an appeal from the judgment of Mr. Justice TREVELYAN in those cases.

Mr. *Pugh*, Mr. *Evans* and Mr. *Allen* for the Appellant.

Mr. *Bonnerjee* and Mr. *Roberts* for Surut Kumari.

Mr. *Woodroffe* and Mr. *Hill* for Grish Chunder Roy.

Mr. *Phillips* and Mr. *Stokoe* for Mr. Broughton.

Mr. *Pugh*.—There was an intestacy as regards the accumulations of income for the eight years. Under the deeds, the accumulations were treated as an increment to the estate: at the time Badam Kumari received them, she might have spent them. [WILSON, J.—But she never received them.] Yes, under the arrangement with Shama Charan; the deed of settlement recites that she is entitled to the eight years' accumulations for her own use and benefit. Twenty years after the release she is said to have desired to set up Grish Chunder Roy. Whatever she saved she kept separate, as also her *stridhan*, I submit that the accumulations were part of the residuary estate of N. K. Mullick, and a portion of it was made over to her, and kept apart by her. As to the law, I refer to Mayne's Hindu Law, para 580 *et seq.*: *Grose* v. *Amritamayi Dasi* (4 B. L. R., O. C., 41) [that case has never been departed from in this Court], *Rabutty Dossee* v. *Sibchunder Mullick* (6 Moore's I. A., 1.), *Soorjeemoney Dossee* v. *Denobundoo Mullick* (9 Moore's I. A., 123), *Gonda Kooer* v. *Kooer Oodey Singh* (14 B. L. R., 159, 165), [578] *Isri Dutt Koer* v. *Hansbutti Koerain* (L. R., 10, I. A., 150; I. L. R., 10 Cal., 324), *Puddo Monee Dossee* v. *Dwarka Nath Biswas* [25 W. R., 335 (341)], *Sheolochun Singh* v. *Saheb Singh* (I. L. R., 14 Cal., 387), *Rivett-Carnac* v. *Jivibai* (I. L. R., 10 Bom., 478).

Mr. *Evans* on the same side.—The old law was that a widow should frugally enjoy the estate (3 Colebrooke, 576). The onus is on the person contending that the accumulations do not go with the husband's estate to show special circumstances. This is how it stands on the later authorities cited. The questions are, What had happened up to the date of the release? And what was the intention of the parties to the release? [WILSON, J.—There are statements of the widow's intentions which are in your favour, namely, that she was claiming the money as part of her husband's estate.] Yes, at the time she so declared her views, and it was not till long after that that she set up a claim to treat it as part of her own *stridhan*. The presumption is in my favour unless displaced by strong facts. The facts are also in the appellant's favour; for during the eight years before the release, there was nothing done to alter the position of matters. The widow was waiting to see if a son was adopted. If she had so desired (she was co-executrix with Shama Charan) she could have demanded and spent the money; but that was not a proper course, and she did not adopt it. Then at the time of the release she claimed it as a part of her husband's estate and not as her *stridhan*.

Mr. *Hill* for Grish Chunder Roy.—I contend the release shows that the widow claimed the income as belonging to herself; there is, first, a series of colourless acts, and then express acts declaring her intention, and what her intentions had always been. The question is rather one of fact than of law, did she treat it as part of her husband's estate? [WILSON, J.—The cases say that you have to show affirmatively that there was something done to take it out of her husband's estate.] We have to see the intention with which the accumulation was made, and I say the facts show that she took it out of her husband's estate. On the entire facts we start with an indication that it is not to [579] go with the bulk of the estate, and she claims it as her own. The long-continued investment is enough to show that it was severed. The cases cited are distinguishable; no case shows that when there is no other estate of the husband in a widow's hands, and she is dealing only with a lump sum, the cases as to increment to the husband's estate apply. *Panalal Seal* v. *Bamasundari Dasi* (6 B. L. R., 732) shows that the widow is entitled absolutely to the accumulations of income from her husband's estate.

Mr. *Woodroffe* on the same side.—In the old books, accumulations and accretions are treated conjointly. The case of *Grose* v. *Amirtamayi Dasi* (4 B. L. R., O. C., 41) differs from previous decisions, and is not warranted by them, and is contrary to *Soorjeemoney Dossee* v. *Denobundoo Mullick* (9 Moore's I. A., 123); here there was an accumulation by the widow, and, if so, was there any intention to make it an increment to the estate? There was not, there was only a saving of income. There is no evidence that she made the investment for the benefit of her husband's heirs. The husband had determined by his will that his heirs were not to have his estate. The mere fact of investment raises no presumption of intended accretion. The use of the word "accumulations" in the release is not conclusive, it is merely in the sense of monies being unexpended. As to the widow's power over income, see *Puddo Monee Dossee* v. *Dwarkanath Biswas* [25 W. R., 335 (339)]. The case of *Sheolochun Singh* v. *Saheb Singh* (I. L. R., 14 Cal., 387) is authority for showing that her prior intention may be gathered from the actual disposition that she made.

Mr. *Phillips* for Mr. Broughton.—The widow had a lakh of rupees left her under the will; her husband imposed upon her no duty to accrete to his estate. Is there any duty on the part of the widow to accrete to the husband's estate when it is left away from her? I submit not. Here the widow does not stand in the ordinary position of a Hindu widow; here there was nothing to which the accumulations could accrete. As to the investment, Government paper is the most realisable form for it to take, next to leaving it in money. As to the form of the release, it does not show an intention to accrete the money.

[580] Mr. *Pugh* in reply.—The main contention on the other side is that the monies are not "accumulations." As to what an accumulation is, see Macnaghten's Hindu Law, 258, and 1 Strange's Hindu Law, 246.

The **Judgment** of the Court (PETHERAM, C.J., and WILSON, J.) was delivered by

Petheram, C. J.—This appeal arises out of three proceedings. The first of them was a petition for obtaining the probate of the will of a person called Badam Kumari, which is numbered 53 of 1887; the second was a suit brought by Grish Chunder Roy against Mr. Broughton, the Administrator-General of Bengal, Surut Kumari Dassi and Sowdamini Dassi to carry out the trusts of two deeds, dated the 12th July 1886, and that is numbered 64 of 1887; and the third was a suit brought by Sowdamini Dassi against Mr. Broughton, Grish Chunder Roy and Surut Kumari Dassi to obtain a declaration that the deed of trust of the 12th July 1886 is void, and that the plaintiff Sowdamini is entitled

to a share of the funds dealt with by that deed, and that suit is numbered 141 of 1887.

The property which is in dispute in these suits are the savings from the income of an estate left by a person called Nobo Kumar Mullick. Nobo Kumar Mullick died on the 16th March 1856, leaving him surviving his widow Badam Kumari, whose will is in dispute in these proceedings, and four daughters, of whom one is Sowdamini, the plaintiff in the third proceeding, and another, Surut Kumari, one of the defendants in that suit and in the other suit.

Nobo Kumar Mullick left a will, and by the terms of that will, and that is the only thing in it which is material here, he appointed his widow and his brother, Shama Charan Mullick, his executrix and executor, respectively, and in the 9th clause of the will he provided that "should my executor Sreeman Shama Charan Mullick, my younger brother, have more than two sons within eight years from this date, in that case such son shall be made my adopted son; should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother, within the specified time of eight years, power [581] is reserved for adopting up to the extent of a third time; should my brother have no more than two sons, or the adopted sons should die one after the other, in that case the share belonging to me of Company's Paper, and lands and houses and gardens, and so forth, the whole real and personal estate, will be received by my younger brother, Sreeman Shama Charan Mullick."

Shama Charan Mullick had not more than two sons within eight years of the date of the testator's death, and so the residuary estate became his. The testator made no provision for the disposal of the rents and profits for the eight years during which the succession to the property remained in abeyance, and then his widow, as his heiress, became entitled to them; but during these eight years she did not receive these rents and profits.

Disputes arose between Badam Kumari and Shama Charan Mullick regarding their respective rights to the accumulations of these eight years, and in settlement of those disputes Shama Charan, on or about the 13th August 1866, paid Badam Kumari a sum of Rs. 2,89,000.

The dispute which arises in these proceedings is with reference to that sum, and the first point which it is necessary to note here, it is not specifically noted in Mr. Justice TREVELYAN'S judgment, is that at the time that sum was paid by Shama Charan Mullick to Badam Kumari, the eight years had expired, and Shama Charan Mullick had himself become entitled to the entire estate of the deceased, and was actually in possession.

That being the state of things, when that money was paid over Badam Kumari executed a deed of release to Shama Charan Mullick, and she recites in it that a question had arisen between her and Shama Charan as to who was entitled to this money, she describes it as the accumulations of the property of Nobo Kumar Mullick, which was then in the hands of Shama Charan Mullick, and that upon the payment of that sum of money by him to Badam Kumari, she, Badam Kumari, executes to him an absolute release.

Badam Kumari lived for twenty years after executing that release. During that time these funds remained in her hands, and were dealt with by her, a portion of the income from that sum being spent by her, and a portion of it re-invested in Government [582] Securities in the same way as the fund itself had been, and on the 12th of July 1886, she handed over a large sum of money to Mr. Broughton, and endorsed notes to the extent of Rs. 2,69,500, part being principal and part the accumulations of the interest which she herself had invested in that way, to Mr. Broughton, and executed a deed by which she

constituted him the trustee of that fund, settling it upon one of her grandchildren, the son by a daughter; and these proceedings are now brought by the other daughters to contest that transaction. First of all they say that as a matter of fact, at the time this deed was executed and this will was made, this being done about the same time, she did not know what she was doing, and that the documents were not explained to her, and that consequently they must be set aside; and in the next place they say, even if that were not so, she legally had not power to dispose of this property, because it consisted of accumulations to her husband's estate, and so could not be dealt with by her.

The first point was a question of fact as to whether this transaction was explained to her, so that she knew what she was doing, and her mind went with what she was doing. Mr. Justice TREVELYAN has come to the conclusion that the deeds were properly explained to her, and that she knew what she was doing, and intended to do what appears by the documents she has done; and I do not think it necessary to say more as to that than that I agree with the view taken by Mr. Justice TREVELYAN on the facts, so that if she had power to make this disposition of the property, this disposition is valid.

The question that then arises is as to whether she had power to deal with this fund, or whether it had become a portion of the *corpus* of the husband's estate which she could not deal with.

As to that, it is to be noticed that her position was that she had a Hindu widow's estate for the eight years which elapsed before Shama Charan's interest vested. And he took possession of the residue, and this claim is not made by Shama Charan, the person who is now entitled to the *corpus* of Nobo Kumar's estate and who took possession of it on the expiration of the eight years, but is made by the daughters of Nobo Kumar who **[583]** would have been the persons who would have taken anything which remained of the accumulations of those eight years if this woman had died pending the eight years, and who would not have been entitled to the *corpus* of the estate in any sense whatever, because that was to go to Shama Charan by the will of Nobo Kumar if no son were adopted.

Therefore the present claim is made not by the person entitled to the estate of Nobo Kumar, but by persons who would have been entitled only to a small share of it, if this woman had died before the expiration of the eight years.

The cases on the subject are fully examined and discussed in the case of *Isri Dutt Koer* v. *Hansbutti Koerain* (L. R., 10 I. A., 150), and the discussion is continued in the case of *Sheolochun Singh* v. *Saheb Singh* (I. L. R., 14 Cal., 387), and so much of the law as is applicable to this case is to be found in the judgment of Sir RICHARD COUCH in the last case. He says there, when a widow comes into possession of the property of the husband, and receives the income, and does not spend it but invests it in the purchase of other property, their Lordships think that, *primâ facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *primâ facie*, be intended to be accretions to that estate. If the case here were that the persons who were claiming this fund were the persons who were entitled to the entire estate of Nobo Kumar, that *dictum* would be strong to show that, *primâ facie*, this money having accumulated in the hands of the person possessed of a particular estate, and having been invested by her, must be taken to have been so accumulated and so invested in order to increase the estate of the husband. But that is not the case here, and that cannot be the case here, because the accumulations were handed over by the person entitled to the reversion to this woman after the entire estate had vested in him, and the matters were released as between themselves. Therefore it seems to me

that there is no presumption here of its having been accumulated by her for the benefit of the other heirs of Nobo Kumar. Then the case of *Sheolochun Singh* v *Saheb Singh* (I. L. R., 14 Cal., 387) would indicate that, if [584] there is no presumption of this kind, then you must look to the facts of the case to ascertain what the intention of the parties was with regard to this fund.

Mr. Justice TREVELYAN, in his examination of the evidence in this case, has come to the conclusion that there is nothing to indicate an intention on the part of Badam Kumari to invest these moneys for any one's benefit but her own. There is nothing from what took place, to indicate that she intended to hold this money for the benefit of any other person, or to give up the control of it by herself. In my opinion, that view is a correct view of the evidence in this case. I think that the conduct of Badam Kumari during these years shows that she had no intention of accumulating this fund for any one's benefit but her own or that she ever intended to give up the power of disposing, spending, and dealing with it any way, and, as in this case it does not seem to me that the presumption that the money, *primâ facie*, was supposed to be accumulated for the benefit of the husband's estate arises, I think that the conclusion to which Mr. Justice TREVELYAN came was correct, and that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

Attorneys for the Appellant: Messrs. *Remfry and Rose*, Baboo *Ashutosh Dhur*.

Attorneys for the Respondents: Messrs. *Watkins and Co.*

NOTES.

[This case was affirmed by the Privy Council in (1892) 20 Cal., 438.]

[16 Cal. 584]

APPELLATE CIVIL.

The 11th April, 1889.

PRESENT:

MR. JUSTICE BEVERLEY AND MR. JUSTICE BANERJEE.

Khudiram Mookerjee............Objector

versus

Bonwari Lal Roy............Petitioner.*

Hindu law—Guardian—Right to Guardianship of Hindu Widow—Grant of certificate of administration under Act XL of 1858.

The relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. A certificate of administration, under Act XL of 1858, was therefore granted to one of the former in preference to the latter.

[585] THIS was an application for a certificate of administration to the estate of a female minor under Act XL of 1858. The applicant, Bonwari Lal Roy, was the brother of the minor. The application was opposed by Khudiram

* Appeal from Order No. 25 of 1889, against the order of R. F. Rampini, Esq., Judge of Burdwan, dated the 12th of January 1889.

Mookerjee, the sister's son of the husband of the minor, who was a reversionary heir to the property of the minor's deceased husband. The father of the minor was alive, but it appeared that he did not wish to take out the certificate himself, and that he consented to its being granted to the applicant. It also appeared that a certificate of administration of the minor's property had been previously granted to the mother of the minor's deceased husband, and that this certificate was recalled under the provisions of s. 21 of the Act, because her advanced age rendered her unfit to manage the property.

The Judge granted the application.

Khudiram Mookerjee appealed to the High Court.

Baboo *Monmotho Nath Mitter* for the Appellant.

Mr. *R. E. Twidale* for the Respondent.

The **Judgment** of the Court (BEVERLEY and BANERJEE, JJ.) was delivered by

Banerjee, J.—This is an appeal against the order of the District Judge of Burdwan, appointing the respondent as the guardian of a minor Hindu widow; and the only question raised before us is whether the respondent, who is the brother of the minor, or the appellant, who is her husband's sister's son, and the reversionary heir, has the preferential right to the certificate.

It appears that a certificate had been granted to the minor's mother-in-law which was subsequently recalled by reason of her unfitness to manage the property owing to her extreme old age; and the only reason assigned by the learned Judge for giving preference to the minor's paternal relations seems to be the fact of a certificate having once been granted to one of her husband's relations and of its having been subsequently recalled.

That in our opinion would be no good reason for passing over the claims of other relations on her husband's side, if no other reason is made out against them, and if under the Hindu law they are entitled to the certificate in preference to the widow's paternal relations.

[686] Now under the Hindu law, we think that the relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. This is clear from the text of Narada, Chapter XIII, *verses* 28, 29, cited in the Dayabhaga, Chapter XI, s. 1, paragraph 64. That text runs thus: —" When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself as well as in her maintenance they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *sapinda*." This text has been followed in three cases, one to be found in Macnaghten's Principles and Precedents of Hindu Law, Volume II, page 203; another, *Kishen Mohan Mitter* v. *Khettermoni Dassi* (2 Hay, 196; Marsh, 313); and a third, the case of *Bai Kisar* v. *Bai Gunga* (8 Bom., A. C., 31).

This, we think, is ample authority in support of the appellant's contention, and the certificate in this case ought therefore to be granted to the appellant against whose fitness nothing has been said.

The result is that the appeal will be allowed with costs.

J. V. W. *Appeal allowed.*

NOTES.

[*See* also (1910) 33 All., 222 : 7 A. L. J., 1149.]

[16 Cal. 586]

APPELLATE CIVIL.

The 21st March, 1889.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

Akshaya Kumar Dutt............Defendant

versus

Shama Charan Patitanda............Plaintiff.*

Enhancement of rent—Settlement of a Government Khas Mehal—Regulation VII of 1822—Bengal Act III of 1878—Bengal Act VIII of 1879, ss. 10—14.

In order to make the enhanced rent, stated in *jummabundi*, settled under Regulation VII of 1822, binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law, with reference to enhancement of rent, in force at the time of such enhancement.

[587] *D'Silva* v. *Raj Coomar Dutt* (16 W. R., 153), *Enayetoollah Meah* v. *Nubo Coomar Sircar* (20 W. R., 207) and *Reazooddeen Mahomed* v. *McAlpine* (22 W. R., 540) followed.

The rent of a Government Khas Mehal can only be enhanced by the same process as the rent on any private estate.

Quære : Whether a *jummabundi* is a public document.

THIS was a suit brought by an izarahdar to recover rent from a tenant.

The plaintiff stated that he formerly held an izarah of certain lands under Government; that on the expiration of such izarah, Government held the lands khas, and when so holding took, in the year 1283 (1876-77), a measurement of the said lands, the result of which was (amongst other matters) that the defendant, who was a ryot under Government, and who formerly held a *jumma* of Rs. 780, was found to be holding 1,374 bighas of land, and was assessed according to the *jummabundi* at Rs. 950-2-1, and he therefore entered into a kabuliat in respect of this land at the rate mentioned.

Subsequently to the measurement and *jummabundi* being confirmed by the Board of Revenue, the plaintiff took an izarah of the whole Mehal for twenty years at an annual *jumma* of Rs. 3,000.

The defendant fell into arrears with his rent, and the plaintiff, as his superior landlord, sued him for the same at the enhanced rent settled by the Government in the year 1283.

The defendant denied that the rent had ever been enhanced or that he had ever assented to the *jumma* fixed by the new assessment.

The Munsif found that the *jummabundi* had been prepared under Regulation VII of 1822, and that it was unnecessary that the defendant should have consented to the *jummabundi* ; that the defendant had not, in accordance with s. 10 of Bengal Act VIII of 1879, contested by suit the assessment made by

* Appeal from Appellate Decree No. 1057 of 1888, against the decree of C.B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 14th of March 1888, affirming the decree of Baboo Srinath Pal, Munsif of Diamond Harbour, dated the 21st of April 1887.

Government; and that, therefore, he was liable to pay the rent recorded against his name in the *jummabundi*.

The defendant appealed to the District Judge, who found that it was not clear whether the settlement by Government was [588] made before or after Bengal Act VIII of 1879 came into force, but that for the purposes of the appeal he assumed the settlement to have been made under Regulation VII of 1822, and held that there was nothing in either Regulation VII of 1822 or in Bengal Act VIII of 1879 or the present Tenancy Act requiring a ryot's assent to the *jumma* imposed, or making it necessary for the zemindar to serve a special notice on him, calling upon him to attend at the settlement; he therefore dismissed the appeal.

The defendant appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey* for the Appellant.

Baboo *Doorga Mohun Das* and Baboo *Sarut Chunder Roy* for the Respondent.

The **Judgment** of the Court (WILSON and TOTTENHAM, JJ.) was as follows:—

In this case the first thing that is important is to ascertain, as accurately as we can, what the facts as found by the Lower Appellate Court are to which we have to apply the law. The suit is brought by an izarahdar to recover rent from tenants at an enhanced rate. The case made is that the property on which the tenants hold is a Khas Mehal of Government; that the plaintiff and another formerly held an izarah of the Mehal; that then it fell into the Khas possession of Government, and that in about the year 1876 a fresh settlement was made under which the rent of these tenants was enhanced: that subsequently the plaintiff and another again took an izarah, and the plaintiff alleges his title to sue for and recover rents from the tenants at the enhanced rate.

The District Judge, before whom the case came on appeal, says this:—

"The Deputy Collector, Baboo T. C. Mitter, who made the re-settlement on behalf of Government, raised the *jummas* to" so and so. "The *jummabundi* was in due course approved by the Board of Revenue, but it is not clear whether the settlement was before or after Bengal Act VIII of 1879 came into force. I shall, for the purposes of this appeal, assume that the settlement was made under Regulation VII of 1822." Then he describes the present appearance of the *jummabundi*, and he [589] goes on:—"Now, no doubt, if it were necessary in case of a re-settlement of a Khas Mehal to prove that the tenants assented to pay any enhanced rent assessed on them, or it were necessary to prove that a notice, calling on each tenant to attend at the settlement, must be proved to have been served on each individual tenant, it would be exceedingly difficult in the present case to say that the defendant was bound by the settlement. I am not aware, however, of anything either in the Regulation VII of 1822 or in the Bengal Act VIII of 1879, or the present Tenancy Act, which either requires the ryot's assent to the *jumma* imposed, or makes it necessary to prove that a special notice was served on any individual tenant"

Now, we think, the intention of the District Judge must have been to find this: that if it were necessary, under the circumstances of the case, in order to comply with the law, as it existed before Bengal Act VIII of 1879, or the earlier Bengal Act III of 1878, to show either of two things, either the consent of the tenants to the *jummabundi* as reçorded, or a notice of enhancement served upon the tenants, to justify the enhancement, then the case of the plaintiff was not made out, for that there was neither assent established nor notice proved. But the District Judge went on to hold that neither of these

conditions need be complied with. Taking that to be the finding of fact, and that to be the proposition of law, we have to say whether the proposition has been correctly laid down; and, it appears to us that it has not been correctly laid down. It has been held in a series of cases that one or other of two things must occur in order to make the enhanced rent stated in a *jummabundi* settled under the Regulation which has been referred to, binding upon a tenant. There must be either an assent to that enhancement, or else there must be a compliance with the provisions of the rent law which was in force at the time, Bengal Act VIII of 1869, with regard to enhancement of rent; because it was long settled law, established by a series of decisions, that the rent of a Government Khas Mehal could only be enhanced by the same process as the rent on any private estate.

With regard to that it is not necessary to refer to more than a few cases. There is the well-known case of *D'Silva* v. *Raj* **[590]** *Coomar Dutt* (16 W. R., 153); the case of *Enayetoollah Meah* v. *Nubo Coomar Sircar* (20 W. R., 207); and the case of *Reazooddeen Mahomed* v. *McAlpine* (22 W. R., 540).

In the first Court reliance was placed upon the case of *Taru Patur* v. *Abinash Chunder Dutt* (I. L. R., 4 Cal., 79) as an authority for the contrary proposition; but it appears to us that that case is not really an authority for that for which it has been cited. All that was there decided was that the settlement *jummabundi* is a public document, and is admissible in evidence as such under s. 74* of the Evidence Act. It is evident that the question, whether it is admissible in evidence as a public document, and the question whether that which is in it is binding upon tenants without reference to the question of consent or notice, are entirely separate matters, and it is right to notice that even as to that which was actually decided in that case, viz., that the document was a public document, the question is now open to some degree of doubt, because it has been seriously questioned by the late Chief Justice and Mr. Justice MACPHERSON in the case of *Ram Chunder Sao* v. *Bunsidhur Naik* (I. L. R., 9 Cal., 741). The passage occurs in p. 743 of the report.

It appears to us, therefore, that if this matter is to be disposed of under the provisions of the law as it was settled, independently of the Bengal Acts of 1878 and 1879, the decision of the Lower Appellate Court cannot be supported.

In the first Court, reliance was placed on Bengal Act VIII of 1879. Now, if there be any section in that Act which makes this *jummabundi* binding upon the tenants in question, it is s. 10, which says:—"Every under-tenant and ryot shall be liable to pay the rent recorded as demandable from him under this Act, unless it shall be proved in any suit instituted by such under-tenant or ryot to contest his liability to pay the same that such rent has not been assessed in accordance with the provisions of this Act." Taking that alone, it could not, we think, affect this case, because it only deals with the rent recorded as demandable under the Act, that is to say, in compliance with the provisions **[591]** of ss. 6 and 9, and those sections can only be complied with, if the settlement is actually made in accordance with the terms of the Act. And practically, therefore, it is hardly possible that a settlement could be made which would be affected by s. 10 unless it were substantially made after those clauses

---

Public documents. *[Sec. 74:—The following documents are public documents:—

1. Documents forming the Acts, —or records of the Acts—
   (i) of the sovereign authority,
   (ii) of official bodies and tribunals, and
   (iii) of public officers, legislative, judicial, and executive, whether of British India or of any other part of Her Majesty's dominions or of a foreign country.
2. Public records kept in British India of private documents.]

came into operation. But reference has further been made to s. 14, which says: "The provisions of this Act shall apply to all settlement proceedings under Regulation VII of 1822, which may have been confirmed after the commencement of Bengal Act III of 1878, or which may hereafter be confirmed or sanctioned by the Revenue authorities from time to time empowered in that behalf by the Lieutenant-Governor, whether such proceedings shall have been commenced before or after the commencement of the said Act." That, no doubt, makes the Act retrospective in this sense, that the effect of settlement proceedings having been commenced before the passing of the Act of 1878, or the Act now in question, is not fatal to the notion of the Act applying. On the other hand, it only makes the Act retrospective; and the provisions of the Act themselves only apply to settlements made in accordance with the terms of the Act, and they cannot therefore have any application to a case in which it has been found by the lower Courts that the settlement was made about two years before the first of the two Acts came into operation. For these reasons we think that this appeal must succeed. The appeal is against the decision of the Lower Appellate Court to this extent, that the defendant objects to any rent having been allowed to the plaintiff in excess of the old admitted rate of rent, and in accordance with the enhanced rent. The details of the matter can readily be settled between the parties. The amount deposited by the defendant will be taken into account, and a decree made accordingly. In any event the appellant will have his costs of this appeal.

T. A. P. *Appeal allowed.*

NOTES.

[*See* also (1898) 3 O.C., 205.]

[592] APPELLATE CIVIL.

The 16th April, 1889.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Haro Pria Dabia............Decree-holder

versus

Shama Charan Sen............Judgment-debtor.*

Insolvency—Insolvent debtors under Civil Procedure Code—Civil Procedure Code, ss. 344, 350, 352, 357, 358—Debt not in schedule—Omission to come in and prove debt.

A judgment-debtor, arrested in execution of a decree, filed his petition and was adjudicated an insolvent, under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend: and her name was not included in the schedule of creditors. The insolvent

* Appeal from Order No. 45 of 1889, against the order of F. H. Harding, Esq., Judge of Chittagong, dated the 10th of November 1888, reversing the order of Baboo Debender Chunder Mookerjee, Munsif of that district, dated the 16th of August 1888.

was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent : *Held*, that the discharge of the insolvent did not operate as a discharge of the debt under s. 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property.

Semble.—Under s. 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him, unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them.

SHAMA CHARAN SEN, the judgment-debtor, having been arrested in execution of a decree obtained by Haro Pria Dabia, applied to be declared an insolvent under s. 344 of the Code of Civil Procedure, duly setting forth in his application the names and residence of his creditors, amongst them his decree-holder, Haro Pria Dabia. A day was fixed for hearing the application, and notices were served on Haro Pria and the other creditors. Haro Pria and certain other creditors opposed the application, but eventually, on 22nd April 1887, Shama Charan was declared to be an insolvent and a receiver of his property was appointed. On the same day, in the presence of the opposing creditors or their pleaders, the Court fixed a day, 26th May, for the creditors to **[593]** produce evidence of the amount and particulars of their respective claims against the insolvent. Haro Pria Dabia did not appear to prove her claim ; but some of the other creditors appeared and proved the amount due to them, and a schedule was framed by the Court of those creditors and their debts proved, a copy of which schedule was stuck up in the Court-house. On the 29th October 1887, no other creditor having applied under s. 353 of the Code of Civil Procedure, the receiver was directed to proceed under s. 356, and to report the result to the Court, and in his report the insolvent was, on 2nd March 1888, discharged under s. 355 * ; the money in the hands of the receiver was disbursed to the scheduled creditors under s. 356, and the surplus was made over to the insolvent. Subsequently, on the 20th March 1888, Haro Pria applied to the Court for execution of the decree obtained by her against Shama Charan previously to the insolvency proceedings by attachment and sale of the insolvent's property.

The Munsif allowed the application, holding that the discharge of the insolvent was no bar to the execution.

The Judge on appeal reversed that order and held that the execution of the decree could not be allowed. The decree holder appealed to the High Court.

Munshi *Seraj-ul-Islam* for the Appellant.

Baboo *Jogender Chunder Ghose* for the Respondent.

The **Judgment** of the Court (TREVELYAN and BANERJEE, JJ.) was as follows :—

It seems to us clear that the learned District Judge is wrong in the conclusion at which he has arrived. The material facts are shortly as follows :— The appellant obtained a decree against the respondent. The respondent on being arrested on this decree, filed his petition under the insolvency section of the Code of Civil Procedure. The procedure laid down in Chapter XX seems

* [Sec. 355.—The receiver so appointed shall give such security as the Court may direct and shall possess himself of all such property, except as aforesaid : *(Receiver to give security and collect assets.)*

And on his certifying that the insolvent has placed him in possession thereof, or has done everything in his power for that purpose, the Court may discharge the insolvent upon such conditions (if any) as the Court thinks fit.] *(Discharge of insolvent.)*

to have been carried out, and, in course of time, the creditors were required to prove their debts. The appellant before us, although she seems to have received notice, did not attend, and, in the result, her name was not included in the schedule. The scheduled creditors, that is to say, the persons who proved [594] their debts, have been paid and the residue of the property in the hands of the receiver has been paid out to the insolvent. Now this decree-holder seeks to execute her decree against the property of the insolvent.

We have heard argument on behalf of the respondent, and the effect of that argument is shortly this: The learned pleader contends that, as the decree-holder did not attend before the District Judge and give evidence, the whole debt is wiped off, and he argues that his client having got a discharge from his scheduled debts, they are not debts at all.

There can be no doubt that, where a person has got a right, and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment, that there can be no doubt about it. The section of the Code as to discharge, is s. 357. The first portion of that section gives an insolvent a release, so far as arrest and imprisonment are concerned, from his scheduled debts. It then goes on not to give him a discharge in respect even of the scheduled debts, but it goes on to say this; "Subject to the provisions of s. 358, his property, whether previously or subsequently acquired, except the particulars specified in the first proviso to s. 266, and except the property vested in the receiver, shall, by order of the Court, be liable to attachment and sale, until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years from the date of the order of discharge under s. 351 or 355." That is to say, all the property in the hands of the receiver is to be sold, and the proceeds paid to the scheduled creditors; and besides that, his other property is liable to be attached and sold until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years. Probably the effect of that would be to discharge him from the debts to the scheduled creditors entirely, but there is no reference there to any persons whose names are omitted from the schedule. We do not think that the fact that a creditor is invited to prove his claim limits or destroys his rights. There is no doubt that, if he had not been so invited, a creditor would not be affected by s. 357.

[595] It is said that the effect of her omission to come in operates as a decree dismissing her claim. We cannot hold that when we have here a decree-holder, whose decree is admitted, and execution of whose decree is the cause of these insolvency proceedings being taken.

We think it is necessary for us to notice what does appear at first sight to be somewhat anomalous in the provisions of s. 352. As the learned pleader points out, although an insolvent may come into Court seeking to be released from his debts, and although the object of those proceedings is to release him from those debts, if a creditor does not come in and prove his debts, this would prevent an insolvent acquiring the relief that the Code contemplates giving him.

That is unfortunate, but unless the Act takes away existing rights, we cannot say that the rights have ceased to exist. This question is not for us, but for the Legislature to consider. But as Mr. Justice BANERJEE pointed out during the argument, it is possible to read s. 352 a little less strictly than is suggested, and to say that an insolvent might come in and prove the debts of the creditors if he wishes to get a discharge from them. That would get rid of the difficulty.

It seems to us that as s. 357 does not give the debtor any right to get his discharge from this debt, we must allow execution to go In the result we set aside the order of the District Judge, and restore that of the Munsif. The judgment-creditor is entitled to her costs in the Lower Appellate Court and in this Court.

J. V. W. *Appeal allowed.*

NOTES.

[This was followed in (1899) 21 All., 227; (1902) 30 Cal., 407; (1907) 9 Bom. L. R., 466; (1891) P.R., 96.]

[596] APPELLATE CIVIL.

The 15th May, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GORDON.

Shewbarat Koer............Plaintiff

versus

Nirpat Roy and others............Defendants.*

Appeal—Superintendence of High Court—Bengal Tenancy Act (VIII of 1885), ss. 104, cl. 2, 105, 106, 108—Rule 33 of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622.

The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents.

THE ryots of one Shewbarat Koer who was the proprietor of mouzah Pupri in Mozufferpore, applied, under s. 104, cl. (2) of the Bengal Tenancy Act, for settlement of their rents; and on the 10th July 1886 the Assistant Settlement Officer passed an *ex parte* order settling such rents. On the 20th November 1886 Shewbarat put in a petition to the Assistant Settlement Officer, stating that the rates of rent, as stated in that officer's "Khettian," did not agree either with the rates the ryots had mentioned, or with the rate as appeared in her Sherista. The Assistant Settlement Officer thereupon directed the petitioner to file a detailed list of her ryots, showing the rental paid by them. This was done on the 2nd December 1886. The Assistant Settlement Officer thereupon passed an order, refusing to re-open the case, the rents having been settled under s. 104 of the Tenancy Act.

Shewbarat appealed against this order to the Special Judge who held that the appellant should have applied to the Assistant Settlement Officer under s. 108 of the Civil Procedure Code, and not under s. 105 of the Bengal Tenancy Act of 1885, and dismissed the appeal.

* Appeal from Appellate Decree No. 1326 of 1888, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 25th of April 1888, affirming the decree of E. W. Collin, Esq., Settlement Officer of Mozufferpore, dated the 1st of March 1887.

Shewbarat appealed to the High Court.

Baboo *Tarack Nath Palit*, for the Appellant, contended that s. 105 of the Tenancy Act and Rule 33 of the rules made under that Act clearly pointed out the remedy in this case.

[597] Baboo *Sharoda Charan Mitter*, for the Respondents, submitted that there was no appeal against the order of the Special Judge; the High Court having no jurisdiction to entertain appeals from a Special Judge, save under s. 106 of the Rent Act.

The **Judgment** of the Court (TOTTENHAM and GORDON, JJ.) was as follows: —

It appears to us that in this case the High Court has no jurisdiction either to entertain a second appeal, or to interfere with the order of the District Judge under s. 622 of the Code of Civil Procedure.

The matter in dispute is an entry in the record of rights and of rents settled, made under Chapter X of the Bengal Tenancy Act. The settlement appears to have been made *ex parte*, the Zemindar not having been present. Subsequently the Zemindar objected to the entry, and sought to have it corrected. The Revenue Officer declined to re-open the matter, and the Zemindar appealed against his order (and apparently she had a right to do so) to the District Judge, who is Special Judge under the Tenancy Act. The District Judge held that the only remedy which the Zemindar had was to apply to set aside the *ex parte* order under s. 108* of the Code of Civil Procedure, and he dismissed the appeal. The Zemindar has preferred a second appeal to this Court.

It has been pointed out to us by the respondents' Vakil that we have no jurisdiction to entertain this appeal. It appears that the only cases in which the High Court has jurisdiction to entertain appeals from the decisions of a Special Judge are cases under s. 106. Clause 3 of s. 108 of the Rent Act gives the High Court jurisdiction to hear appeals in such cases as if the Special Judge were a Court subordinate to the High Court within the meaning of Chapter XLII of the Code of Civil Procedure. Section 106 provides for the hearing and decision of disputes regarding the record of rights by a Revenue Officer; but that section excludes from a Revenue Officer's consideration disputes regarding the entry of rent settled under the chapter. This entry, therefore, is not such as can be decided or entertained under s. 106; and therefore it appears to us that the High Court has no jurisdiction to hear an appeal from an order of a Special Judge **[598]** in regard to settlement of rent. In respect of that entry, a Special Judge is not a Court subordinate to the High Court; and that being so, we have neither appellate jurisdiction over him, nor any authority under s. 622 of the Code to interfere with his order.

The appeal must, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

Setting aside decree *ex-parte* against defendant.

* [Sec. 108:—In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside;

and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.]

NOTES.

[See (1896) 23 Cal., 723 F.B. where this case was dissented from. *See* also (1889) 17 Cal., 326; 21 Cal., 776; 24 Cal., 462: (1906) 33 Cal., 897: 4 C.L.J., 138]

[16 Cal. 598]

APPELLATE CIVIL.

The 25th April, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GORDON.

Nundun Lall............Decree-holder

versus

Rai Joykishen and others............Judgment-debtors.*

Limitation Act (1877), Art. 179, para. (2)—Appeal against whole decree by one defendant only—Execution of decree—Execution against judgment-debtor who did not appeal.

A plaintiff obtained on the 14th September 1881, a decree against two defendants, the decree as against the first defendant being one for partition; and as against the second defendant (who had set up a julkur right on the lands claimed to be partitioned, and had contended that partition could not be had, and had obtained a partial decree, but had been ordered to pay partial costs to the plaintiff), being one for costs.

The first defendant alone appealed against this decree, but unsuccessfully, his appeal being dismissed on the 18th January 1884. The decree-holder applied for execution of his decree as against the second defendant for costs in December 1886. *Held* that the application was not barred, for that limitation ran from the 18th January 1884.

NUNDUN LALL, one of the proprietors of mouzah Hossoinpore, which mouzah was, in the year 1881, partitioned by the Collector save and except a portion thereof, measuring 91 bigahs at that time under water. Subsequently the water on this portion dried up, and it became fit for cultivation. Nundun Lall thereupon applied to the Collector for partition of this portion; his application was, however, rejected on the ground that this land did not form part of the revenue-paying estate of Hosseinpore. Thereupon Nundun Lall brought a regular suit against the Secretary of **[599]** State for India in Council to compel partition. The Secretary of State appeared and contended that the land did not form part of Hosseinpore, and could not therefore be partitioned. In this suit one Rai Joykishen intervened, and was made a party-defendant thereto; he then set up a julkar right and objected to partition. The suit was on the 14th September 1881, decreed in favour of Nundun Lall, but the Subordinate Judge found that the 91 bigahs in question were sometimes covered with water, and at other times dry land. He therefore made his decree subject to the intervenor's julkar rights during the periods that the land was under water, and directed him to pay a proportionate amount of costs to the plaintiff as he had been unsuccessful in his contention that the land ought not to be partitioned.

* Appeal from Order No. 224 of 1888, against the order of A. C. Brett, Esq, Judge of Tirhoot, dated the 13th of March, 1888, reversing the order of Baboo Grish Chunder Chatterjee, Subordinate Judge of that district, dated the 29th of June, 1887.

Against this decree, the Secretary of State alone appealed, contending that the whole suit should have been dismissed · his appeal was, however, dismissed by the High Court on the 18th January 1884.

On the 19th July 1886, Nundun Lall applied for execution of his decree; this application was, however, dismissed, and on the 3rd December 1886, a further application was made by him for execution as against the intervenor defendant for costs. The intervenor objected that the plaintiff's decree had become final as against him on the 14th September 1881, and that therefore the application was barred by limitation.

The Subordinate Judge, before whom the application was made, held, relying on the case of *Raghunath Persad* v. *Abdul Hye* (I. L. R., 14 Cal., 26), that the application was not barred: the appeal by the Secretary of State, if it had been successful, being one which would have led to the dismissal of the whole of the plaintiff's suit and therefore with loss of his costs obtained against the intervenor defendant; that limitation ran therefore as from the date of the High Court decree of the 18th January 1884.

The intervenor defendant appealed to the District Judge. who, on the authority of the cases of *Sangram Singh* v. *Bujharat Singh* (I. L. R., 4 All., 36) and *Hur Pershad Roy* v. *Enayet Hossein* (2 C. L. R., 471), held that [600] limitation ran as against the intervenor from the 14th September 1881, he not having appealed from the decree of that date.

The decree-holder appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellant, contended that the application was not barred, limitation running from the date of the final decree of the High Court, and cited *Gungamonee Dossee* v. *Shib Sunkar Bhuttacharjee* (3 C. L. R., 430), *Mullick Ahmed Zumma* v. *Mahomed Syed* (I. L. R., 6 Cal., 194), *Basant Lal* v. *Najmunnissa Bibi* (I. L. R., 6 All., 14).

Moulvi *Mahomed Yusuf*, for the respondents, contended that the application was barred, relying on *Hur Proshad Roy* v. *Enayet Hossein* (2 C. L. R., 471), *Sangram Singh* v. *Bujharat Singh* (I. L. R, 4 All., 36), *Hingan Khan* v. *Ganga Parshad* (I. L. R., 1 All., 293), *Raghunath Pershad* v. *Abdul Hye* (I L. R., 14 Cal., 26).

The **Judgment** of the Court (TOTTENHAM and GORDON, JJ.) was as follows :—

The question in this appeal is whether execution of the decree, obtained by the plaintiff-appellant against the respondents, is barred by limitation.

The case is governed by article 179 of the second schedule of the Limitation Act. The decree was passed in the Court of First Instance on the 14th September 1881. The case came up ultimately on second appeal to the High Court, and the High Court's decision, *Secretary of State* v. *Nundun Lall* (I. L. R, 10 Cal., 435), was passed on the 18th January 1884. Applications for execution were made in July and December 1886. Article 179, clause 2, provides that, where there has been an appeal, the date of the final decree or order of the Appellate Court is the date from which limitation begins to run.

Upon the face of the proceedings, this application would appear not to be barred by limitation; but the Lower Appellate Court, upon consideration of various authorities cited by it,—cases in the Calcutta High Court and in that of Allahabad,—has come to the [601] conclusion that, as against the present respondents, execution of the decree is really barred. For it seems that the present respondents were not parties to the appeal from the Subordinate Judge's decision, dated the 14th September 1881.

It was contended that, as against them, the appeal preferred by another defendant would not have affected the decree; and therefore as against these respondents the decree was really final when it was allowed to go by them without an appeal.

The suit was one for partition of certain lands. The present respondents intervened in that suit, and were made defendants upon the plea that no partition could take place, because they had julkar rights over the land in question which, they said, was submerged by water. Another party to the suit was the Secretary of State for India. His defence was that the land in question did not belong to the estate of the plaintiff, and he also contended that no partition could be made.

It may be that he intended to contend only that no partition could be made by the Collector under the butwara law; but at any rate he contended that no partition could be made, and alleged that the land did not belong to the plaintiff's estate. The decree was in favour of the plaintiff, and the Secretary of State was the only party who appealed. In the High Court his appeal was practically successful, so far as Government was concerned,—that is, the High Court was of opinion that the land could not be partitioned under the butwara law by the Collector, though it could be partitioned under the Code of Civil Procedure, and the Secretary of State was discharged from the suit with his costs.

We are asked, upon the circumstances of the case, to hold that article 179 of the schedule of the Limitation Act should not be applied literally to this case, but should be modified in the sense in which it has been modified already in certain cases in the Calcutta and Allahabad High Courts. Those cases are *Hur Proshad Roy* v. *Enayet Hossein* (2 C. L. R., 471), *Sangram Singh* v. *Bujharat Singh* (I. L. R., 4 All., 36), *Hingan Khan* v. *Ganga Pershad* (I. L. R., 1 All., 293), and *Raghunath Pershad* v. *Abdul Hye* (I. L. R., 14 Cal., 26). On the other hand, we have been referred to cases in this Court and in the High Court of Allahabad **[602]** in which the decisions favour the appellant's contention in the present case. Those cases are *Gungamonee Dassee* v. *Shib Sunkur Bhuttacharjee* (3 C L. R., 430), *Mullick Ahmed Zumma* v. *Mahomed Syed* (I. L. R., 6 Cal., 194), and *Basant Lal* v. *Najmunnissa Bibi* (I. L. R., 6 All., 14). In one of these cases, namely *Gungamonee Dassee* v *Shib Sunkur Bhuttacharjee* (3 C. L. R., 430), the Judges went entirely upon the words of the article, and it seems to us that, in a question of limitation, we ought to abide as strictly as possible by the terms of the law. We should not be disposed to import into the law any further restrictions, as to the rights of parties to sue and to execute their decrees, than the law itself expressly provides; but we are bound to recognise the fact that the law has been by interpretation, so to say, modified by decisions of this Court and the High Court of Allahabad. If therefore those cases were on all fours with the present one, we should feel bound to follow the decisions, unless we thought it right to refer the matter to a Full Bench. But we think that the present case does not come exactly under the rule laid down in those cases. In those cases in which execution was held to be barred as against parties who were not parties to the appeal, the decision rests expressly upon the ground that the appeal made by one did not and could not affect the decree as against others of the parties concerned in the case. In one case a former Chief Justice, Sir RICHARD COUCH, in delivering judgment, said that the decree being against various parties for various reliefs in reality amounted to several decrees, although embodied in one paper. The rule governing this decision appears to be shortly this, that unless the whole decree was imperilled by the particular appeal which was preferred, the decision in the appeal would not alter the period of limitation in respect of execution of the decree as

between other parties to the suit. In the present case we think that the whole decree was imperilled by the Secretary of State's appeal. Had he succeeded fully in maintaining his contention, namely that the land did not belong to the plaintiff's estate, his appeal would have been decreed, and as a matter of course practically the result would have been that the plaintiff's suit would have been dismissed; and he would have been precluded from executing any decree as against [603] the present respondents. We are not bound, and we have no inclination to introduce into the limitation law any restrictions further than those which have been adopted by this Court on previous occasions. We think that the present case does not come within the further restrictions which we have mentioned, and that, upon the face of the proceedings and of the law, the execution in question is not barred.

That being so, we decree this appeal, setting aside the order of the lower Appellate Court and restoring that of the first Court, with costs.

T. A. P. *Application allowed.*

NOTES.

[This was followed in (1891) 19 Cal., 750; *see* also 23 Cal., 876; 25 Cal., 594; (1912) 16 I.C., 370 (Cal.). In 22 Bom., 500; 23 Mad., 60; 26 Mad., 91; 33 Bom., 39, however, it was held that *appeal* meant an appeal of *any* kind and by *any* party; and that only the appellate decree was the final decree in *all* cases.]

[16 Cal. 603]

APPELLATE CIVIL.

The 14th May, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GORDON.

Mungeshur Kuar and others............Judgment-debtors

versus

Jamoona Prashad............Decree-holder.*

Civil Procedure Code (Act XIV of 1882), s. 244—Claim to attached property—Question to be decided in execution—Liability of property to be sold in execution.

The question whether property is liable to be sold in execution of a decree is one to be determined under s. 244 of the Code of Civil Procedure.

Chowdhry Wahed Ali v. *Jumaee* (11 B. L. R., 149; 18 W. R., 185) followed in principle.

ON the 20th April 1887 one Jamoona Prashad obtained a decree for Rs. 3,374 against one Panchu Kuar, the widow of Rajkumar Baboo Kali Pershad Singh. The debt in respect of which the decree was obtained was apparently incurred by the lady for payment of Government revenue and other public demands, but the decree itself was simply a personal decree, and created no charge on her husband's estate which had come into her possession. The decree-holder took out execution, and caused certain shares in the villages of Shampar and Shampar Dearah, which he described as the property of the judgment-debtor, to be attached and advertised for sale. But prior to the date (the 15th September 1887) fixed for the sale Panchu Kuar died, and further [604] proceedings

* Appeal from Order No. 46 of 1889, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 28th of January 1889, reversing the order of Baboo Anant Ram Ghose, Subordinate Judge of Tirhoot, dated the 11th of August 1888.

were accordingly stayed, pending the determination of the question as to who were her representatives for the purpose of executing the decree. Several petitions relating to this question and the execution of the decree were then filed from time to time by some of the daughters of the deceased, as well as by the decree-holder, and ultimately, on the 21st May 1888, one of the daughters, Sundar Kuar, having filed a certificate granted by the Judge of Sarun to her and her sisters, Mungeshur Kuar and Tapessar Kuar, to collect debts due to their mother Panchu Kuar, the Subordinate Judge, before whom the execution proceedings were pending, ordered execution to proceed against the daughters as heiresses and representatives of the deceased judgment-debtor, and the usual notice to be served on them. This order was written in vernacular in the order sheet, but on the reverse an order was written in English, directing execution to proceed against Sundar Kuar alone. The effect of the order recorded in the order sheet was taken to be to bring on the record, for the purpose of executing the decree, all the three daughters of Panchu Kuar, as was prayed in the petition.

On the 16th June 1888, the execution case was struck off the file because the necessary process fees had not been deposited by the decree-holder. But on the 18th June, the decree-holder filed a fresh application for execution against the three daughters, and the property referred to above was again advertised for sale on the 15th August 1888. But on the 28th July 1888, the daughters filed a petition objecting to the sale of the property in question on the ground that it belonged to their father, and not to their mother; and that on their mother's death it had devolved upon them as heiresses of their father, and could not therefore be followed in execution of a personal decree against their mother. The Subordinate Judge, assuming apparently that the property belonged to the estate of their father, and was not the *stridhan* of their mother, released it from attachment. The decree-holder then appealed to the District Judge, and the judgment-debtors raised a preliminary objection that their objection before the Subordinate Judge was a claim under s. 278 * of the Civil Procedure Code, and that therefore no appeal lay. The learned Judge over-ruled this objection, and held that s. 244 applied; **[605]** and, on the merits, he was of opinion that there was no proof on the record that the attached property belonged to the father, and that, as the debt was one incurred for the payment of Government revenue, there was a legal necessity for it, which would bind the father's estate. He accordingly reversed the order of the Subordinate Judge, and directed execution to proceed.

The daughters appealed to the High Court.

Baboo *Hem Chandra Banerjee* and Baboo *Sharoda Churn Mitter*, for the Appellants, contended that the case before the Subordinate Judge was in the nature of a claim under s. 278 of the Code and that no appeal lay to the District Judge, relying on the following cases:—*Shanker Dial* v. *Amir Haidar* (I. L. R., 2 All, 752), *Nath Mal Das* v. *Tajammul Husain* (I. L. R., 7 All., 36), *Bahori Lal* v. *Gauri Sahai* (I. L. R., 8 All., 626), *Roop Lall Dass* v. *Bekani*

*[Sec. 278:—If any claim be preferred to, or any objection be made to the attachment of any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Investigation of claims to, and objections to attachment of, attached property

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

If the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.]

Postponement of sale.

Meah (I. L. R., 15 Cal., 438), *Kameshwar Pershad* v. *Run Bahadur Singh* (I. L. R., 12 Cal., 458), *Kanai Lall Khan* v. *Sashi Bhuson Biswas* (I. L. R., 6 Cal., 776); and further contended that the properties were not liable to be sold, as they had devolved on the appellants as heiresses of their father. *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (I. L. R., 14 Cal 316).

Mr. *M. P. Gasper* and Baboo *Rajendro Nath Bose* for the Respondent.

The **Judgment** of the Court (TOTTENHAM and GORDON, JJ., after stating the facts, proceeded as follows): —

It is contended on behalf of the appellants, *firstly*, that the case before the Subordinate Judge was in the nature of a claim under s. 278, Civil Procedure Code, and that therefore no appeal lay to the District Judge; and, *secondly*, that the property is not liable to be sold, because it devolved on the appellants as heiresses of their father and not of their mother.

As regards the first point, we are of opinion that the case is governed by the provisions of ss. 234 * and 244, Civil Procedure Code. It is clear from what we have already said that the appellants were brought on the record as representatives of the deceased judgment-debtor, without reference to their liability or non-liability as **[606]** such representatives. This was in accordance with para 1 of s. 234. Then as to their liability, that question has to be ascertained according to the provisions of para 2 of s. 234 by the Court executing the decree In the present case the question was whether certain property was liable to be sold in execution, and we think that such a question is a question relating to the execution of the decree between the decree-holder and the appellants, and that consequently it has to be determined under s. 244, Civil Procedure Code. It is strongly urged that as the property came into the hands of the appellants through their father, they are in respect of such property his legal representatives, and not representatives of their mother. Assuming that the property did belong to their father, and this is a disputed question before us, this contention is no doubt true. But after all, it seems to us that this is rather a matter of liability than of representation. The liability of the property to be sold in execution depends upon the determination of the question, whether it was the father's or the mother's, and upon the determination of the same point depends the question whether the appellants are in respect of this property the legal representatives of their father or their mother. But as we have already intimated we think that question falls within the scope of s. 244. It is also contended that the form of the proceedings before the Subordinate Judge, shows that he treated the case as one coming under s. 278, and not under s. 244. The petition of the appellants has been read to us, and we find no reference in it to s. 278, and the mere use of the word "claim" by the Subordinate Judge in his judgment is not in our opinion inconsistent with the objection of the appellant's coming under s. 244.

Further, in the view we take we think we are fully supported by authority. In the case of *Chowdhry Wahed Ali* v. *Jumaee* (11 B. L. R., 149; 18 W. R., 185) the Privy Council, dissenting from the opinion of a Full Bench of this Court, held that, "when a decree has been properly passed and proceedings taken under

If judgment-debtor die before execution, application may be made against his representative.

* [Sec. 234 :—If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.]

it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to [607] the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of the 11th clause of the Act of 1861."

That was a case under the old Code, and there is this difference between it and the present case, that in that case the decree was against the representative, whereas in this case the representatives have been brought in after decree. But this we think makes no difference. The principle laid down applies to both cases, as the liability of a representative under ss. 234, and 252, Civil Procedure Code, is substantially the same.

The Privy Council decision was followed by this Court in the cases of *Oseemunnissa Khatoon* v. *Ameeroonissa Khatoon* (20 W. R., 162) and *Ameerunnissa Khatoon* v. *Mahomed Mozuffer Hossein Chowdhry* (12 B. L. R., 65; 20 W. R., 280) [this case is very similar to the present]: by the Allahabad High Court in *Ram Ghulam* v. *Hazaru Kuar* (I. L. R., 7 All., 547), and *Kashi Prasad* v. *Miller* (I. L. R., 7 All., 733); by the Madras High Court in the case of *Kuriyali* v. *Mayen* (I. L. R., 7 Mad., 255): and by the Bombay High Court in the case of *Nimba Harishet* v. *Sitaram Paraji* (I. L. R., 9 Bom., 458). The following rulings are relied upon on behalf of the appellants, but we think they are clearly distinguishable from the present case:—*Shankar Dial* v. *Amir Haidar* (I. L. R., 2 All, 752), *Nath Mal Das* v. *Tajamal Hossein* (I. L. R., 7 All., 36), *Bahari Lal* v. *Gauri Sahai* (I. L. R., 8 All., 626), *Fanindro Deb Raikut* v. *Jugudishwari Debi* (I. L. R., 14 Cal., 316), *Roop Lall Das* v. *Bekani Meah* (I. L. R., 15 Cal., 438), *Kameshwari Pershad* v. *Run Bahadur Singh* (I. L. R., 12 Cal., 458), *Kanai Lall Khan* v. *Soshi Bhuson Biswas* (I. L. R., 6 Cal., 777).

The cases of *Shankar Dial* v. *Amir Haidar* (I. L. R., 2 All., 752), and *Nath Mal Das* v. *Tajamal Hossein* (I. L. R., 7 All., 36), were both referred to in the case of *Ram Ghulam* v. *Hazaru Kuar* (I. L. R, 7 All., 547), which we have already mentioned, and were distinguished from that case. In both these cases the judgment-debtor objected to the attachment [608] of certain property, on the ground that such property was in his possession as trustee for an endowment and not in his own right; and it was held that the objection, although made by the judgment-debtor, was one properly falling under ss. 278—283 Civil Procedure Code, and that the order passed upon it was not appealable.

But in the present case the appellants claim the property in their own right. The case of *Bahari Lal* v. *Gauri Sahai* (I. L. R., 8 All., 626), is also different. There the judgment-debtor filled two distinct characters, one as representative of the original judgment-debtor, and the other as representative of a third party who had died after preferring a claim; and it was the order passed on this objection which was held to have been passed under s. 281,* Civil Procedure Code.

The cases of *Fanindro Deb Raikut* v. *Jugudishwari Debi* (I. L. R., 14 Cal., 316), and *Roop Lall Das* v. *Bekani Meah* (I. L. R., 15 Cal., 329), are clearly not on all fours with the present case. And in the case of *Kanai Lall Khan* v. *Soshi Bhuson Biswas* (I. L. R., 6 Cal., 777), the High Court held that there were special circumstances which took it out of the general rule

* [Sec. 281:—If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.]

Disallowance of claim to release of property attached.

established in the cases of *Chowdhry Wahed Ali* v. *Jumaee* (11 B. L. R., 149; 18 W. R., 185), and of *Ameerunnissa Khatoon* v. *Mahomed Mozuffer Hossein Chowdhry* (12 B. L. R., 65; 20 W. R., 280).

Lastly, there is the case of *Kameshwar Pershad* v. *Run Bahadur Singh* (I. L. R., 12 Cal., 458), to which our attention has been particularly drawn. But in that case there was no decision that the order passed by the Subordinate Judge did not fall under s. 244. On the contrary, the case appears to have been treated by the Subordinate Judge and the High Court as one coming under s. 244. The real point decided was that Run Bahadur could not be held liable as regards property which had devolved on him as reversionary heir of the husband of the deceased judgment-debtor, or as regards property which had been made over to him by the debtor prior to decree, and that in respect of such property he was not, properly speaking, the representative of the judgment-debtor.

[609] We think therefore on a careful examination of all the reported cases bearing on the matter in dispute, that the weight of authority is in favour of the view we take, viz., that the present case comes under s. 244.

Then as regards the second point argued before us, we think there has been no proper judicial enquiry as to whether the property in dispute belonged to the father or the mother of the appellants.

From an affidavit filed before us it would appear that it was understood before the Subordinate Judge that there was no question as to the property having originally belonged to the husband of the judgment-debtor, and it was for this reason that certain documentary evidence on this point tendered by the appellants was not received. The District Judge merely observes that there is no proof on the record that the properties attached belonged to the father's estate, while before us the matter is disputed. Under these circumstances we think the appellants are entitled to ask for a judicial enquiry, and that the proper course will be to set aside the District Judge's order, and to remand the case to him with directions to receive and consider any evidence that may be adduced by the parties in reference to the matter in dispute, that is, the ownership of the property, and then to re-try the appeal. We may add that we think the question of legal necessity does not arise in the execution of the decree. The decree-holder cannot go behind the decree. Costs will abide the event.

T. A. P. *Case remanded.*

NOTES.

[*See* also (1880) 12 All., 313; (1890) 17 Cal., 711: (1906) A. W. N., 157; (1906) A.W.N., 158; (1909) 32 Mad., 429.]

[610] CRIMINAL APPEAL.

The 7th May, 1889.

PRESENT :

MR. JUSTICE TREVELYAN AND MR. JUSTICE HILL.

Bikao Khan and others............Appellants

versus

The Queen-Empress............Respondent.*

Criminal Procedure Code (Act X of 1882), ss. 161, 172, 211—Statements of witnesses recorded by Police Officers investigating under chap. XIV of the Criminal Procedure Code, Right of accused to call for and inspect—Police Diaries.

Statements of witnesses recorded by a Police officer while making an investigation under s. 161 of the Criminal Procedure Code, form no portion of the Police Diaries referred to in s. 172†, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon.

IN this case five persons were committed to the Durbhangah Sessions by the Joint-Magistrate of that district to take their trial on charges framed under ss. 302, 147 and 149 of the Indian Penal Code. On the commencement of the trial in the Sessions Court, the Counsel for the accused applied to the Judge before the opening speech of the Government Pleader, to call for the statements of the witnesses for the prosecution recorded by the investigating Police officer under s. 161 of the Criminal Procedure Code, on the ground that these statements formed no part of the diary referred to in s. 172 of the Code, and that the accused were entitled to see them. Counsel stated that these statements were then in the custody of the District Superintendent of Police who might be subpœnaed to produce them without delay, so that the accused might be in a position to cross-examine the witnesses for the prosecution regarding the statements made by them to the Police. The Sessions Judge disallowed the application, on the ground that under s. 211 of the Criminal Procedure Code, the application for the production of these documents ought to have been made before the committing officer, so as to

* Criminal Appeal No. 173 of 1889, against the order passed by A. C. Brett, Esq., Sessions Judge of Durbhangah, dated the 26th February, 1889.

† [Sec. 172 :—Every Police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

Diary of proceedings in investigation.

Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police officer, the provisions of the Indian Evidence Act, 1872, s. 161 or s. 145, as the case may be, shall apply.]

entitle the accused to call for the papers as of right. The Police officer, who had recorded the statements in question, subseqently brought them into Court of his own motion, and held them in **[611]** his hands during his examination as a witness. The Counsel for the accused then applied to the Judge to compel the production of the papers, then in Court, and to enable him to see them. This application was also refused by the Judge, who eventually convicted four out of five of the accused persons under ss. 304 and 149. As regards the non-production of the statements, the Sessions Judge made the following observations in his judgment :—

" In conclusion I would wish to make some remarks on an incident in the case before even the *Government Pleader* had commenced his opening address. I was asked by Mr. *Ghose* to order the production, as exhibits in the case, of the statements recorded by the Police under s. 161, Criminal Procedure Code. Mr. *Ghose* said he had with him a copy of an unreported judgment of the Calcutta High Court laying down that he was entitled to call for these documents. The point is a new one. But I am not concerned to discuss the question as to whether these papers can be treated as evidence, and whether, therefore, the defence (or the prosecution for the matter of that) can enforce their production or produce them. The question is not free from difficulty. I disposed of the application on another ground. Under s. 211 of the Criminal Procedure Code, as soon as the committing officer has framed the charge, the accused has to apply for coercive process. I hold that he is not entitled, as a matter of right, to ask the Court of Session for the issue of such process. It may be said that I should, as a matter of equitable discretion have ordered their production, as this could be obtained without much delay. I do not think so. But even if I am wrong, no harm has been done, for I have read the statements, which I have had translated, and there is practically no difference between what the persons examined stated, and what the witnesses have deposed before both Courts. The papers were, in fact, in Court on the second day of the trial ; and, indeed, Exhibit S. B. is an integral portion of them. I therefore hold (1) that the defence was not entitled to enforce their production ; (2) that it was a proper exercise of my discretion to refuse to order their production ; (3) that my refusal has in no way damnified the defence."

The prisoners appealed to the High Court against the conviction.

[612] Mr. *Woodroffe*, Mr. *M. M. Ghose*, Mr. *M. P. Gasper* and Baboo *Saroda Churn Mitter* for the Appellants.

The Standing Counsel (Mr. *Philips*) and Baboo *Ram Churn Mitter* for the Crown.

Mr. *Woodroffe* contended, among other matters, that there ought at least to be a new trial as the judge had improperly disallowed Mr *Ghose's* application, calling for the statements, and had further prevented him from reading them when they were actually before the Court. Statements recorded under s. 161 are not privileged and form no portion of the diary referred to in s. 172. The latter is to contain a record of the proceedings of the Police and their movements, together with expressions of opinions and private matters which the Legislature probably intended should not be placed at the disposal of the parties But it could never have been intended that the accused should be debarred from calling for the statements made by the witnesses for purposes of cross-examination, especially as under the new Code a witness is liable to be prosecuted for perjury for false statements made before the Police. This question was fully argued recently before MITTER and MACPHERSON, JJ., in the

case of *Mahomed Ali Hadji* v. *The Queen-Empress* * (Criminal Motion 422 of 1888 decided on the 30th January 1889), and those learned Judges have held that the accused were entitled to have these statements produced, and that it was an error on the part of the Magistrate not [613] to have compelled

*PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE W. MACPHERSON.

In the matter of Mahomed Ali Hadji and others............Petitioners

versus

The Queen-Empress............Opposite-party.

Mr. *M. M. Ghose* and Baboo *Jogendro Nath Bose* for the Petitioner.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

The facts of the case are sufficiently stated in the **judgment** of the High Court (MITTER and MACPHERSON, JJ.) which was as follows :—

Mitter, J.—The petitioners, Mahomed Ali Hadji, Nabi Baksh, and Bazra Sonar, were charged in the Deputy Magistrate's Court of Gaibanda with being members of an unlawful assembly, on the 25th day of June last, armed with deadly weapons, and that by such unlawful assembly, force or violence was used in the prosecution of a common object : the common object being described in the charge-sheet as the forcible dispossession of Budrunnissa's party from the Sultanpore cutcherry. That is, they were charged under the first count with rioting and being armed with deadly weapons under s. 148 of the Indian Penal Code. In the second count, they were charged under s. 326, coupled with s. 149, of the Indian Penal Code, it being stated that, in the prosecution of the common object of that unlawful assembly, grievous hurt was inflicted by some of the members of that assembly. The facts, as found by the Deputy Magistrate, are as follows :—One Kheraj Ali Chowdhry was the owner of Sultanpore estate, and had his family dwelling-house in the village of that name. He had also a cutcherry-baree in it. He died some time in the month of Kartick 1294, and the death of his widow Asmutunnissa followed within a few days. Moazum Hossein Chowdhry of Shibganj, a brother of Asmutunnissa, claimed the whole estate left by Kheraj Ali, on the ground that it had been transferred by Kheraj Ali in his lifetime to his wife Asmutunnissa. Upon this allegation, Moazum Hossein had obtained a certificate under Act XXVII of 1860 to collect the debts due to the estate of Asmutunnissa. With the assistance of two leading ryots in the village of Sultanpore, viz., Kedar Ali Mir, a witness examined on behalf of the prosecution, and Noimudeen Pundit, Moazum Hossein succeeded in obtaining possession of Sultanpore with the cutcherry-baree in it. But in Bysack last, these two men went over to the party of one Budrunnissa. Budrunnissa is the paternal aunt of Kheraj Ali. She and others denied the allegation of transfer of his whole estate by Kheraj Ali to his wife, and claimed either the whole or a portion of it as heirs-at-law of Kheraj Ali. As usual, in these cases, both parties struggled to maintain possession by force. The Deputy Magistrate found that the possession by Moazum Hossein of the cutcherry at Sultanpore, with the assistance of the two leading ryots mentioned above, was maintained up to Bysack last, but on these two men going over to the other side that possession was lost and Budrunnissa's servants occupied the cutcherry-baree from that time and were in occupation of it at the time when the riot took place at the cutcherry-baree ; that on the date mentioned in the charge, viz., on the 25th day of June last, a body of latials headed by the petitioners came on behalf of Moazum Hossein to the cutcherry-baree, attacked the men occupying it, and inflicted injuries with spears on four persons, Hyat Mahomed, Boli Sheikh, Kedar, and Daleh, servants of Budrunnissa. This attack was made in the latter end of the night on that date, but Budrunnissa's party soon collected men in sufficient numbers to repel the attack, and the assailants were pursued up to another cutcherry-baree in a village called Mujlispore, distant about three or four miles from Sultanpore, in which a cutcherry-baree had been erected by Moazum Hossein sometime about the month of Bysack, when his people were ejected from the cutcherry-baree at Sultanpore.

Upon these facts, found by the Deputy Magistrate, the petitioners before us have been convicted of the offence of rioting, and of the offence of committing simple hurt, it being not proved that the injuries inflicted amounted to grievous hurt. It may be mentioned here that some of the men forming the attacking party were also wounded during the riot, and one of them has since died in hospital.

Each of these petitioners has been sentenced to two years' rigorous imprisonment. The witnesses for the prosecution were examined on the 5th and 6th of July last. On this

their production. The Police authorities themselves have recognised the distinction contended for, and have laid down in Circular No. 16, of the 28th July 1883, to all District Superintendents of Police, that statements recorded under s. 161, Criminal Procedure Code, are different from the diary.

[**Trevelyan, J.**—The Police circular need not be referred to in order to explain the law. It is no authority. But we are satisfied that the law is clear on the subject, and that you were entitled to call for the statements, provided you asked for them in proper time.]

The Sessions Judge is quite mistaken in supposing that s. 211 of the Criminal Procedure Code has any application. Even if that section applied, as a matter of sound discretion, the Judge ought to have granted Mr. Ghose's application.

---

last mentioned date, the two charges mentioned above were framed against the petitioners. The witnesses were fully cross-examined by the pleader engaged on behalf of the petitioners before these charges were framed. The case was then fixed for trial on the 17th of July; but it was postponed in consequence of Counsel from Calcutta, who was engaged on behalf of the petitioners, not arriving on that date. It was taken up on the following day, viz., on the 18th. In the meantime, certain witnesses had been cited by the petitioners to establish their defence, but none of the witnesses for the prosecution had been cited to be re-called.

On the 18th of July, when the case was taken up, the Counsel for the petitioners put in the witness-box the Inspector of Police of Sadullapore, who was conducting the prosecution in this case, and it appears from the drift of the examination that the Counsel intended to establish that four of the witnesses examined on behalf of the prosecution, viz., Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, who had received injuries in the course of the riot, had given evidence before the Police officer who investigated the case under s. 161 of the Criminal Procedure Code, not agreeing with the version of the story told by them at the trial.

It appears from the examination of the aforesaid Inspector that these four men had at first denied that they were sleeping in the cutcherry on the night when the riot took place, but that they subsequently admitted that fact on being further questioned by the investigating Police officer. Upon some points the Inspector, from his memory, could not answer the questions put to him by the Counsel for the defence regarding the statements made by these witnesses. Thereupon an oral application was made by the Counsel for the production of the diaries kept by the investigating officer. A note made by the Court of this application, and the order made thereupon is to the following effect:—"Mr. *Gregory* asks the Court to require the Inspector to produce the diaries, and as I find the witness has admitted almost everything required by the defence, and because Police diaries cannot be used as evidence, nor can they be called for by the accused, the Court declines to call for the diaries at the instance of the Counsel for the defence" This evidence of the Inspector was taken on the 18th July. There were some more witnesses examined on behalf of the defence on the next day, and the trial was concluded, but judgment was reserved and not delivered till the 27th of July. On the 20th of July, we find that an application was made on behalf of the petitioner before us, embodying the purport of the oral application made by Counsel on the 18th of July referred to above. In this application, it was stated that the four witnesses, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, had made statements to the Police Inspector contrary to those which had been made by them in their depositions in Court, and that to a certain extent this fact had been established by the evidence of the Police Inspector; but it was not established to the full extent, and therefore they prayed that that portion of the Police diary in which the statements of these four witnesses had been recorded be sent for, and then after inspection of the said portion of the diaries, if it be considered proper to send for any witnesses, such witnesses might be sent for. An appeal was preferred to the Sessions Judge against the conviction and sentence passed by the Deputy Magistrate. In the petition of appeal, no point was made regarding the refusal of the Deputy Magistrate to send for the Police diary mentioned above, but it has been stated to us by Mr. *Gregory*, who appeared both in the Deputy Magistrate's Court as well as in the Court of the Sessions Judge, that this point was argued by him before the Sessions Judge. We do not find that it is dealt with by the Sessions Judge in the judgment which was recorded by him. This, however, is the principal point which has been taken before us in support of the rule which was issued in this case. In fact it forms the first and second grounds taken in the petition presented to this Court. The first ground is to the following effect:—"That the Deputy Magistrate ought to have compelled the production of the statements of the witnesses for the prosecution as recorded

[614] [**Trevelyan, J.**—As at present advised we are with you on this point.]

Mr. *Woodroffe* then proceeded to argue the case on its merits.

The *Standing Counsel*, in support of the conviction, conceded that the accused probably had a right to call for the papers, and look at them, but they were not prejudiced as the Judge had himself looked to them, and given the accused the full benefit of their contents.

by the Sub-Inspector and the Inspector of Police under s. 161 of the Criminal Procedure Code. Such statements are not governed by the provisions of s. 172 of the Criminal Procedure Code, and were therefore not privileged. These statements were most material, and their production would have enabled your petitioners' Counsel to show that the witnesses were not reliable. Your petitioners' Counsel had strongly complained before the Appellate Court of the non-production of the said statements." The second ground is:—"That the petition, presented by your petitioners, clearly shows that the papers wanted were the statements of the witnesses and not the diaries, though the word 'diaries' was inaccurately used, because the Inspector had used the expression. The Deputy Magistrate ought to have called for those papers." The first paragraph, it seems to us, does not accurately state what happened; the first paragraph says that an application was made for the statements of the witnesses for the prosecution, as recorded by the Inspector and Sub-Inspector of Police, under s. 161 of the Criminal Procedure Code. The fact is that what was wanted was not the statements of all the witnesses, but only the statements of the four mentioned above, viz., Hyat Mahomed, Boli Sheikh, Kader, and Daleh. It may be conceded that the document that was asked to be produced was misdescribed in the petition, and also in the Judge's notes as "diaries." It appears that, from ss. 161 and 172 of the Criminal Procedure Code, what was wanted was not properly described as "diaries." Under s. 172, a diary is a privileged document, and neither of the parties has any right to ask for its production; but although in the application and in the note the document in question is described as a diary, it is sufficiently clear that what was wanted was the production of the statements, which in this case seem to have been reduced to writing, of the four witnesses mentioned above, which statements were taken by the investigating Police officer under s. 161 of the Criminal Procedure Code. It may also be conceded in favour of the petitioners that these statements could have been, under certain conditions, used as evidence in the case. For instance, they might have been used for the purpose of contradicting the witnesses mentioned above, or of contradicting the Inspector of Police under s. 145 of the Evidence Act. That being so, the Counsel for the petitioner was entitled to have an order from the Deputy Magistrate for the production of these statements. It is an error on his part to have refused the application, but it does not follow that because there is this error his judgment should be set aside. On the other hand, both under s. 537 of the Criminal Procedure Code as well as s. 167 of the Evidence Act, we cannot reverse or alter a judgment unless we are satisfied that the error in question has caused a failure of justice. Mr. *Ghose* was asked to point out in what way this error has caused a failure of justice, and he contended that, if the statements had been sent for, the petitioner would have been in a position to establish that the cutcherry-baree in Sultanpore was really in the possession of Moazum Hossein, and not in the possession of Budrunnissa; and if it was established that the cutcherry was in the possession of Moazum Hossein, then the charge would have entirely fallen to the ground because the common object of the unlawful assembly stated in that document was the forcible taking possession of the cutcherry. Now we have referred to the judgment of the Deputy Magistrate, and we are of opinion that it is not based, as regards the question of possession upon any part of the depositions of the four witnesses mentioned above, viz., Hyat Mahomed, Boli Sheikh, Kedar, and Daleh. His finding upon the question of possession is mainly based, ***firstly***, on the evidence of one of the two leading ryots, viz., Kedar Ali, and, ***secondly***, upon the circumstance that, about the time that Moazum Hossein's servants were alleged to have been ejected from the cutcherry of Sultanpore, they erected another cutcherry-baree in Mujlispore, within three or four miles from Sultanpore. With reference to this second ground, the Deputy Magistrate says that Mujlispore was a very small village, and if Moazum Hossein had been in possession of the cutcherry at Sultanpore, there would have been no necessity for erecting a new cutcherry at Mujlispore. In fact the judgment of the Deputy Magistrate was not founded on the evidence of the four witnesses, whose statements before the investigating Police officer was asked to be sent for. We are therefore not satisfied that the omission to send for these documents has in any way caused a failure of justice.

There was only one other point argued before us, viz., that the sentence in this case is too severe. We have considered this point, and we are of opinion that the sentence that has

[615] The **Judgment** of the High Court (TREVELYAN and HILL, JJ.) was as follows :—

In this case the prisoners have been convicted by the Sessions Judge of Durbhangah, agreeing with one of the assessors, of offences under s. 304, read with s. 149, and under s. 147 of the Penal Code.

They have appealed to this Court, and Counsel on their behalf has urged that the evidence does not justify their conviction, and that even if the evidence, as given, would justify a conviction, the accused have been so prejudiced by the action of the Judge in excluding evidence which ought to have been admitted, that they are entitled to a new trial.

[616] We consider that the Judge has wrongly excluded evidence which he ought to have admitted.

A Police officer in this case had, under the provisions of s. 161 of the Criminal Procedure Code, examined persons who were afterwards called as witnesses.

At the Sessions trial this Police officer was in Court, and had with him the statements which he had taken down.

There can be no doubt that these statements would be admissible in evidence. They are not a portion of the diary, and are not protected by any enactment.

[617] The Judge refused to allow them to be used on the ground that the accused had not asked the committing Magistrate to allow them to be produced.

It appears from an affidavit, which has been used before us, that when the Sub-Inspector, who made the investigation, was being cross-examined, the Counsel for the accused asked the Judge to hand up the statements taken down by the witness to enable him to answer questions as to statements made by some of the persons who were called as witnesses for the prosecution. This the Judge refused to do.

[618] We think that the Judge ought to have permitted Counsel to put the statements to the witness. There is no doubt that an accused person is entitled to call as his witness any person who is in Court, whether he has summoned him or not (see s. 291 of the Criminal Procedure Code), and there is, we think, equally no doubt that an accused may, so far as the law of evidence permits him to do so, make use of, as evidence, any document which is in Court at the trial. Before, however, we could order a new trial on [619] this ground, we would have to be satisfied that injustice had been done to the accused by the exclusion of this evidence.

If it had appeared that there was a material difference between the statements made by the witnesses to the Sub-Inspector, and their statements made in Court, it would have been difficult to say that the accused had not been prejudiced by the Judge's decision on this question.

The Judge says that he has read the statements, and that there is practically no difference between what the persons examined stated and what the witnesses have deposed before both Courts. We see no reason to doubt the

been passed upon the petitioners, having regard to the nature of the offence established against them, is not too severe. We therefore discharge the rule.

Macpherson, J.—I agree. I further think that the statements called for would have been of no practical use to the petitioners unless they were in a position to summon the witnesses for the prosecution, and cross-examine them with reference to statements which they had made to the Police.

The statements were called for at a very late stage, when the petitioners were not entitled to have the prosecution witnesses summoned for the purpose of cross-examination.

correctness of the Judge's statement, and if the legal advisers of the accused had seen any real ground for disputing it, they would have endeavoured to obtain the production of these statements, so that they might have been considered at the hearing of the appeal.

Taking all the circumstances into consideration, we do not think that the omission of the Judge to admit this evidence would justify us in ordering a new trial. On the mere speculation that these statements would disagree, and in face of the Judge's statement that they do not materially disagree, we could not order a new trial.

[Their Lordships then proceeded to determine the case on its merits, and ended in upholding the conviction and reducing some of the sentences.]

H. T. H. *Conviction upheld.*

NOTES.

[*See* also 19 All., 390 ; 20 Mad., 189 ; 33 Cal., 1023 : 10 C.W.N., 600 ; and the amendment in the Cr.P.C., 1898, sec. 162, by which the corresponding provisions in the Codes previous to that of 1882 were restored.]

[16 Cal. 619]

APPELLATE CIVIL.

The 16th January, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

Kristo Ramani Dassee............Appellant

versus

Kedar Nath Chakravarti and other...........Respondents.*

Set-off- Civil Procedure Code (Act XIV of 1882), ss. 233, 213, 246 —Execution of assigned decree- Set-off against assigned decree partly executed.

A. B. had obtained a decree against *K.* and *T.* After the decree had been partially satisfied, *A. B.* assigned it to *D.* Prior to the date of the assignment, *K.* and *T.* had instituted a suit against *A. B.* and *D.*, and ultimately obtained a decree against both of them.

[620] *Held*, that *K.* and *T.* were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to *D.*

THE appellant, the respondents, and one Anisul Barkat appear to have been co-sharers in a certain putni-tenure. On the 13th June 1883, Anisul Barkat obtained a decree for rent for about Rs. 9,000 against the respondents Kedar Nath Chakravarti and Troylucko Nath Chakravarti. After the decree had been partially satisfied, on the 29th June 1886, Anisul Barkat assigned it to the appellant Kristo Ramani Dassee, a sum of Rs. 5,118-12-3 being then due under it. Meanwhile, on the 3rd February 1885, that is, prior to the date of the assignment, the respondents Kedar Nath and Troylucko Nath instituted a suit against both Anisul Barkat and Kristo Ramani Dassee, the assignor and assignee, for possession and mesne profits in respect of another share in the same putni, and obtained a decree against both of them on the 23rd March 1887.

* Appeal from Order No. 381 against the order of Baboo Gopal Chunder Bose, Subordinate Judge of Bhagulpore, dated the 25th August 1888.

Under this decree; on the 16th July 1888, mesne profits, as against the assignor Anisul Barkat, were assessed at Rs. 5,187-13-8. While the respondents' suit was pending, Kristo Ramani attempted to execute the decree which had been assigned to her, but was resisted by them. Ultimately she established her right to execute the decree, and also obtained a decree for costs in those proceedings amounting to Rs. 60-3-3. Kristo Ramani thus held decrees against the respondents, Kedar Nath and Troylucko Nath, for an aggregate sum of Rs. 5,178-15-6, in execution of which she attached the same share in the putni, in respect of which they had obtained a decree, and the property was advertised for sale on the 16th July 1888. On that date, as already stated, the respondents had obtained their decree for mesne profits, amounting to Rs. 5,187-13-8, as against Anisul Barkat. As this decree had been obtained in a different Court, the respondents applied for a postponement of the sale in order to enable them to have their decree transferred to the Court which was executing Kristo Ramani's decree. That was done, and the respondents having pleaded their decree by way of set-off, the lower Court allowed the plea.

From this order Kristo Ramani appealed to the High Court.

[621] Mr. *J. T. Woodroffe*, Baboo *Troylucko Nath Mitter*, and Baboo *Saroda Charan Mitter* for the Appellant.

Baboo *Navadip Chunder Roy* for the Respondents.

The **Judgment** of the Court (PIGOT and BEVERLEY, JJ.,) after setting out the facts, proceeded as follows :—

The question raised is shortly this : Whether or not the decree obtained by the respondents against the assignor in a suit which was pending at the date of the assignment, and which had ripened into a decree before the assigned decree was fully executed, can be set-off against the unexecuted portion of the assigned decree. The question for decision depends upon the construction of three sections of the Civil Procedure Code ; ss. 246, 243 and 233. By s. 246 a set-off of one decree as against another is allowed. By explanation 2 of that section, it is allowed "where either party is an assignee of one of the decrees, and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself." It was for some time a subject of controversy in this Court, whether in the case of decrees, both of which were in existence but not yet set-off one against the other, upon the assignment of one of them, the right to set-off still subsisted as against the assignee ; and after some controversy that question was finally decided in favour of the right to set-off. The case now before us opens a further question, inasmuch as at the date of the assignment of the decree now held by the appellant, the decree held by the respondents had not been made, although their suit had been filed. Section 243 provides that, " if a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it think fit) stay execution of the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided. In s. 233, it is enacted that " every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder." When the appellant took an assignment of this decree, she must have known perfectly well (for it is admitted that she had full notice) of the existence of the suit against herself and her assignor, her co-sharer in the putni.

[622] A right to set-off the amount of one decree against another was repeatedly referred to, as an equity affecting the latter decree, in the decisions of this Court prior to the Code of 1877, which for the first time enacted section 233. In whatever mode that equitable right could be made to operate as

against the holder of the decree, we think it must be allowed to operate against his assignee with notice of the existence of the pending suit. It is clear that, apart from the assignment, the right of set-off as to the unexecuted part of the first decree would exist in the present case under s. 246 against the assignor; and for the reason just stated it must equally exist against the assignee.

We therefore dismiss both appeals with costs. We think that we ought not to be illiberal in assessing the costs in this case, which is an exceedingly oppressive attempt on the part of the appellant; and for that reason, and the importance of the matter, we allow five gold mohurs as the hearing fee in each appeal.

C. D. C. *Appeal dismissed.*

NOTES.

[*See* also (1903) 26 Mad., 428; (1907) 31 Mad., 33; (1909) 32 Mad., 336.]

[16 Cal. 622]

APPELLATE CIVIL.

The 16th April, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE TREVELYAN.

Khatu Bibi ....Defendant No. 2

versus

Madhuram Barsick............Plaintiffs.*

Transfer of Property Act (IV of 1882), s. 54—Transfer of immoveable property by unregistered deed—Deed of which registration is optional—Suit by purchaser for possession when vendor is out of possession.

Section 54† of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated, so as to confer a valid title.

* Appeal from Appellate Decree No. 958 of 1888, against the decree of W. H. M. Gun, Esq., Judge of Noakhali, dated the 13th of February 1888, modifying the decree of Baboo Srigopal Chatterjee, Munsif of Sundip, dated the 27th of June 1887.

† [Sec. 54.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. ("Sale" defined.)

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. (Sale how made.)

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. (Contract for sale.)

It does not, of itself, create any interest in or charge on such property.]

Where the plaintiff bought from the heirs of *M.*, who were out of possession, their right, title and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than Rs. 100) not being compulsory · *Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on [623] the plaintiff, though not made by registered deed or by delivery of the property.

The *dictum* of GARTH, C.J., in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (I.L.R., 8 Cal., 597, at p. 612) dissented from.

THE facts necessary for the purpose of this report were that the plaintiff sought to recover a share of certain land, after establishment of his *howla* title to it; that the *howla* originally belonged to two persons, Pan Gazi and Mahabat Ali, who died in 1283 (1876) and 1284 (1877), respectively, leaving as their heirs the defendants Nos. 2 to 8; that Khatu Bibi, the defendant No. 2, was the widow of Pan Gazi, and she claimed the whole of the property in dispute, but the Lower Appellate Court found that she was entitled only to an eight-anna share which her husband had conveyed to her in lieu of dower by a deed of sale of 30th Assin 1283 (15th October 1876); that the defendants Nos. 1 and 2 had taken possession of the whole of the property after dispossessing the other defendants; and that the other defendants or some of them who had acquired the interest of the others had, while out of possession, sold the remaining eight-anna share (that of Mahabat Ali, whose heirs they were,) to the plaintiff by a deed of sale, dated 6th Choitro 1291 (18th March 1885). This deed of sale was unregistered, the registration of it, as the value of the property was less than Rs. 100, being optional.

The defendants Nos. 1 and 2 were the only defendants who really defended the suit, and by the findings of the lower Courts the defendant No. 2, Khatu Bibi, was alone adversely affected. She consequently appealed to the High Court from the decree of the Lower Appellate Court, which gave the plaintiff an eight-anna share of the property.

Baboo *Jaggat Chunder Banerjee* and Baboo *Debendro Mohun Sen* for the Appellant.

Baboo *Okhil Chunder Sen* for the Respondent.

For the appellant s. 54 of the Transfer of Property Act was referred to, as showing that the transfer of immoveable property must be made either by a registered instrument or by [624] delivery of possession; and that under an unregistered deed, although registration was not compulsory, the plaintiff could not obtain a valid title, and the dictum of GARTH, C. J., in the case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (I. L. R., 8 Cal., 597, at p. 612) was referred to in support of this contention.

The **Judgment** of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

The District Judge in appeal has found that plaintiff has bought the right, title and interest which Mahabat Ali had in an eight-anna share of a certain *howla*. This was conveyed to the plaintiff by an unregistered document, registration not being compulsory within the terms of s. 17 of the Registration Act, because the value of the property conveyed was less than Rs. 100. The vendors were out of possession when the sale took place, and the plaintiff seeks to obtain possession on this title as against certain defendants who have been found to have no title at all.

The question raised before us on second appeal is whether, having regard to the terms of s. 54, clause 3, of the Transfer of Property Act, the sale to the plaintiff has conferred any valid title, inasmuch as it has not been completed

either by a registered document or by delivery of possession of the property sold. As an authority for this, we have been referred to some observations made by the late Chief Justice, Sir R. GARTH, in the case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (I. L. R., 8 Cal., 597, at p. 612). These observations were only *obiter dicta* without any argument at the bar, and are therefore not binding on us, but, as coming from so high an authority, are entitled to every respect and consideration.

The conveyance on which the plaintiff's title depends is one, registration of which, under s. 18 of the Registration Act 1877, is not compulsory, but optional with the parties.

There is no question, in this case, of competition between this document and another executed by the same person and duly registered, so that s. 50 of the Registration Act does not apply. The conveyance therefore is a valid document, receivable in evidence of the transaction affecting the immoveable property [623] with which it professes to deal, and is not affected by the Registration Act. It would convey a good title under which the vendee could sue to obtain the rights conveyed to him as against trespassers who may have unlawfully dispossessed his vendor unless such title be restricted by some special law.

The Transfer of Property Act, s. 54, defines a sale of immoveable property, and declares how it may be made. A sale is defined to be " a transfer of ownership in exchange for a price paid or promised, or part paid and part promised."

In declaring how transfers may be made, the section draws a distinction between transfers of tangible immoveable property of the value of Rs. 100 and upwards, and of the value of less than Rs. 100. Of the former it declares that transfer " can be made only by a registered instrument ;" of the latter it declares that " transfer may be made either by a registered instrument or by delivery of the property." But the law does not state that such transfer can be made only by one of these means. Nor is it anywhere provided that a person out of possession shall not sell to another his right, title and interest in any property, nor is it declared that in such a case the transfer can be made only through a registered instrument. The actual rights may, in our opinion, be conveyed through an unregistered instrument, for that, by the Registration Act, is receivable in evidence of the transaction, because the value of the property conveyed is less than Rs. 100. It surely could never have been intended that one who has been found to have no title as the defendant appellant, should on such a plea succeed as against the purchaser of the right, title and interest of the lawful owner who has been unlawfully put out of possession. Such an owner cannot complete the transfer of his property by delivery of possession. Was it necessary that the conveyance should have been by a registered instrument so as to confer a valid title? We think not.

Section 18 of the Registration Act expressly declares that an instrument, such as that before us, *may* be registered as distinguished from instruments specified in s. 17, which the law declares *shall* be registered.

[626] Section 49 declares that " no document required by s. 17 to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered under the provisions of the Act," but there is no prohibition in respect to other documents. It is only when a registered document comes into competition with an unregistered document of the same nature, and relating to the same property, that the former takes effect, although registration of the latter may have been optional and not compulsory. We apprehend that it could not have been the intention of the Legislature to allow the law, as

expressed in the Registration Act, to remain unrepealed and indirectly to nullify the effect that it has always received by the enactment of s. 54 of the Transfer of Property Act, which has been quoted.

We are not inclined to adopt such a rigid construction of the law as that pressed on us and held by the late Chief Justice, Sir R. GARTH, when it would seem that another construction would reconcile the Registration Act with the Transfer of Property Act, so as to prevent what, in this case, would amount to a denial of justice. If such an alteration of the law, amounting to a confiscation of previously existing rights, were contemplated, we apprehend that it would have been expressed in other and clearer terms.

We are therefore of opinion that s. 54, clause 3, of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property sold, and of small value, should be made only under one of these conditions so as to confer a valid title. In clause (ii) the law is clear that a transfer of immoveable property of a particular description *can be made* only by a registered instrument, but clause 3 uses the expression *may be made.* It does not declare that it may be made *only* and thus repeat an expression first used in the preceding clause. We therefore hold that, on his unregistered conveyance, the plaintiff is entitled to obtain possession of an eight-anna share, and we dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[This case was **overruled in (1892) 19 Cal., 623, F.B.**]

[627] PRIVY COUNCIL

The 21st November and 19th December, 1888.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH AND MR. STEPHEN WOULFE FLANAGAN.

Kali Dutt Jha and others ....Defendants

versus

Abdul Ali and another...........Plaintiffs.

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Guardian—Power of guardians—Sale by guardian of property to which ward's title was in dispute, and for the benefit of the latter.

By the Mahomedan law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover

having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was.

Although the sale deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it was one beneficial to them.

APPEAL from a decree (8th February 1884) of the High Court, reversing a decree (17th January 1882) of the Subordinate Judge of Mozufferpore.

The two plaintiffs, now respondents, were the son and daughter of Bibi Udulunnissa, who died on the 26th October 1861, leaving them, with her husband, their father Sheikh Riazuddin Hossein, her heirs. The share of the latter in her estate was one-fourth, and the residue formed the children's shares. Riazuddin, who in his wife's lifetime had been managing her estate, continued to manage it as to the children's interests after her death, the son being little more than two years old, and the daughter about one year, and he being their natural guardian according to Mahomedan law.

[628] The plaintiffs, of whom the first attained full age on 3rd May 1880, and the second was still a minor suing by her maternal grandmother, claimed to obtain possession of a one-anna share in a taluk named Wari in Zillah Durbhunga, and to have set aside, as to the one-anna share, a sale made by their father Riazuddin (the kobala or sale deed having been dated 7th May 1862), of two annas out of nine annas of the whole sixteen of taluk Wari, for Rs. 6,235 (the price of the one-anna share being half that amount). The sale was to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as shareholding proprietors and inhabitants of taluk Wari. They were defendants in this suit, their representatives and survivors being now appellants.

Taluk Wari, resumed as invaild lakhiraj in 1840, had from that time down to its final settlement by the Collector in 1862, been the subject of disputes, as to what persons were entitled to settlement; whether entitled as *maliks*, among whom were the predecessors of the Hindu respondents, the owners of neighbouring mouzahs, or entitled as *menhaidars* (persons holding at a reduced assessment), among whom were certain Mahomedans.

The taluk, including a share in it bought by Udulunnissa amounting to four-and-a-half annas (she having purchased jointly with her brother nine annas, and Riazuddin her husband holding *benami* for her), became the subject of various dealings. These are set forth in their Lordships' judgment, which also contains all the relevant facts relating to the deed of sale of 7th May 1862 executed by Riazuddin.

The plaint stated that the consideration of the sale deed, so far as regarded the one-anna share, was Rs. 3,117, which sum was alleged to have been appropriated by Riazuddin to his own use. The ground on which the sale was impeached was that Riazuddin had not obtained a certificate from the Civil Court to act as guardian, and that the sale was not made to pay off any debt, as alleged in the deed of sale, or for the plaintiffs' benefit.

Besides other grounds of defence, the following was relied upon, viz., that the defendants or their predecessors in estate had acquired by purchase in 1856, from one Sufdar Hossein, **[629]** the right to a certain share in taluk Wari; and by virtue of that right, and also of a right of pre-emption by reason of vicinage, as regarded other interests sold by Sufdar Hossein to the plaintiffs' great-grandfather Jaffer Ali in 1856 and 1857, had instituted five several suits, in which they, the defendants, claimed nine annas of the taluk, and were also claiming in a resumption

suit, then, and since 1840, pending before the Collector of the district, the right to settlement with them of the interest which they had so purchased; that the sale to them by the plaintiffs' father was made for the purpose of putting an end to litigation, and that the consideration was applied to paying off a debt due from the plaintiffs', or their mother's estate, to a banking firm styled "Babu Gopal Das and Babu Bunsi Lal Das." And they further alleged that the suit was brought by the plaintiffs in collusion with their father, and contended that, even assuming that the plaintiffs' father had no right to sell their interest, his own interest in taluk Wari equalled or exceeded that which he had professed to sell, and that the plaintiffs had no title to what they claimed.

The issues raised the following questions, viz.: (1) whether the plaintiffs' father could sell the disputed property without having obtained a guardianship certificate from the District Judge; (2) whether the sale deed of 7th May 1862 was valid, either on account of benefit to the plaintiffs or because the father's share in his wife's property covered the interest sold; (3) whether the plaintiffs were benefited by the purchase money.

The Subordinate Judge dismissed the suit on the grounds that the plaintiffs' father, as their natural guardian, could without a certificate sell the plaintiffs' properties "under legal necessities;" that prior to the execution of the deed of sale in question, the five pre-emption suits alleged by the defendants were pending, and affected the interest of the plaintiffs' mother in taluk Wari, and the sale was effected *bonâ fide* to compromise those suits, and the consideration was paid to the bankers, to an account which stood in their books in the name of Wasimunnissa, the plaintiffs' grandmother, but which was in fact the joint account of her and her daughter Udulun-**[630]** nissa, the plaintiffs' mother, and the plaintiffs had the benefit of that payment; that the plaintiffs' father Riazuddin, who was by Mahomedan law entitled to one-fourth of his wife's interest in taluk Wari (*i. e.*, to one anna and two-and-a-half gundas), had not, as alleged by the plaintiffs, relinquished that share; that the present suit had been brought in collusion with him, and that he had evaded the process of the Court to obtain his appearance and evidence.

A Division Bench (MITTER and MACLEAN, JJ.) reversed the judgment of the first Court, being of opinion that it was not proved that any money was, prior to the sale in suit, due from the plaintiffs' estate to the bankers, and that there was no account between the latter and the plaintiffs' estate; that no benefit had resulted to the plaintiffs from the compromise of the pre-emption suits, which appeared to have been brought against their mother and another, after her death, and which could hardly have been successful; and that therefore the plaintiffs had not benefited by the sale of their property by their father and guardian. And the Division Bench, differing therein also from the first Court, were of opinion that the evidence of the plaintiffs, and especially the language of the deed of sale in question, proved that Riazuddin had relinquished his interest in his deceased wife's estate, in consideration of her dower unpaid by him.

A decree in favour of the plaintiffs was accordingly made, and the defendants thereupon appealed to Her Majesty in Council.

Mr. *R. V. Doyne* appeared for the Appellants.

The Respondents did not appear.

For the appellants, it was contended by Mr. *Doyne* that the first Court had rightly held that the sale had been made by Riazuddin as guardian of the minors for their benefit. That benefit arose either from the liquidation of debts for which their mother's estate was liable, or from the pending litigation being brought to an end by the sale, and its being thereby rendered practicable

for the Collector to effect a settlement of three-and-a-half annas of taluk Wari. The High Court's judgment was accordingly wrong, and that of the first Court should be restored. [631] Again, the evidence including that afforded by the language of the kobala of 1862, had been wrongly treated by the High Court as proof of Riazuddin's alleged renunciation of his share of his wife's estate, in satisfaction of her claim for unpaid dower. That renunciation had been by no means established. Moreover, in regard to the whole case, if the sale should appear on other grounds to have been made without title (though it was submitted that it was not so), it should nevertheless be considered that Riazuddin was at the time of the sale entitled to a share equal to, if not larger than, one anna of Wari, which share therefore passed to the defendants, so that this suit could not be decreed.

Their Lordships' **Judgment** was, on a subsequent day, 19th December, delivered by

Sir R. Couch.—The suit, which is the subject of this appeal, was brought by the respondents to have it declared that a deed of sale, dated the 7th May 1862, executed by the defendant Sheik Riazuddin Hossein, the father of the plaintiffs, was invalid, and for possession of a one-anna share in taluk Wari, which was the subject of that deed.

Mahomed Ali, who died in November 1854, had two wives, Wasimunnissa and Fakirunnissa. By the former he had a daughter, Udulunnissa, and by the latter a son, Mahomed Hossein. Udulunnissa married the defendant Riazuddin, and died on the 26th October 1861, leaving a son and daughter, the plaintiffs. Taluk Wari had been resumed as invalid lakheraj in 1840, and from that time to its final settlement by the Collector had been temporarily let to various persons. Disputes arose and doubts existed as to the persons who were entitled to settlement, and the final settlement was not made until the 19th May 1862. Between 1840 and 1862, there had been various dealings with the taluk. It will be sufficient to mention those which affected the parties to this suit. On the 19th December 1856, Syed Sufdar Hossein executed a deed of sale of one anna three pie eleven cowries plus a fraction (which may conveniently be called a two-annas share) in the taluk and its dependency Sosi Narhat, in favour of Bhupat Jha and Madhuri Jha in consideration of Rs. 2,250. On the 6th January 1857, Sufdar Hossein executed another deed by which (after stating the sale [632] of the 19th December, and that owing to the inattention of the purchasers, the mutual exchange of equivalents did not take place, and the deed of sale remained with him; and that Udulunnissa and Fakirunnissa had, by their karpurdazes, claimed the right of pre-emption by reason of having, previously to the sale to Bhupat Jha and Madhuri Jha, purchased other shares in the taluk), Sufdar Hossein sold the two-annas share to Udulunnissa and Fakirunnissa for Rs. 2,250. On the 11th August 1856, the 4th December 1856, the 6th January 1857, the 29th January 1857, and the 23rd February 1857, purchases of other shares in the taluk and its dependency were made by Udulunnissa and Fakirunnissa. Those shares, together with the share sold to them on the 6th January 1857, made up nine annas of the taluk, half of which was declared to belong to each of them. On the 31st December 1861, five suits were instituted against Fakirunnissa and Udulunnissa by Sardari Jha, the ancestor of some of the defendants, to establish a right of pre-emption to the shares composing the nine annas, and the Collector had before him these conflicting claims to the settlement.

It was in this state of things that the deed of the 7th May 1862 was executed by the duly empowered mokhtear on behalf of Riazuddin Hossein, described as the father and guardian of the plaintiffs, minor heirs of

Udulunnissa, and on behalf of Fakirunnissa, mother and guardian of Mahomed Hossein, her minor son. By this a two-annas share of the nine annas of the taluk was sold for Rs. 6,235 to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as the shareholding proprietors and inhabitants of the taluk Wari. And it was stated that the Rs. 6,235 was for liquidating the debts due to Baboo Gopal Das and Bunsi Lal, mahajuns. One anna was said to be purchased by Bhupat Jha, and one by the other three. The books of the firm of Gopal Das and Bunsi Lal were produced. They contained accounts in the name of Mussummat Wasimunnissa, the grandmother of the plaintiffs, who appeared to be possessed of considerable property, but had no interest in the taluk Wari. From various entries in these accounts they appeared to relate to this taluk as well as to the property and transactions of Wasimunnissa. In the account for the year [633] 1269 (1861-62), under the native date corresponding with 16th May 1862, is the following entry :—

	Rs.	As.	P.
The 3rd Jeyt Budi.—Received on account of the consideration money of two annas of taluk Wari debited to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha	6,235	0	0
Deduct on account of the share of Fakirunnissa, which is debited to her	3,117	8	0
Remainder .. .. Rs.	3,117	8	0

On the other side of the account, under a date corresponding with the 13th January, among the entries of "paid on account of revenue into Collectorate," there is an entry "Wari, Rs. 181-9," and under a date corresponding with the 29th March an entry "Wari of Raja, Rs. 447-15," and on the date corresponding with the 26th May 1862 there is an entry, "Paid through Sheik Velait Hossein, in order to defray the expenses of the settlement of taluk Wari Rs. 2,500." It appears from the proceedings of the Collector of Tirhoot, dated the 19th May 1862, in a suit for obtaining permanent settlement of taluk Wari, that a petition was filed on behalf of Bhupat Jha and Madhuri Jha, stating that they were the purchasers of one anna three pies and eleven cowries and a fraction share, and subsequently on the 10th May 1862 a petition of withdrawal was filed on their behalf, stating that they withdrew from that claim filed previously, and praying that the deed of sale to them on the 19th December 1856 might be considered ineffective, and that the settlement might be effected with Fakirunnissa and others. And that subsequently on the 12th May 1862 another petition was filed on their behalf with the deed of the 7th May 1862, praying that a settlement of the two-annas share mentioned in that deed should be made with them. On the same 7th May 1862, consent decrees were made in the five pre-emption suits by which they were dismissed. Thus all opposition on the part of the Jhas as regards seven annas was withdrawn, and they claimed the settlement of only two annas under their new title. In the end, the settlement was made with Fakirunnissa, described as mother and guardian of Mahomed Hossein, and Riazuddin, described as father and guardian of the plaintiffs, for seven annas of the nine, and with the Jhas for the [634] remaining two annas. The allegation in the plaint that Riazuddin appropriated the consideration for the sale of the 7th May 1862, was not only not proved, but was disproved, and nearly the whole, if not the whole, of the consideration appeared to have been applied on account of the taluk.

The Subordinate Judge held that the deed of the 7th May 1862 was valid, saying in his judgment that the pre-emption suits and the defendants' claim case before the Collector were "impending dangers over Wari at that time, and what might have been the consequence of those objections cannot be now determined at this distance of time, and I should therefore think that Riazuddin

acted wisely in making a compromise with the defendants by executing the disputed kobala so soon as only eleven months after the death of Udulunnissa, and thereby to avert that danger." He dismissed the suit. The High Court set his decree aside, and made a decree for the plaintiffs, being, they said, "on the whole of opinion that the respondents (the defendants) failed to establish that any benefit was conferred upon the appellants by the sale by their father of the disputed property." The statement in the deed, and in the petition to the Collector on the 12th May 1862 of Riazuddin and Fakirunnissa, asking that a settlement of the two-annas share should be made with the Jhas, that the sale was for the purpose of liquidating debts due to the mahajuns, is not correct, though looking at Gopal Das's account, and the large payment made by his bank on account of Wari three weeks afterwards, the parties may have thought that it was correct; but at all events their Lordships think it does not preclude the defendants from proving the real nature of the transaction and that it was a beneficial one to the minors.

It is not a case of a sale by a guardian of immoveable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances.—Macnaghten's Principles of Mahomedan Law, chap. VIII, cl. 14. The right of Udulunnissa and Fakirunnissa to be purchasers of the nine annas was disputed. By the sale of the two annas, the dispute was put an end to, and thus a settlement obtained of the seven annas. Moreover the Rs. 6,235 appeared [635] to be a fair price for the two annas which had in December 1856 been sold by Sufdar Hossein for Rs. 2,250.

Their Lordships differ from the opinion of the High Court that the present appellants, who were then respondents, had failed to establish that any benefit was conferred upon the minors by the sale. They are of a contrary opinion, and looking at the whole transaction they think it was within the power of the guardian to make the sale.

There is another ground upon which the appellants are entitled to have the decree of the High Court reversed, and the decree of the Subordinate Judge dismissing the suit affirmed.

The case stated in the plaint is that Riazuddin had sold to the defendants one anna out of four-and-a-half annas, the property left by Udulunnissa in taluk Wari, and the plaintiffs only got three-and-a-half annas partitioned to them by the Collector. Now Riazuddin, as the husband of Udulunnissa, was entitled to one-fourth share of her property, and consequently the plaintiffs were in possession of more than they were entitled to by inheritance, their shares amounting to 3⅜ annas. This objection was taken in the written statement of the Jha defendants. It was attempted to be met by some loose evidence of Riazuddin being liable for dower and relinquishing his share to the plaintiffs on that account. No document was produced, and the Subordinate Judge found, as a fact, that Riazuddin did not relinquish his one-fourth share. Their Lordships are of opinion, upon the evidence, that this finding was proper, and that the reason given by the High Court for not agreeing in it is insufficient. An admission of Riazuddin that he had relinquished his share, even if it was clearly made in the deed of sale, ought not to affect the other defendants. He had been ordered to attend as a witness, and did not do so, and the Subordinate Judge thought he was in collusion with the plaintiffs. This was highly probable, and the suit appears to their Lordships to be a dishonest attempt to get back property, for which the plaintiffs had received full consideration, and had had the benefit of it.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to **[636]** the High Court, with costs, and to affirm the decree of the Subordinate Judge.

The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers.*

C. B.

NOTES.

As regards contracts by the guardian for the sale of the minor's immoveable property, *see* also(1911) 36 Cal., 232 on appeal from (1906) 34 Cal., 163.

As regards validity of dealings with the property, *see* also (1906) 34 Cal., 36; (1903) 26 All., 22; (1895) 20 Bom., 116; (1910) 20 M. L. J., 946: 34 Mad., 527.

The guardian's powers are discussed exhaustively by **Abdur Rahim, J.** in **(1912) 23 M. L. J., 244**; *see* also the Full Bench judgment in (1912) 19 I. C., 911 (Sind) where that case was criticised.

[16 Cal. 636]

PRIVY COUNCIL.

The 6th and 19th December, 1888.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE AND SIR R. COUCH.

In the Matter of the Petition of R. E. Twidale.

Privy Council, practice of—Admission to practise in the Privy Council—Rules of 31st March 1871—Vakil of High Court.

The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practise in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee.

THIS was a petition by Mr. Richard Erasmus Twidale, a pleader in the High Court, Calcutta, to be admitted as Agent to practise in the Privy Council, upon his subscribing the declaration prescribed by the rules established by the order of Her Majesty in Council of 31st March 1871, "to be observed by Proctors, Solicitors, Agents and other persons admitted to practise before Her Majesty's Honourable Privy Council."*

After requiring in the first section that every Proctor, Solicitor, or Agent admitted to practise before the Privy Council or any of the Committees thereof, shall subscribe a declaration in the form given, the rules contain the following:—

2. Every Proctor, Solicitor, or Attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his certificate for the current year.

3. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors to the High Courts of Judicature in India or in the Colonies respectively may apply by petition to the Lords of the Judicial Committee of the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th November, a fee of five guineas to the Fee Fund of the Council Office.

[637] Mr. *R. V. Doyne*, in support of the petition, argued that the scope of the Rules of 1871 having been to state certain duties to be discharged by practitioners upon admission, their object had not been to define the classes of

* The rules are printed in the Appendix to "The Practice of the Judicial Committee," by William Macpherson, Esq., at p. 65.

persons to be admitted to practise. This was left to be, as it must have been before the rules, a matter discretionary with their Lordships; and the second and third sections specified those classes in imposing a duty upon them, which hitherto alone had been admitted. But the rules were for an enabling purpose, imposed no limit upon the powers of the Committee, and used no negative words to confine the term "Agents" to any classes of persons. He referred to the case of *In the matter of the petition of W. Tayler.*

The **Judgment** of their Lordships was delivered by

Lord Hobhouse:--Since this case was argued their Lordships have considered the matter very carefully and they have been furnished with a copy of the shorthand notes of the proceedings on Mr. Tayler's petition; and they find, with some regret, that they are unable to accede to Mr. Twidale's request.

Mr. Twidale is a vakil of high standing and reputation in the Calcutta High Court; but he has not been admitted as a Solicitor anywhere, in England or in India. He now applies to be admitted to practise here as an Agent, and the question is whether the Orders in Council admit of such an application being granted. No doubt, there is some ambiguity about them because in general terms they refer to "Proctors, Solicitors, or Agents." There are four sections of the Order relating to the subject, and in the first and fourth of those sections all those terms are mentioned; but the two sections which show what is the mode of admission, and the classes to be admitted, are the second and third; and those only apply to Solicitors or others practising in London, and to Solicitors admitted by the High Courts in India or the Colonies respectively. The question is whether those rules 2 and 3 are exhaustive of the classes to be admitted, or, as was argued by Mr. *Doyne*, they only specified what should be done in the case of those two classes, and left an undefined class called "Agents," who were to be admitted at the discretion of the Committee. Mr. Tayler's case, which has been cited, is exactly in point. Mr. Tayler also was a vakil of the Calcutta High Court, and he had [638] not been admitted as a Solicitor anywhere. He applied for leave to practise at this bar. His Counsel, Sir *Roundell Palmer* (Lord Selborne) put the case very much as Mr. *Doyne* has done. Lord CAIRNS, on behalf of the Committee, said in that case "the qualifications are in the Schedule." That means in the Orders I suppose; it is a mistake of the shorthand-writer. "The third appears to be the only one upon which any claim can be made. The third applies to Solicitors practising in India." Then Sir *Roundell Palmer* said "yes, I see there are affirmative words which do not embrace this case: I do not perceive that there are any negative words which would exclude it." Well that is precisely the argument which Mr. *Doyne* put at the bar here. The answer to this is, "Lord CAIRNS:—There was an obvious reason for specifying the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakils who are under very different jurisdictions, but certainly they are not included at present in the Order." That (as will be seen) is exactly in point.

Their Lordships collect that the Committee on that occasion, as on this, were by no means disinclined to grant the petition, if it were within their power. But it has been expressly decided that it is not within their power, and their Lordships now must follow that decision, and refuse the application.

Petition rejected.

Solicitors for the Petitioner: Messrs. *T. L. Wilson and Co.*
C. B.

[16 Cal. 639]

APPELLATE CIVIL.

The 21st May, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE GORDON.

Mohesh Chunder Chuttopadhya............Defendant

versus

Umatara Deby............Plaintiff.*

Appeal—Bengal Tenancy Act (VIII of 1885), s. 153—Cesses, Suit for—Bengal Act (IX of 1880), s. 47—Appeal in cases under Rs. 100.

A suit to recover cesses for an amount not exceeding Rs. 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals.

[639] THIS was a suit for cesses.

The defendant admitted the tenancy, but contended that as no valuation of the tenure, since his holding had commenced, had been made by the Collector, he was not therefore liable to pay any cesses.

The Munsif dismissed the suit. On appeal the District Judge reversed the Munsif's decision and gave the plaintiff a decree for the amount claimed which was a sum under Rs. 100.

The defendant appealed to the High Court.

Baboo *Nil Madhub Bose*, for the Respondent, took the preliminary objection, that, under s. 153 of the Rent Act, there was no appeal, the suit being in reality one for rent, cesses being recoverable as rent under Bengal Act IX of 1880, s. 47, and the word "rent" in cl. 5, s. 3 of the Bengal Tenancy Act, being defined as "money recoverable under any enactment for the time being in force as if it was rent."

Baboo *Sharoda Churn Mitter* for the Appellant.

The **Judgment** of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

Gordon, J.—We think that the preliminary objection taken by the respondent in this case, that no appeal lies, must prevail. The appeal arises out of a claim for cesses less than Rs. 100, which, under s. 47 of the Cess Act (Bengal Act VIII of 1880), [Act IX of 1880?] are made recoverable in the same way as an arrear of rent. And, under the definition of rent given in cl. 5 of s. 3 of the Bengal Tenancy Act (Act VIII of 1885), rent "includes also money recoverable under any enactment for the time being in force as if it was rent." That being so, the suit is really a suit for rent; and as the defendant has raised no question in his written statement as to the amount of cess which is payable by him to the plaintiff, no dispute has been decided between the parties which would have the effect of bringing the case under the provision of para 4 of s. 153 of the Bengal Tenancy Act. We think the case does not fall within that paragraph, and that, consequently, no appeal lies to this Court. That being so, this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[This was followed in (1906) 4 C. L. J., 119.]

* Appeal from Appellate Decree No. 1545 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 27th of June, 1888, reversing the decree of Baboo Dino Nath Sircar, Munsif of Baripore, dated the 31st of December, 1887.

[640] APPELLATE CIVIL.

The 28th May, 1889.
PRESENT :
SIR W. COMER PETHERAM, KT., CHIEF JUSTICE
AND MR. JUSTICE GORDON.

Prosonna Coomar Singha...........One of the Defendants
versus
Ram Coomar Ghose...........Plaintiff.*

Right of user—License to use land of another, coupled with grant—Revocation of License—Right of licensee to damages.

A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages if revoked contrary to the terms of any express or implied contract.

Wood v. *Leadbitter* (13 M. & W., 838) applied.

SUIT for declaration of right over a plot of land and for an injunction.

The plaintiff claimed, under a solenamah entered into between himself and the defendant, to have the use of a plot of land belonging to the defendant as his privy; the defendant admitted the solenamah, but objected to the use of the land for the purpose referred to, and contended that the solenamah was obtained from him whilst a minor, and that the suit was barred.

The Munsif found that the land had been used by the plaintiff as alleged, that there was no defence to the suit, and granted a decree prohibiting the defendant from preventing the plaintiff using the land for the purpose alleged in his plaint.

The Subordinate Judge on appeal upheld this decree.

The defendant appealed to the High Court.

Mr. *H. Bell* (with him Baboo *Tarucknath Sen*) for the Appellant contended that the license granted by defendant to the plaintiff was revocable at any time subject to a liability to pay damages. *Wood* v. *Leadbitter* (13 M. & W., 838).

Mr. *Twidale* and Baboo *Durga Mohun Das* for the Respondent.

The **Judgment** of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

Petheram, C.J.—This is a suit by the plaintiff to have his rights declared under a contract made between him and the **[641]** defendants, and to obtain an injunction against the defendants restraining them from breaking the contract.

The contract is in respect of some land as to the ownership of which some years ago there was a dispute between the plaintiff and the defendants That dispute was finally settled by the present plaintiff giving up all claim to the land, and admitting that it was the property of the defendants, and in consideration of his doing so the defendants agreed to allow him to go on to the land at all times for the purpose of using a particular corner of it as a privy. That went on for a great number of years apparently, but in course of time the defendants used this land for purposes inconsistent with its continued user in this way, and though the plaintiff might have gone on to the

* Appeal from Appellate Decree No. 1449 of 1888 against the decree of Baboo Purno Chunder Shome, Subordinate Judge of Dacca, dated the 25th of May, 1888, modifying the decree of Baboo Purno Chunder Chowdhry, Munsif of Munsheegunge, dated the 19th of May 1887.

land and used it in the same way, he would have become a nuisance, and what he did would have become a nuisance, and it was under these circumstances that the defendants refused to allow him to go there any more for that purpose, and it is to assert this right that this action has been brought.

This action has been defended in the two lower Courts on various grounds. I should say that no claim was advanced for damages, but only for an injunction to compel the defendants to allow the plaintiff to use the land in this way. But the point was never made, until the matter came to this Court, that this was a license which was revocable at any time subject to the liability to pay damages. That point has been taken here, and we think it is a perfectly good one. The law, so far as we have been able to ascertain, is the same in this country as it is in England, there being so far as we can see no common law in this country on the subject and no statutory law either. The law in England is clearly laid down in the case of *Wood* v. *Leadbitter* (13 M. & W., 838). The Courts have acted upon the law as there laid down ever since, and it has always been held to be good law and binding upon them. That case decided that the license to go upon another man's land, unless coupled with a grant, was revocable at the will of the grantor, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied contract.

[642] That being so, we think that the Munsif and the learned Judge were both wrong in granting an injunction in this suit, but inasmuch as this point was not taken below, and there is no doubt about it that the defendant has acted in this case in a high-handed manner, he has revoked this license and has prohibited the plaintiff from using the land without offering compensation ; therefore, although we think that this appeal must be decreed and the suit dismissed, we think that each party ought to bear his own costs all through. In the result then, this appeal will be decreed and the plaintiff's suit dismissed without costs.

T. A. P. *Appeal allowed.*

NOTES.

[In (1893) 18 Bom., 382 a similar right to privy contained in a mortgage was treated as ancillary to the mortgage interest and was held to be irrevocable.

Kerrison v. *Smith*, (1897) 2 Q. B., 445 was a case where a suit for damages, it was held, could be brought on revocation of licence.]

[16 Cal. 642]

APPELLATE CIVIL.

The 29th May, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE GORDON.

Kristo Bulluv Ghose and others............Defendants

versus

Kristo Lal Singh and another............Plaintiffs.*

Bengal Tenancy Act (VIII of 1885), s. 12—Transfer of a permanent tenure—Permanent tenure, Registration of.

The transfer of a permanent tenure under s. 12 of the Bengal Tenancy Act is complete as soon as the document is registered.

THIS was a suit brought by two putnidars to recover from their durputnidars rent from Bysack to Kartick 1292 and from Aughran 1292 to Kartick 1293, together with cesses.

The defendants admitted they held the durputni tenures up to the 1st Bysack 1293, on which date they sold the tenure to one Keshub Chunder Roy, whose name was duly registered in place of theirs in the Sherista of the putnidars. The deed of sale was duly registered and the putnidars fee duly deposited with the Sub-Registrar under s. 12 of the Bengal Tenancy Act. The notice under that section was however served on one only of the putnidars.

The Munsif gave a decree to the plaintiffs for the rent claimed, holding that the notice under s. 12 was bad, it not having been served on both the plaintiffs.

[643] The District Judge found that there was nothing in s. 12 which obliged the defendants to inform either the Sub-Registrar or the Collector of the names and addresses of their landlords, but said "I take it that the putnidars are clearly not bound to recognize any transfer of which they have not received due notice. Now granting for a moment that plaintiff No. 1 did receive notice, I think the Munsif was quite right in holding that to be insufficient. There must, I hold, be a complete notice, *i. e.*, one which has been served on each landlord, not necessarily personally, but in the mode prescribed in rule 1 of chapter V of the Rules under the Bengal Tenancy Act (pp. 258, 259 of Rampini's and Finucane's 1st Edition); " and, after finding that the notice had not been served in accordance with this rule, he dismissed the appeal and confirmed the decision of the Munsif.

The defendants appealed to the High Court, on the ground that the provisions of s. 12 had been sufficiently complied with.

Baboo *Rash Behari Ghose* and Baboo *Aushotosh Mukerjee* for the Appellants.

Baboo *Troylucko Nath Mitter* for the Respondents.

* Appeal from Appellate Decree No. 1549 of 1888, against the decree of H. Anderson, Esq., Judge of Moorshedabad, dated the 8th of June 1888, affirming the decree of Baboo Loke Nath Nundi, Munsif of Kandi, dated the 26th of December 1887.

The **Judgment** of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

Petheram, C.J.—This is a suit brought by a landlord, who is the putnidar, to recover the rent of the durputni.

The answer which is made by the defendant is this,—He says: a part of the rent I owe you, and I have paid that into Court; as for the rest I am not liable to you, because at the time when that rent accrued I had transferred the durputni to a purchaser under the provisions of the Bengal Tenancy Act, ss. 11 and 12, and that transfer, so far as I was concerned, was complete.

The answer which the landlord makes to that is this,--He says: that is quite true, you did make the transfer you say, but I did not receive notice of it from the Collector, and therefore, notwithstanding the fact that you had transferred your interest, you are still liable for the rent, and the question for us to consider is that question.

Section 11 of the Bengal Tenancy Act provides that every permanent tenure shall be capable of being transferred. That [644] may or may not be declaratory of the old law, but for the purpose of what I am going to say, that is the law that is created by that Act, and every such tenure is made transferable by the authority of that Act. Then comes s. 12, which limits the power of transfer. If it were not for s. 12, the transfer under s. 11 might be made in any way, either by an unregistered deed, or verbally; but s. 12 of the Act provides a limit, and the limit is this, that the transfer of permanent tenures can be made only by a registered instrument. In this particular case, it was made by an instrument which it is admitted was duly executed, and which it is also admitted was duly registered, and consequently the transfer from the vendor to the vendee was complete. Then come the other parts of the section, and sub-section 2 provides a condition precedent to the registration, that certain monies shall be paid by the vendor into the hands of the Registrar before he shall be entitled to the registration, but the registration concludes all that, because the registration could not take place unless those things had been done, and it is not disputed in this case that those things were done, so that the registration is absolutely complete.

Then comes another sub-section which provides what the Registrar is to do after the registration, how he is to dispose of the money in his hands, and what notices he is to give of the fact of registration; but that seems to us to be a mere question as to how he is to deal with the matter and how the Collector is to deal with the money when it comes into his hands. But, so far as the transfer is concerned, the only thing which this Act says is necessary to complete it is registration. That was done, and it seems to me that the transfer was complete as soon as the document was registered.

Then is there any reason or possibility to say that, notwithstanding the fact that the transfer was complete, this man still remained liable to his landlord. The liability here is a liability in consequence of the estate, and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred and the vendor ceases to have any estate in the property, but that, in whatever way the transfer may be made, the liability remains on the original tenant, until notice has been given to the landlord.

[645] As to that, it is enough for us to say that the Act is absolutely silent upon the point, and we do not think that any such condition of things can be inferred from the provisions of the Act. If the Legislaure had intended to impose any such limitation upon the right to transfer, we think they would have said so in so many words. They have not done so, and we think we cannot imply it from what they have said.

Under these circumstances we think that the Judge was wrong in the view he took of the law in this case, and this appeal must be decreed with costs.

T. A. P. *Appeal decreed.*

NOTES.

[This was followed in (1908) 12 C.W.N., 478 ; (1900) 4 C.W.N., 590 ; (1905) 10 C.W.N., 270 ; (1911) 9 I.C., 1001 : 16 C.W.N., 64 but benami transfers stand on a different footing (1906) 33 Cal., 580.]

[16 Cal. 645]

APPELLATE CIVIL.

The 14th May, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Goluck Nath *alias* Rakhal Das Chuttopadhya and another............Plaintiffs

versus

Kirti Chunder Haldar............Defendant.*

Second appeal—Practice—Finding of facts—Interference with finding of facts on second appeal.

As a general rule, the High Court will not interfere with the finding of facts by the Lower Appellate Court on second appeal, save on some very special ground ; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case has not been satisfactorily arrived at.

SUIT for declaration of title and khas possession.

This suit was brought for a declaration that the plaintiffs were entitled by right of inheritance to a plot of land, measuring 14 bigahs 6½ cottahs, and for possession of the same.

The plaintiffs alleged in their plaint that their father, Gopal Chunder Chuttopadhya, was in khas possession of the land; that, upon the death of their father, this piece of land as well as other lands and property left by him, were under the management of their mother, Troilokho Monee Debi; that in the month of Joisto 1290 (May 1883), the defendant, Kirti Chunder Haldar, who was in possession at the time, was requested by the plaintiff, **[646]** Goluck Nath Chuttopadhya, to execute a kabuliat of the land, which the defendant refused to do on the ground that his father had purchased the land from Troilokho Monee Debi under a kobala, dated the 15th Bysack 1285 (27th April 1879). The plaintiffs further alleged that the kobala was a fraudulent document; that there was no consideration for it; and that even if any consideration had passed, it was invalid as against the plaintiffs, inasmuch as they were minors at the time, and there was no legal necessity for the sale of the land by their mother, nor was the sale for their benefit. The defendant contended that in 1284 (1877-78) when Gopal Chunder, the plaintiffs' father, died, the defendant's father, as Gopal's servant, was in possession; that upon the death of

* Appeal from Appellate Decree No. 1394 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 21st of March 1888, reversing the decree of Baboo Janokee Nath Mukerjee, Munsif of Diamond Harbour, dated the 16th of September 1887.

Gopal, his widow Troilokho Monee, with the object of supporting her sons, the plaintiffs, of paying the arrears of rent for which the landlord had obtained a decree, and of meeting the expenses of her husband's shrad as well as other liabilities, sold the land in suit to the defendant's father for Rs. 175 under a kobala dated the 18th Bysack 1285 ; that the kobala was not fraudulent, and was for an adequate consideration ; and that the sale was made by the plaintiffs' mother under a legal necessity for the benefit of her sons.

The Munsif found that Troilokho Monee Debi had no sufficient reason for alienating the land, and that the sale therefore was not for the benefit of the plaintiffs. He also found that the consideration money had not been paid. In arriving at these findings, the Munsif made the following observations :—

"The kobala of the defendant (Exhibit A) filed in the case purports to have been executed by Troilokho Monee Debi herself, on account of paying the arrears of rent due to the landlord, and for meeting the expenses of supporting her two minor sons. She did not sign the kobala as guardian of the minors, and so far the sale does not appear to have been on account of the minor sons of Troilokho Monee. But this defect may be considered as a mere formal one, so I enter upon the merits of the case. In order to show that consideration passed for the kobala, and that it was executed for the benefit of the minors, the defendant examined four witnesses before the Court, and another of his witnesses was examined by Commission. The defendant himself **[647]** also gave his deposition in this case, and now let us see how far the defendant's plea is made out. The defendant himself deposed that, out of Rs. 157, the consideration payable under the kobala, Rs. 65-7-6 were not paid by his father who made the purchase, and that it was kept by him to pay the arrears due to the landlord for 1284, and to satisfy a decree also of the landlord of which a certified copy is filed in this case. This decree (Exhibit B) on perusal shows that the money due upon it was payable by instalments. The first of the instalments was payable in Magh 1284, the second in Magh 1285, and the third in the month of Magh 1286. The Exhibit C, which is a copy of the execution petition filed in Court by the landlord, shows that the instalment due on account of the first instalment was paid in Magh 1284, namely, before the date of defendant's father's purchase, and that the second instalment fell due long after the date of the kobala, so that, at the time of the execution of the sale-deed, the plaintiffs' mother was not pressed for money to pay the decretal debt, nor was it then possible for the defendant's father to guess what would be the debt under the decree with the cost of execution on the 5th September 1879, when he actually paid the debt due upon it. The debt upon the decree that was payable at the date of the kobala was Rs. 31-5-6 only. The landlord's dues on that date on account of the rent of the year 1284 were Rs. 10-10-6, with a trifling amount on account of interest and cesses. That the amount of arrears was no more is visible from the fact that the jama of the disputed land was Rs. 28-10-6 (See Exhibit B) : and that out of this the plaintiffs' father did pay Rs. 18 (See Exhibit No. 3). This exhibit is proved by the deposition of the defendant's witness No. 3. As the rent due on account of the disputed land for the year 1284 was a trifling amount, and as the decree debt was not then payable, I am of opinion that the plaintiffs' mother had no sufficient reason to alienate the disputed land and the sale was therefore evidently not for the benefit of the minors.

"As regards the passing of the consideration money on account of the kobala, I feel very great doubt. I have already commented upon the fact that the plaintiffs' father had no debt payable at the time the kobala was executed, and that the debt under the decree, **[648]** and the arrears due respecting the

rent of the disputed land, did not come to Rs. 65 and odd annas, and that the defendant's father had no reason to keep back that amount out of the consideration money. There is also no proof of the payment of Rs. 3 paid as earnest money. The defendant and his witnesses, Nos. 1 and 2, no doubt deposed that Rs. 86-8-6 were paid to Troilokho Monee in cash during the time the kobala was executed, but there is some discrepancy on this point, the witness No. 2 deposing that no pice was paid, whereas the defendant stated that it did pass. The witness of the defendant, the writer of the deed, who was in a very bad state of health, and though present in Diamond Harbour, could not come up to Court, was examined upon Commission. He deposed that Troilokho Monee only took Rs. 15, and that the remainder of the purchase money was paid in the Registration Office to the plaintiffs' maternal uncle. This deposition strongly goes in opposition to the statements of the defendant's witnesses Nos. 1 and 2, and the passing of the consideration money seems to me to be very suspicious. The witness No. 1 of the plaintiffs is related to them, and the witness No. 2 is the father of their servant. Their deposition is also open to doubt on that account, and I hold that no consideration did pass for the deed of sale.

"It is true that the defendant's father is proved to have paid the rent of 1284 to the extent of Rs. 10 and odd annas, but being the person in possession of the land he was bound to pay it, and to pay also the decretal debt, which, if not paid, would have made his lands liable to sale for its own arrears. These payments were made long after the date of the purchase, showing that the defendant paid them to protect his land from sale. The payment of these sums do not, therefore make out payment of consideration."

The Munsif accordingly decreed the plaintiffs' suit.

The defendant appealed, and the Additional District Judge of the 24-Pergunnahs reversed the Munsif's decision. The judgment of the Lower Appellate Court was as follows :—

"This was a suit to upset a sale effected by plaintiffs' mother and guardian, on the ground that no consideration passed for the transaction, and that it was against the minors' interest. [649] Plaintiffs do not directly assert that their mother did not execute the deed, and they have not called her as a witness. The execution has been fully proved, and the only point for decision is, was the sale valid ? The Munsif has found that it was not, and has decreed the suit. Defendant appeals.

"Admittedly defendant has been in possession of the land for ten years. The deed of sale is dated 15th Bysack 1285 (27th April 1878), and the suit was brought on 5th March 1887 (22nd Falgun 1292). Plaintiffs admit that defendant had the land before the alleged sale, for they say that their father let it to defendant. Now their father died in 1284. Defendant is in a difficult position in having to show how money was disposed of, which was paid by his father nine years ago. The sale was made by Troilokho Monee. She does not, at the top of the deed, describe herself as the guardian of the minors, but the body of the deed shows that it was in the capacity of the guardian that she sold the property, and for the benefit of the minors. The Privy Council case of *Watson & Co.* v. *Sham Lall Mitter* (I. L. R., 15 Cal., 16) shows that if there is any doubt as to the capacity in which a mother acts in such a case as this, it should be presumed that she did so in her lawful capacity. The defendant has proved by his own evidence and that of his witnesses that adequate consideration was paid for the deed. He has shown that his father kept back part of the purchase money, and discharged debts due by plaintiffs' father's estate, and that the rest went into the hands of Troilokho Monee. The

landlord's petition to the effect that the first instalment of the kistibundi was paid on 23rd Magh 1284 is not, I think, evidence against defendant. Defendant produces a dakhila for payment of Rs. 30 odd on account of the rents of 1284: even if it be held that Rs. 18 of this were paid by Gopal Thakur, still Rs. 120 odd annas and not Rs. 10, as stated by the Munsif, were paid by defendant's father. I do not know how the Munsif came to the conclusion that this payment was made long after the purchase. The purchase was in Bysack 1285, and presumably the rent for 1284 was paid in Choit 1284 or Bysack 1285. The fact that other payments **[630]** were made some time after the purchase, is consistent with defendant's evidence, and does not show that the sale was not for consideration. The zemindar's gomashta deposes that Gopal Thakur was not in good circumstances, and so we need not be surprised that his widow found it necessary to raise money for the support of her children by selling some of the property.

"In my opinion defendant has proved that the sale was a valid one; that consideration was given; and that the sale was to the advantage of the minors.

"I attach no importance to the few discrepancies in the account of the witnesses to the sale. Such discrepancies must occur when witnesses are speaking to the mode of payment, and the distribution of money at a transaction which occurred about ten years before.

"Plaintiffs have failed to establish their allegations, and defendant has established his. I therefore reverse the decision of the Munsif, and decree the appeal with costs; the result being that the suit is dismissed with costs of both Courts and interest at 6 per cent."

The plaintiffs appealed to the High Court.

Baboo *Baikant Nath Dass* for the Appellants.

Baboo *Harendra Nath Mukerjee* for the Respondent.

The **Judgment** of the High Court (PIGOT and RAMPINI, JJ.) was as follows:—

The rule followed in this Court not to interfere, save on some very special ground, with a finding of facts by the Lower Appellate Court on second appeal, is one which we follow with very jealous care: but in this case we cannot say that such a finding of facts, as in a case of this peculiar kind appears to us to be necessary, has been satisfactorily arrived at by the Lower Appellate Court.

We have these facts: The defendant's father, a servant of the plaintiffs' father, purchases from the plaintiffs' mother, when she becomes a widow, the property in question. He purchases it shortly after the plaintiffs' father's death. The consideration money is Rs. 157. Of that consideration money, Rs. 65 admittedly remained in his hands, either with the intention or under colour **[631]** of meeting liabilities in respect of this property, incumbent on the family of the plaintiffs. The liabilities which then existed in respect of the property consisted of the rent for 1284, which was Rs. 12, and the amount payable at foot of a decree for rent for some previous years was in Bysack 1285, the date of the sale, about Rs. 31. That was payable by instalments falling due in Magh. The instalment due in the previous Magh, that is Magh 1284, had been paid by the plaintiffs' father. There was therefore in Bysack 1285 no instalment due, and no urgent need of money pressing on the family in respect of this piece of land, beyond the sum of Rs. 12 for payment of the 1284 rent. We do not understand that the rest of the Rs. 65 is accounted for. As to the residue of the purchase money, two things were disputed, *one*, that there was any necessity for that money such as to justify the widow in selling the property; and, *another*, that the consideration passed.

The learned Judge has not made such findings as satisfactorily show that the plaintiffs' case must fail. He has not stated in his judgment in respect of what necessity he considers the sale to be justified. He has not adverted to the circumstance of the retention of money in the defendant's hands, which was not needed for the purpose of the family; and he has not adverted to this, that, when a servant of the plaintiffs' father purchased from the widow, his relation to the family makes it reasonable that from him or his representative should be exacted very complete proof of the necessity and of the passing of the consideration. The first Court has noticed that the writer of the deed himself, called on behalf of the defendant, has stated that no money, save Rs. 15 of the consideration money, was paid to the widow, the residue of such money as was paid having been paid to the widow's brother. We think that that was a circumstance that ought to have been dealt with in the judgment.

There are many cases in which a simple compendious finding of fact is quite enough to satisfy all requirements; but in a case of this sort, while it is our duty not to set aside clear findings of fact, save on grounds which rarely exist, we are bound to see that a proper view of the law in the case has been taken and applied by the Subordinate Court; and we do not feel satisfied **[652]** that that has been done here. The case before us is, in its circumstances, one requiring very close scrutiny; and we are of opinion that the learned Judge has not made a satisfactory finding in respect of the question of necessity, in respect of the receipt of the consideration money by the mother of the plaintiffs, and in respect of the reality of the transaction as a sale for necessity, the purchaser purchasing on the faith of that necessity, and whether or not with full knowledge of the circumstances of the family.

We must remand the case to the Lower Appellate Court for a finding upon the matters we have indicated. The costs will abide the result of the learned Judge's determination of the case on this remand.

C. D. P. *Case remanded.*

[16 Cal. 652]

APPELLATE CIVIL.

The 17th May, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Rakhal Das Addy, Executor to the Estate of late Govind Chunder Addy............Plaintiff

versus

Dinomoyi Debi and others............Defendants.*

Right of Occupancy—Suburban lands let for building purposes.

There is no authority for the proposition : "that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."

Gungadhur Shikdar v. *Azimuddin Shah Biswas* (I. L. R., 8 Cal., 960) explained.

Ramdhun Khan v. *Haradhun Puramanick* (12 W. R., 404 : 9 B. L. R., 107 note) relied on.

SUIT for ejectment and khas possession.

Rakhal Das Addy brought this suit, as executor of the will of his father Gobind Chunder Addy, to eject the defendants from a piece of land about half a bigha in area, situate in the village of Chetla in the suburbs of Calcutta.

[653] The plaintiff alleged that by a kobala dated the 29th Bhadro 1276 (13th September 1869), Doyamoni Dasi sold 1 bigha 9 cottahs of land, including the half bigha in suit, to the plaintiff's father Gobind Chunder Addy ; that on the 27th Assin 1293 (12th October 1886) the plaintiff served the defendants with notice to quit by the end of the month of Choitro (April 1887) ; and that the defendants had not complied with the terms of such notice.

The defence was that the tenure had been sold to Dinomoyi Debi (defendant No. 1) by Gora Chand Sadhukhan, the father of the defendants Nos. 2, 3 and 4, under a kobala dated the 27th Bhadro 1274 (11th September 1867) ; that the tenure was agricultural and permanent ; that Dinomoyi and her predecessors in title had been in possession for nearly a hundred years, and that Dinomoyi had acquired a right of occupancy in the land.

The main issues in the case were, *first*, whether any notice had been served upon the defendants and was it sufficient in law ? and, *secondly*, whether the defendants had acquired a right of occupancy in the land ?

The kobala of the 27th Bhadro 1274 recited that the land was held under a pottah dated 1229, and that the deeds relating to the land had all been made over by the vendor, Gora Chand, to the defendant Dinomoyi. The defendants did not produce this pottah nor the other deeds at the trial, nor attempt to account in any way for their absence.

The Munsif held that notice to quit had been duly served upon the defendants and that it was valid in law. He found that the tenure was not a permanent one ; that the land was neither agricultural nor horticultural but

* Appeal from Appellate Decree No. 1495 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 25th of April 1888, reversing the decree of Baboo Hari Krishna Chatterjee, Munsiff of Alipore, dated the 7th of November 1887.

homestead land; and that it had been actually occupied for building purposes; and accordingly held that no right of occupancy had been acquired in the land.

The Munsif therefore decreed the suit.

The defendant Dinomoyi and one of the other defendants appealed.

The Additional District Judge, while he agreed with the Munsif in holding that a valid notice to quit had been duly served on [654] the defendants, differed from him on the question of the right of occupancy in the land. As regards this question the learned Judge observed:

"I think it is clear that the land is not agricultural or horticultural land. It is too small for such a purpose, it is in a town or suburb, and it seems always to have been used for trading or residentiary purposes.

"It does not however follow that defendants cannot have an occupancy right in it. It may not be an occupancy right of which the Bengal Tenancy Act will take cognizance, and it may be that the enhancement suits formerly instituted were brought under a mistake of law, but there are of course occupancy rights besides those recognized by the Landlord and Tenant Acts.

"The case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (I. L. R., 8 Cal., 960) seems to me in point. I cannot see any distinction between it and the present case. The buildings in that case were substantial, it is not said that they were pucca, and it appears that the buildings in the present case may fairly be called substantial. They have existed apparently for many years, and two of them have thick mud walls.

"Whether the enhancement suit was properly brought or not, its institution was certainly an admission that Gora Chand had a right of occupancy." The Judge further observed: "There may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."

* * * *

"In my opinion defendants have a right of occupancy in the land, and cannot be ejected. The land has been in their possession and that of their vendor and his family for about a century, and the conduct of the plaintiff in suing for enhanced rent shows that he knew the tenant had an occupancy right in it. It was leased out apparently for building purposes, and the tenant built houses and planted trees on it in accordance with the grant and on the faith of it."

The Judge accordingly reversed the decision of the Munsif and dismissed the suit.

[655] The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Bhobani Charan Dutt* for the Appellant.

Baboo *Debender Mohun Sen* for the Respondents.

The **Judgment** of the Court (PIGOT and RAMPINI, JJ.) was delivered by

Rampini, J.—This is a suit for ejectment from an area of about half a bigha of land after service of notice to quit. The land has been found by both the lower Courts not to be agricultural or horticultural land. The Lower Appellate Court remarks that "it is too small for such a purpose, it is in a town or suburb, and it seems always to have been used for trading or residentiary purposes." The Court of First Instance gave the plaintiff a decree, but the Lower Appellate Court has held that the defendants have a right of occupancy in the land in consequence of its occupation by their vendor and his family for about a century, and that, therefore, they cannot be ejected. The learned Additional District Judge cites the

case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (I. L. R., 8 Cal., 960) as an authority for the view which he expresses, that "it is not only agricultural tenants that can plead occupancy rights, and that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants." But the case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (I. L. R. 8 Cal. 960) would seem to us to be no authority for such a proposition. All that is laid down in that case is that when land has been let, not for agricultural, but for building purposes, and when buildings of a substantial character have been erected on it for more than 60 years, and the defendant and his ancestors have been in occupation of it for that period, the Courts are at liberty to presume, if they think fit, that the original grant of the land was of a permanent character. Moreover, none of the rulings which have been cited in this case in any way support the view taken by the learned Additional District Judge. On the other **[656]** hand, the contrary has been expressly held in the case of *Ramdhun Khan* v. *Haradhun Paramanick* (12 W. R., 404: 9 B. L. R., 107 note), in which it has been said by MARKBY, J.: "It was stated that if a man (altogether independently of Act X of 1859, and even assuming that that Act would not apply) grants, we will say, a house to another for an indefinite term, the tenant, merely by occupation of it under that grant, acquires, on equitable principles (for that is what it comes to), a right for occupancy. I know of no such principle of law. If authority were needed, it seems to me that such a proposition of law was expressly repudiated by the decision of the Privy Council in a case reported in 11 Moore's Indian Appeals towards the end of the volume (*Dhunput Singh* v. *Gooman Singh*, 11 Moore's I. A., 433 at p. 465). I do not say that a grant, which was originally wholly indefinite in its terms, may not be made perpetual by the subsequent conduct of the parties, but that is a matter of fact, and no facts have been shown in this case of that kind, nor has the Court been asked to infer it. What we have been asked to hold, and what we cannot hold, to give the defendants what they ask, is, that simply by occupying under a grant for no specified period and by paying rent under it a tenant acquires a right of occupancy. I think that right is entirely confined to the special cases in which the Legislature has granted it." In no subsequent ruling has any other principle been laid down.

The learned Additional District Judge has not found that there is anything in the circumstances of this case, or the conduct of the parties, which would justify the inference that the lease originally granted to the predecessor of the defendants' vendor was of a permanent nature. He has abstained from coming to any such finding, and we think rightly so, for there would seem to us to be circumstances in the case which point to the opposite conclusion. In the *first* place, the defendants' kobala, dated 27th Bhadro 1274, recites that the land was held under a pottah dated 1229, and that the deeds relating to the land have all been made over by the vendor to the defendant No. 1. It is a most significant **[657]** fact that the defendants do not produce this pottah, or attempt to account in any way for its absence. This conduct of theirs certainly lays them open to the imputation that they are purposely withholding this pottah, as it would have shown that their tenancy is not of a permanent character. *Secondly*, it is an undisputed fact in this case that the rent of the half bigha of land from which it is sought to eject the defendants has very recently been enhanced; so that no presumption in favour of the defendants from long occupation of the disputed land at a fixed and unvaried rate of rent can arise. *Thirdly*, the buildings on the disputed land are found to be but huts made of non-permanent and non-substantial materials, which can be easily removed. We therefore do not think that any presumption as to the permanent character

of the original grant of the disputed land could fairly have been made in the case, or that there are any circumstances to negative the right of the landlord, as the plaintiff is admitted to be, to re-enter on the land after taking proper steps to determine the defendants' tenancy, as he has taken.

We therefore set aside the decree of the Lower Appellate Court and restore that of the Court of First Instance. This order carries costs in the suit in all the Courts.

C. D. P. *Appeal allowed.*

NOTES.

[It was held in (1904) 9 C.W.N., 141 that the Bengal Tenancy Act 1885 did not apply to urban or suburban lands.

In (1898) 25 Cal., 898 this was referred to, in the course of a discussion about the presumption of permanent tenancy.]

[16 Cal. 657]

CRIMINAL REVISION.

The 20th May, 1889.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

In the matter of the Petition of Koilash Chandra Chakrabarty.

Koilash Chandra Chakrabarty

versus

The Queen Empress.*

Penal Code (Act XLV of 1860), ss. 441 and 456 —House-breaking by night - Criminal Trespass—Intent.

When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and when an attempt is made to capture him uses great violence in his efforts to make good his **[658]** escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441† of the Penal Code.

An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence and effected his escape. Upon these facts he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts con-

---

* Criminal Revision No. 163 of 1889 against order of J. G. Campbell, Esq., Sessions Judge of Mymensingh, dated the 2nd of February, 1889, affirming the order of Baboo Bhuban Mohun Raha, Deputy Magistrate of Netrokona, dated the 31st of December, 1888.

† [Sec. 441.—Criminal trespass. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property ; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass.]

victed the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal.

Held that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld.

THE petitioner in this case was charged with house-breaking by night in the premises of one Golak Mohun Mojumdar, and of voluntarily causing hurt to one Sarba Joya Debi under ss. 456 and 323 of the Penal Code.

The case as proved by the complainant and his witnesses was that he was awoke in the middle of the night by his cousin Sarba Joya Debi, calling out that there was a thief in the house, shaking the padlock of the *sindhuk*; that he rose and went out at once to the house in which Sarba Joya slept and found the accused coming out; that he thereupon seized him by his beard and a struggle ensued; that the accused bit him on the neck, and that on Sarba Joya coming out, and giving an alarm, the accused left him and hit her over the head with a *khota*, and then left the premises. The defence set up by the accused, who was the village doctor, was an *alibi*; but the Deputy Magistrate accepted the story of the prosecutor and disbelieved the *alibi*. The accused, by way of assigning a motive for a false charge being brought against him, alleged that the cousin of the complainant, a widow named Bhaba Sundari who slept in the same house as Sarba Joya, was unchaste, and that as he, the accused, had been interfering with her visitors, this charge had been got up against him.

[659] The Deputy Magistrate came to the conclusion that the accused broke into the house and committed the assault charged, but that his object in breaking into the house was not theft, but probably something worse, suggesting thereby that his object was the prosecution of an intrigue with Bhaba Sundari. He accordingly convicted the accused on both charges and sentenced him to six months' rigorous imprisonment, and a fine of Rs. 25 on the first charge, and a fine of Rs. 50 on the second charge.

The accused then appealed to the Sessions Judge, and it was contended on his behalf that the conviction under s. 456 could not be sustained, in asmuch as, if he merely entered the house to prosecute an intrigue with Bhaba Sundari, there could be no criminal trespass, and the assault was committed outside the house and had nothing to do with the entry. The Sessions Judge, however, rejected that contention, and held that the conviction was right, as there was no evidence to show that the woman invited him or consented to his intrusion, and, when he was seized, he was guilty of extreme violence. The appeal was accordingly dismissed.

The accused then moved the High Court, under its revisional powers, upon the ground that the prosecution having failed to prove that he entered the house with intent to commit theft or any other offence, the conviction was bad.

A rule was issued which now came on for argument.

Baboo *Dwarka Nath Chuckerbutty* for the Petitioner.

Mr. *Kilby* for the Crown.

The **Judgment** of the High Court (PRINSEP and HILL, JJ.) was as follows :—

In this case the petitioner, Koilash Chandra Chakrabarty, was convicted by the Deputy Magistrate of Netrokona of the offences of house-breaking by night and of voluntarily causing hurt under ss. 323 and 456 of the Penal Code, respectively, and sentenced to six months' rigorous imprisonment in respect of the first offence, and to a fine of Rs. 50 in respect of the second. He appealed to the Sessions Judge of Mymensingh, but his appeal was dismissed; and he now

moves this Court to set aside the conviction and sentence under s. 456 of the Code on the [660] ground that the prosecution failed to prove that he had entered the complainant's house with the intent to commit theft or any other offence.

In our opinion the conviction and sentence ought to be maintained. The facts are these: The complainant, who is apparently a person in comfortable circumstances, lives in a country village in a house which is divided into several distinct apartments. One of these he used himself with his wife and three young children to sleep in, and another was used for the same purpose by two widows, cousins of the complainant, the elder of whom was of advanced age and the younger, whose name is Bhaba Sundari, a woman of about 20 years of age. On the night of the 12th Aughran, when the events out of which this case has arisen took place, there was no other occupant of the complainant's house but the persons I have mentioned. On that night a considerable time before daybreak, the complainant was awakened by his elder cousin, who told him that there was a thief in the house who was shaking the padlock of a *sindhuk* in his room. He got up and went out at once and found the petitioner forcing his way out of the ladies' room by pushing aside the *bera*. He seized the petitioner and a struggle ensued in the course of which the complainant was bitten by the petitioner, and the elder lady received a blow from him with a piece of bamboo which drew blood. The complainant, under these circumstances, charged the petitioner with having entered his house with intent to commit theft and with assault. The defence was an *alibi*, and the petitioner asserted that he had been falsely accused because he was supposed by the complainant to have interfered with the amours of the younger of the widows. The *alibi* has been disbelieved by both the Courts below, and there seems to be no ground for the aspersions cast on the character of Bhaba Sundari.

Neither of the Courts below has found in terms with what intent the petitioner entered the complainant's house. The Deputy Magistrate declined to believe that his object was theft, but thought that he might have been there for "something worse", by which, I presume, is meant the prosecution of an intrigue with the younger widow; but with reference to this aspect [661] of the case the learned Judge, in disposing of the argument that the petitioner's act was not criminal as his entry was for the purpose of having connexion with Bhaba Sundari, remarks: "There is no evidence that the woman invited him in, or consented to his intrusion, and when seized he was guilty of extreme violence," and we should do wrong, were we, in the existing state of the evidence in the case, to assume, as we were invited to do by the pleader who appeared before us on behalf of the petitioner, that the intrusion of the petitioner was less distasteful to Bhaba Sundari than to any other member of the complainant's household. The learned Judge refused to accept that view, and on that ground, as we understand his judgment, declined to disturb the conviction. What we have then to deal with is the case of a man, a stranger, who uninvited and without any right whatever to be there, effects entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances we think a Court ought to presume that the entry was effected with an intent such as is provided for by s. 441 of the Penal Code. This is the view upon which the learned Judge has acted, and we therefore think that his decision ought to be upheld.

H. T. H. *Conviction upheld*

NOTES.

[For similar decisions, see also (1894) 22 Cal., 391; (1895) 22 Cal., 994; (1905) P.R., 18; (1906) 29 All., 46.]

[16 Cal. 661]

CRIMINIAL REVISION.

The 13th May, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Kedarnath Das............Petitioner

versus

Mohesh Chunder Chuckerbutty and another...... .....Opposite-parties.*

Criminal Procedure Code (Act X of 1882), s. 195—Sanction to prosecute—Notice to accused—Revisional power, Exercise of, by High Court.

When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself, from the record whether the application for sanction has been properly granted or not.

[662] A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted."

There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications.

The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to and in the absence of the complainant or his attorney, and the Magistrate granted the sanction asked for.

On an application to the High Court to revoke the sanction; *Held*, that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard.

Held, further, that the mere fact of the charge laid by the complainant not having been proved, was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked.

THE facts which gave rise to this application were as follows. -

The petitioners, Kedarnath Das and his brother, were, according to the allegation of the petitioners, the owners of the southern portion of No. 6, Bholanath Coondoo's Lane in Calcutta, which had been allotted to them

* Criminal Motion No. 175 of 1889 against the order passed by Moulvie Abdul Jubber, Officiating Presidency Magistrate of Calcutta, Northern Division, dated the 11th of April 1889.

under a decree for partition passed by the High Court in its ordinary original civil jurisdiction. In an affidavit filed in support of his application Kedarnath Das stated that in the Bengali year 1293 (1886-87), Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, the opposite parties, who were their purohits, requested him and his brothers to allow them to reside in the portion of the second premises so allotted to them, promising to vacate as soon as they were asked to do so, and that he and his brother allowed them to reside there.

In his affidavit he went on to state that on the first day of March he called on the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, and informed them that the house [663] was badly in need of repairs, and that he and his brothers wished to repair the same and desired them to leave the house as soon as possible, and he placed two of his servants, Jooman and Hem Raj, in the house.

That on the 5th March, having received information that the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty had ordered his servants to leave the house, he called there and met Nobo Coomar Chuckerbutty, who threatened to break his head if he entered the house, but that he entered the house and told his servants not to leave it, and finding that the sudder-door was wholly out of repair and about to fall in pieces, he removed the same to his dwelling-house.

That on the 9th March, having received information that his servants had been turned out of the said house, he called there, and on seeing him Nobo Coomar Chuckerbutty left the house and proceeded towards the direction of the Burtollah thannah. That he went into the house and found that the cook-room had no door, and certain doors and windows, which he had stored in one of the godowns, were missing, and he found a carpenter employed in sawing certain rafters. Seeing this he went to the thannah and informed the jemadar of what had happened, and thereupon the jemadar wrote something in a book and desired him to put his signature thereto, which he did.

That thereafter and on the same day a jemadar of police went to the house, but he did not make any enquiries into the petitioner's charge, while he made certain enquiries into a certain complaint preferred by Nobo Coomar Chuckerbutty against the petitioner, and made him produce the sudder-door which he had removed on the 5th March, but which did not in any way relate to the subject-matter of his complaint. Thereafter, the Inspector of the thannah reported to the Deputy Commissioner of Police that the petitioner's complaint was a false one, whereupon he directed the Inspector to prosecute him. Subsequently, at the instance of the said Inspector, a summons was issued against him.

That on the day of the hearing of the said complaint, he appeared in the Calcutta Police Court with his attorney, Baboo *Kali Nath Mitter*, who informed the Honourable Syed Amir Hossein, [664] the Magistrate of the Northern Division of Calcutta, of the circumstances under which the complaint was made, and the action taken by the Police, and that there was no judicial enquiry as to the truth or otherwise of the said complaint; thereupon the said Magistrate ordered summons to issue against Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, on the complaint preferred by the petitioner, and accordingly summonses were issued against them, returnable on the 10th day of April instant.

That on 10th day of April, the petitioner appeared with his attorney, Baboo *Kali Nath Mitter*, before Syed Abdul Jubber, who was officiating as Presidency Magistrate, and his attorney explained to the Magistrate the circumstances under which the case was placed before him, and in support of

of the petitioner's complaint, his attorney examined him and his brother Amrita Lal Das and also Luckhimoney, Koosum, Hurry Mati, Falgu Mistry and Netto Lall Chunder, as witnesses, but the Magistrate did not take any notes of their evidence, and after the case for the prosecution was closed delivered his judgment.

That he and his witnesses proved the existence of the doors and windows in the house at the time when Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty were in possession of the same, but that he could not give and did not attempt to give any evidence of the taking thereof by Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty or either of them.

That after the defendants were discharged, their pleader, Mr. *Cranenburgh*, applied to the Magistrate for sanction to prosecute him, when the Magistrate stated that he would not hear any application then, as it was not the proper time to hear applications. That his attorney then and there requested the Magistrate not to grant any sanction without notice to the petitioner, when the said Magistrate stated that, when the application for sanction was made to him, he would then consider whether he would issue any notice or not.

That thereafter on the 11th of April, the Magistrate, without any notice to the petitioner or his attorney, granted sanction for the prosecution of the petitioner.

[665] The judgment of the Magistrate, delivered on the 10th of April, was as follows:—

"*Kedarnath Das* v. *Nobo Coomar Chuckerbutty* and *Mohesh Chunder Chuckerbutty*.

Decision :

"The charge of theft of doors and windows is not proved at all against the accused. They are acquitted.

(Sd.) ABDUL JUBBER,
Offg. Presidency Magistrate."

The sanction granted by the Magistrate on the 11th April was in the following terms:—

"Sanction is hereby given to Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, under s. 195 of the Criminal Procedure Code, to prosecute Kedarnath Das, under ss. 211 and 182 of the Penal Code, for having, on the 25th March last, in the said Court, with intent to cause injury to the said complainants, instituted a criminal proceeding against them, and falsely charged them with having, on the 9th March last, in Bholanath Coondoo's Lane, committed theft of two pairs of doors, two windows and 25 rafters, knowing that there was no just or lawful cause for such proceeding or charge.

11th April 1889.

Prosecution sanctioned.

(Sd.) A. J.

11th April 1889.

Issue Summons, ss. 182 and 211.

(Sd.) A. J."

On the 26th of April, Mr. *M. P. Gasper* applied to the High Court (MACPHERSON and RAMPINI, JJ.), for a rule, calling on the Presidency Magistrate and the opposite parties to show cause why the order granting the

sanction should not be set aside and the sanction revoked, and a rule in these terms was granted.

The application was based on a petition and affidavit of Kedarnath Das setting out the above facts.

The rule now came on to be heard.

Mr *M. P. Gasper* and Babu *Kali Nath Mitter* in support of the rule for the Petitioner.

[666] Baboo *Mohun Chand Mitter* for the Opposite parties.

The **Judgment** of the High Court(PRINSEP and HILL, JJ.)was as follows:—

This is a rule issued on an application made by the petitioner for the revocation of a sanction granted by the Presidency Magistrate of the Northern Division of the Town of Calcutta under s. 195, Code of Criminal Procedure, to prosecute him under ss. 182 and 211, Penal Code, in respect of certain proceedings taken by him in the Court of that Magistrate. We have nothing really amounting to any record of the proceedings in that case beyond the judgment of the Magistrate to the effect that "the charge of theft of doors and windows made by the petitioner was not proved at all against the accused." It appears that after the dismissal of that case, an application was made for sanction to prosecute the petitioner Kedarnath Das, in the presence of his attorney, and that the Magistrate declined to hear that application at once, and stated that it should be made at the hour fixed by him for the hearing of such applications. This order, we are told, was made, although the attorney for the petitioner Kedarnath Das expressed his willingness to have the application then heard in his presence, and intimated that he was prepared to oppose it. The application, it seems, was subsequently renewed in the absence of that attorney and granted.

Now, although it has been recently held by a Full Bench of this Court that service of notice before a sanction is given under s. 195 is not absolutely necessary, still, under the circumstances stated, we think that the Magistrate did not exercise a proper discretion in neglecting to give the other side through his attorney an opportunity of being heard, especially after he had intimated that he was prepared to oppose that application; and, further, we think that the Magistrate did not exercise a proper discretion because, so far as we can learn the facts of this case, he should not have readily granted the sanction asked for. Under s. 195, a discretion is granted to us to revoke any sanction which may have been granted by any authority, such as a Presidency Magistrate of Calcutta, subordinate to us, and therefore the law imposes upon us a responsibility in such matters to consider [667] whether the application has been properly granted or not. It is therefore incumbent upon the subordinate Courts so to frame the proceedings before them as to satisfy this Court as a Court of Revision. In the present case we have absolutely nothing before us except the judgment of the Magistrate recording that the charge preferred by the petitioner Kedarnath was not proved. Now, the fact that that charge was not proved was in itself no sufficient ground for granting the accused in that case permission to prosecute the complainant with having intentionally and falsely charged him with such offence. Under such circumstances, we think that there were no sufficient grounds for granting the sanction to prosecute the petitioner and that that order should accordingly be revoked.

H. T. H. *Rule made absolute.*

NOTES.

[Notice is not absolutely required :—18 All., 358 ; 28 All., 142 ; 26 Mad., 592 ; 4 Bom. L.R.,750 ; *see* also 20 Cal., 474.

The proceedings should be so framed as to be intelligible to the superior Court, (1904) C.W.N., 171 ; (1892) A.W.N., 60 ; 23 Mad., 210 ; *see* also 6 Bom.L.R., 897.]

[16 Cal. 667]

CRIMINAL REVISION.

The 20th May, 1889.

PRESENT :

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

In the matter of Bichitranund Dass and others............Petitioners

versus

Bhugbut Perai............Opposite Party.

In the matter of Bichitranund Dass and others............Petitioners

versus

Dukhai Jana............Opposite Party.*

Jurisdiction of Criminal Court—Tributary Mehals—Kheonjur—"Local Area'—Code of Criminal Procedure (Act X of 1882) ss. 182 and 531.

The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur which is on precisely the same footing in that respect as Moaurbhunj.

Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and on appeal to the Sessions Judge, the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the Territory of Kheonjur.

Held, that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside.

[668] *Held*, further, that ss. 182† and 531 of the Criminal Procedure Code had no application to the case.

The words "local area" used in s. 182 only apply to a "local area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other

* Criminal Motions Nos. 4 and 6 of 1889 against the order passed by J. B. Worgan, Esquire, Sessions Judge of Cuttack, dated the 27th of September 1888, modifying the order passed by J. S. Davidson, Esquire, Deputy Magistrate of Tajpore, dated the 6th of February, 1888.

Place of inquiry or trial where scene of offence is uncertain ;	† [Sec. 182 :—When it is uncertain in which of several local areas an offence was committed, or
or not in one district only ;	where an offence is committed partly in one local area and partly in another, or
or where offence is continuing ;	where an offence is a continuing one, and continues to be committed in more local areas than one, or
or consists of several acts.	where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.]

portions of the British Empire to which the Code has no application; and similarly s. 531* only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure.

THE only question raised at the hearing of these two rules was whether the Deputy Magistrate of Tajpore and the Sessions Judge of Cuttack had jurisdiction to try the accused for offences which were alleged and found by the Sessions Judge to have been committed in Kheonjur, a tributary mehal adjoining the district of Cuttack.

The facts of the two cases were practically identical, the principal accused person in both cases being Bichitranund Dass, one of the officers of the Maharajah of Kheonjur, and it is sufficient for the purpose of this report to state the facts whieh gave rise to the issue of the rule in the latter of the two motions.

The prosecution alleged that Bichitranund Dass, who was the peshkar of Anundpore, accompanied by the other accused, all servants of the Maharajah of Kheonjur, came with a large number of men on to lands situate in Sukinda, which is within the district of Cuttack and within the jurisdiction of the Sub-divisional Magistrate of Tajpore, and proceeded to break *mokha* from the *baris* of Dukhai Jana and others, to cut dhan on the lands, and also to cut a *dhandi* which served as a boundary or line of demarcation between Sukinda and Kheonjur. Thereupon certain men of Sukinda came up and protested against the trespass, and this resulted in some nine of the latter being seized by Bichitranund and the other accused and taken off to Anundpore in Kheonjur when they were taken before the Manager. That official sent them down to be tried by the Sub-divisional Magistrate of Tajpore by whom they were discharged. It was alleged by the Sukinda people that they were cutting their *sua* crops on their own land and that their crops were carried off by the Kheonjur party.

After the nine men had been discharged, a complaint was made before the Deputy Magistrate of Tajpore against Bichitranund and the others charging them with offences under [669] ss. 147 and 342 of the Penal Code. The principal question raised in the case was whether the scene of the occurrence was situate within Sukinda or Kheonjur, and on behalf of the accused it was contended that, as the occurrence took place in Kheonjur, the Court had no jurisdiction to try them. The Deputy Magistrate found that Bichitranund, being a resident of Sukinda, and therefore a British subject, was liable to be tried by him, whether the occurrence took place in Kheonjur or not.

Upon the principal question he found that the *sua* lands claimed by the Sukinda people were actually in their possession and formed part of Sukinda; that the accused entered upon their lands with intent to deprive the Sukinda people of them; that they also entered the *baris* of Dukhai Jana and others and committed certain acts of violence therein, such as trampling down the hedges, breaking the *mokha* crops, and cutting the *dhandi*; and that they arrested nine Sukinda men within the limits of Mulasar Mouza in Sukinda and therefore in British territory.

Upon these findings he convicted the accused of offences under ss. 147 and 342 of the Penal Code and fined Bichitranund Dass Rs. 300, Karmokar Patnaik Rs. 100, and the other accused Rs. 20 each with an alternative of one

* [Sec. 531:—No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong Sessions Division, District, Sub-division or other local area, unless it appears that such error occasioned a failure of justice.]

Proceedings in wrong place.

month's rigorous imprisonment each. He further directed all the accused to execute bonds in various sums to keep the peace for a period of three years.

Against that conviction Bichitranund Dass and Karmokar Patnaik appealed to the Sessions Judge, who upheld the conviction but reduced the amount of the fines.

The material portion of the **Judgment** of the Sessions Judge was as follows :—

"The facts of this case are fully stated in the judgment of the lower Court. The allegation of the prosecution is that the riot was committed in the *baris* or homesteads of certain ryots in Mouza Mulasar in Sukinda, in the jurisdiction of the Sub-divisional Magistrate of Tajpore in the district of Cuttack, by the appellants and others, of whom the appellant Bichitranund is a man of the Cuttack district, whilst the appellant Karmokar is a man of the Kheonjur territory. **[670]** The wrongful confinement or seizure of the complainant and his companions is also alleged to have occurred in or close to the said *baris*. About this the Deputy Magistrate was not satisfied, he being of opinion that the arrests were made on the *sua* lands, the cutting of the crops on which led to the same. From these lands he thought the Mulasar men were taken by the appellants to the "Gat" or cattle-fold near the *baris*. He did not pass separate sentences for the riot and the wrongful confinement, but for the two offences jointly. * * * * The case for the appellants is that they were not present, but Bichitranund says that the *sua* lands are not in Mulasar but in Chanchaniapal, a mouza in Kheonjur, adjoining Mulasar, and the arrest was admitted by certain of his co-accused in the case on that ground, it being their allegation that it was effected on the *sua* lands, the distance of which from the *baris* is stated to be a quarter of a mile or something less. The exact position of these fields might, I think, have been with advantage ascertained and shown on a sketch-map, it being a matter of importance to know their distance from the *busti* of Mulasar, as well as from the nearest *busti* in the Mouza Chanchaniapal." [The Judge then proceeded to go into the geographical position of the *sua* lands and other facts immaterial for the purpose of this report, and came to the conclusion that it had not been proved by the prosecution that the *sua* lands were in Sukinda.] He then continued :—

"We are now brought to the other part of the case, viz., the seizure in the *sua* fields, and to the question of jurisdiction, the first point being whether the Penal Code is or is not applicable to the case. It was said for the appellants it is not, because Kheonjur is not in British India. It was said for the prosecution that this statement is incorrect and that Kheonjur is not out of British India, it being under Regulation XII of 1805 a part of Zillah Cuttack. Reference was made for the prosecution to the cases of *Hursee Mohapatro* v. *Dinobundo Patro* (I. L. R., 7 Cal., 523), and *The Empress* v. *Keshub Mohajan* (I. L. R., 8 Cal., 985), the latter being a Full Bench case deciding that Mohurbunj is not in British India. The question of the other tributary mehals being or not being in British India was not settled by that case, special features being found in respect **[671]** of Mohurbunj. The view taken on the general question would, I think, not support a finding that the tributary mehals are not within the limits of British India, and I shall proceed on the view that they are within those limits and that Kheonjur is so situated and thus is not to be regarded as a foreign state under the Extradition Act of 1879. At the same time, I do not consider that the Penal Code can be held to be in force in Kheonjur, inasmuch as the exemption thereof from the Regulation Criminal Law given to this mehal by Regulation XIII of 1805 was not annulled by the Penal Code. What law is in force in Kheonjur does not appear. Criminal jurisdiction is exercised by

the Superintendent as a Sessions Judge, and by the Magistrates of Cuttack, Balasore, and Puri, as Assistant Superintendents; and in a Mohurbunj case tried by me at the May Sessions at Balasore, it was stated that the spirit of the Codes was followed in Mohurbunj, and this is no doubt true of the other tributary mehals.

"Taking it that if the arrest occurred at a place in which the Penal Code, and equally the Criminal Procedure Code, were not in force, the question of jurisdiction demands settlement, it will be well to see how the matter of *venue* stands. If the *sua* fields be held to be in Sukinda, both of the appellants were, and are liable under s. 2* of the Penal Code. All that the one of them who belongs to Kheonjur could claim might be to make an objection as to the matter of his arrest by calling himself a subject of a foreign state but as I have already held Kheonjur not to be a foreign state, no plea of this kind can be entertained. The question is thus only whether Mr. Davidson's decision in the matter of *venue* was justified. It was said for the appellants that it was not, as he made no attempt to re-lay the boundary line as shown by the map to which his decision may very possibly be contrary, and that in acting as he did he assumed a power which is by law vested in the Superintendent and no one else, viz., by Act XX of 1850. I have already shown that the dispute would appear to have involved a very nice question as regards position, and I think myself that this question demanded a more accurate method of determination than that which was adopted by Mr. Davidson, which seems to have left the point [672] in doubt. The fact of the Mulasar men having held the fields would not give the Deputy Magistrate jurisdiction and was hardly relevant to the issue, the position of the lands being one to offer temptation for encroachment. I think that it was a matter in which the onus was on the prosecution and that it was not met. I do not think that I can properly uphold the finding that the *sua* fields are within Sukinda and not in Kheonjur. The point is open to doubt, and of this doubt I think the appellants can claim the benefit.

"It being now held that the scene of the arrests was not proved to be in Sukinda, and that if in Kheonjur, it was in a place not under the operation of the Penal Code, though in British India, the question is how did Mr. Davidson's jurisdiction stand? As regards the Kheonjur appellant Karmokar Patnaik, I do not think that he is, under the view taken by me, differently placed from the other appellant, who is a man of Cuttack. If Kheonjur is in British India, he is as much a native Indian subject of Her Majesty as is Bichitranund. It cannot however be said that s. 188 of the Criminal Procedure Code would apply, nor was it contended. Section 531 was the section on which (with s. 182) the prosecution relies as making the conviction legally sound; and it was urged that the case was one capable of inquiry and trial within either the local area of Sukinda, *i.e.*, Tajpore or of Kheonjur, the latter of which is, it was said, a Sessions division existing at the time of the passing of the present Criminal Procedure Code. Under s. 182, if it was uncertain in which of the areas the offences were committed, it was, it was argued, open to the prosecution to proceed in either the Tajpore Magistrate's or in the Superintendent's Court, and either Court could enquire into and try the case. Against this it was said that Kheonjur cannot be considered to be a 'local area' within the meaning of the Code, and that the alternative procedure was thus not open as contended.

Punishment of offences committed within the said territories.

[Sec. 2:—Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories on or after the said 1st day of May 1861.]

"As to this matter, I do not find any definition of the phrase 'local area' in the law. The point came before me for consideration in the Mohurbunj trial alluded to, and the view that I then took of it was that 'local areas' meant areas within British India. It was said that they are not this, but areas within [673] which the Criminal Codes are in force, and as the Penal Code is not in force in Kheonjur it cannot be held to be a local area. I was not shown any authority for this restricted view of the words 'local area,' and I should not in the absence thereof be disposed to alter the view adopted before. I think that the law is not contravened thereby.

"I thus think that Mr. Davidson was not without jurisdiction as regards either of the appellants, as respects what they are alleged to have done at the *sua* fields, and that as he had jurisdiction he was justified in applying the Penal Code.

"I have not said anything as to the objection of Mr. Davidson's re-laying or defining the boundary being, as alleged, *ultra vires* or not, because on the view taken by me this point of law need not be gone into. My attention was drawn by Baboo *H. B. Bose* to a judgment of Mr. MACPHERSON of the 23rd of May 1877 in R. A. No. 116 of 1875, *Bamadev Bhramachari* v. *Dasrathi Nack*, showing that it was held by him that a Civil Court could not settle its own jurisdiction against a tributary mehal, and I should doubt whether a Magistrate could do so any more. But if s. 182 applies, the Deputy Magistrate's action in this respect is of no importance as regards the conviction.

"I may say that even if the *sua* fields were in Kheonjur, I consider it could not be held that there was no offence, if the application of the Penal Code was legal. The right of private defence would not justify what the appellants did.

"An objection was made that a request made for recall of the witnesses for cross-examination on the 19th of December was disallowed, as also a repetition of the request made on the 9th of January. Looking at the cross-examination which had preceded this petition, and the nature of the evidence, which indicated clearly enough the charge which was made after it was concluded, I do not think that the Deputy Magistrate was wrong in refusing the application, and I do not think that anything could be gained by a remand now. I should thus not interfere on this ground. The conviction is accordingly upheld, as also the order for security, and the appeal to this extent dismissed. In view, however, of the uncertainty of the [674] real position of the land, I think the sentence is capable of mitigation, and I reduce it in the case of appellant Bichitranund to Rs. 200, and of Karmokar to Rs. 60 fine, in default the term of imprisonment to be as ordered by the lower Court."

Against the order of the Sessions Judge, the petitioners moved the High Court, and a rule was issued which now came on for hearing.

Baboo *Mohesh Chandra Chowdhry*, Baboo *Umbica Churn Bose*, Baboo *Abinash Chandra Banerjee* and Baboo *Karuna Sindhu Mukerjee* for the Petitioners.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

The application was based on a petition setting out the above facts, and the principal grounds upon which it was contended that the decisions of the lower Courts were erroneous and the conviction bad were as follows:—

1. That the Courts below were wrong in holding that the territory of Kheonjur, which is a tributary state, formed part of British India.

2. That the Sessions Judge ought to have held that the order of the Deputy Magistrate was liable to be quashed for want of jurisdiction.

3. That the Sessions Judge was wrong in holding that under s. 182 of the Criminal Procedure Code the Deputy Magistrate of Tajpore had jurisdiction to try the case even if the "*sua* land" were held to be within the territory of Kheonjur.

4. That the interpretation put upon the phrase "local area" in s. 182 of the Criminal Procedure Code by the lower Court was not correct, and that that section had no application to the case.

5. That the Sessions Judge ought to have held that the Deputy Magistrate had not the power to assume jurisdiction against a tributary mahal.

6. For that the *sua* lands having been found to be situate within the Kheonjur state, and that the complainant and the people of Sukinda were taking crops from the said land, the **[675]** Court below ought to have held that the petitioners were justified in arresting the trespassers and taking them to the Sub-divisional Officer, and that there was no offence within the meaning of s. 342 or under s. 379 of the Penal Code.

The **Judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :--

In this case we think it clear that the conviction cannot stand. The alleged offence was unquestionably and admittedly, if it was committed at all, committed within Kheonjur. Now there seems to be no question that Kheonjur and Mohurbunj are tributary mehals standing exactly upon the same footing with regard to their relations with the British Government and their independence. This is apparent from the treaty engagements executed by the Rajahs of these respective territories which are set out at pages 184 to 187 of the 1st volume of Aitchison's Treaties. A comparison of these two engagements shows that they are practically identical in terms, and the learned counsel who appears for the Crown has not disputed that proposition. Now this place Kheonjur being in this respect the same as Mohurbunj, we have to consider the effect of the Full Bench case *The Empress* v. *Keshub Mohajan* (I. L. R., 8 Cal., 985), and the cases that gave rise to that reference to the Full Bench. There is no doubt of this, that the result of the Full Bench case and the other cases is this, that whether Mohurbunj was a foreign territory or not, the Criminal Procedure Code and the Penal Code had no application to it. It therefore follows by parity of reasoning that in the case of Kheonjur these Codes have no application. This proposition also was not disputed by Mr. *Kilby* who appears for the Crown. Mr. *Kilby* very properly pointed out his position, and told us that he found it was impossible to support the judgment in the face of these considerations. That being so, and these Codes not applying, it follows that the Magistrate before whom this case first came for decision and the Sessions Judge to whom an appeal was made from the decision of the Magistrate, had no jurisdiction to try the case. It follows also that the Sessions Judge was wrong in his judgment where he considered that s. 182 of the Criminal Procedure Code applied. That section clearly does not **[676]** apply for two reasons. In the first place the words "local area" in that section must mean a local area over which this particular Code applies, and it would not refer to a local area in a foreign country, or in a portion of the British Empire to which this Code has no application. The whole purport of the section makes that clear. Then again that section in reality intends to provide for the difficulty which would arise where there is a conflict between different areas, in order to prevent an accused person getting off entirely, because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. Each portion of the section refers to this conflict. The Sessions Judge finds as a fact that this particular offence was committed in this local area

of Kheonjur, and it is impossible to find from his judgment with what other local area that local area in Kheonjur conflicts. For this reason also s. 182 has no application to the present case. The other section to which the Sessions Judge refers, viz., s. 531, is equally inapplicable. That section, of course, only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure, and for similar reasons it does not apply. In our opinion the place where the offence is said to have been committed was not within the jurisdiction of the Magistrate or of the Sessions Judge.

For these reasons we think it is quite clear that the judgment is wrong. We set aside the convictions and direct that the fines, if realised, be refunded.

H. T. H. *Rule made absolute and conviction quashed.*

---

[677] PRIVY COUNCIL.

The 15th November and 1st December, 1888.

PRESENT :

LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH AND MR. STEPHEN WOULFE FLANAGAN.

Nandi Singh and another............Plaintiffs

versus

Sita Ram and another............Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Gift—Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her to two doness, one of whom could not take.

A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daugheter's son ; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughther, being to modify the law otherwise prevailing, viz., the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer :

Held, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow.

The gift was to the daughter and to her husband jointly. *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey* v. *Tayleur* (Ambler, 138), which not depending on any peculiarity of English law, was applicable here.

APPEAL from a decree (7th July 1885) of the Judicial Commissioner, affirming a decree (10th June 1884) of the District Judge of Lucknow which varied a decree (24th December 1883) of the Subordinate Judge of the Unao District.

The suit out of which this appeal arose related to a gift of a one anna and three pies share in a village, named Baboo Rajnan, in the Unao District of the description generally termed "Zemindari," or jointly held by the proprietary body.* The share had [678] been owned by Sheo Baksh, who died in 1869 without issue, but leaving a widow Mussammat Bichan Kunwar, and a daughter Mussammat Mithan Kunwar. His nephews now claimed his share, and the principal question raised was, whether under the authority of the wajib-ul-arz of the village, and in consequence of a gift made by the widow to her daughter, that daughter's daughter took in priority to the collateral heirs of the deceased Sheo Baksh.

The clause in the wajib-ul-arz, and the contents of the deed of gift of 7th March 1870, by Bichan Kunwar to Mithan Kunwar and her husband Sita Ram (the latter not taking under it) are stated in their Lordships' judgment. Mithan Kunwar died in 1878, leaving her husband surviving her, and he was the first defendant in this suit, the other being his daughter by Mithan Kunwar named Maharaj.

The Subordinate Judge held that the gift was invalid as to Sita Ram, but valid as a gift in favour of Mithan to convey one-half to her; and that Mithan's estate descended to her daughter, Maharaj, under the terms of the wajib-ul-arz, which used the words, *aulad pisri ya dukhtari*.

On the plaintiff's appeal, the District Judge remanded the suit, directing that Maharaj, who had not till then been made a party, should be joined, and adding an issue as to the effect of the deed of gift of 7th March 1870 in favour of Mithan in transferring the entire inheritance. The Subordinate Judge repeated his former decree.

The District Judge's judgment was, that he found no specification of shares in the deed of gift, and though invalid as to Sita Ram, it passed the entire property to Mithan. In regard to possession which should have followed, he held that an application presented by Bichan Kunwar for mutation of names in favour of Mithan, alleging that she had given her possession, was sufficient evidence of possession given in Bichan Kunwar's life-time. He therefore dismissed the suit with costs.

The Judicial Commissioner's judgment, after a short summary was as follows:—

The main contention in appeal is that the deed of gift of 1870, not having been followed by a transfer of possession during the donor's life-time, is invalid according to Hindu law.

[679] The lower Courts however concur in finding that there was a transfer of possession during the life-time of Mussammat Bichan Kunwar. The Court of First Instance has found that Mussammat Mithan Kunwar and her husband Sita Ram lived with Mussmat Bichan Kunwar, and that Sita Ram managed the estate on behalf of the family. Under these circumstances it is difficult, if not impossible, to ascertain the truth as to actual possession. It is however on the whole presumable that Mussammat Bichan did make over the estate to her daughter before her death. If the deed of gift were invalid by reason of Mussammat Mithan Kunwar's not having obtained possession during her mother's life-time, and if she (Mussammat Mithan Kunwar) had no right of inheritance, the conduct of the plaintiffs appellants in acquiescing for nine years in her usurpation is inexplicable.

* In these the co-parceners hold the whole village jointly in shares ordinarily determined by hereditary right, as distinguished from the ownership of shares in villages of another kind, shown by the area of the proprietor's possession.

It is further contended that under the terms of the wajib-ul-arz the widow could not create any interest beyond her own lifetime. This no doubt is the ordinary Hindu law, but it is clear that this is not the intent of the wajib-ul-arz, which I consider has been rightly interpreted by the Courts below, as giving the widow power to create an absolute estate in favour of the daughter, or daughter's son of the original owner.

I further concur with the District Judge that the deed of gift, though invalid as regards Sita Ram, was a valid conveyance of the whole share in favour of his wife, Mussammat Mithan Kunwar, the daughter of Sheo Baksh. I therefore affirm the decree of the Lower Appellate Court, and I dismiss the appeal with costs.

On this appeal, Mr. *J. D. Mayne* and Mr. *J. H. W. Arathoon*, for the appellants regard being had to the finding of the Courts below in succession, as to the question of possession by Mithan, proceeded to other points in the case. It was argued that the judgments to the effect that under the wajib-ul-arz and the deed of gift, an absolute estate of inheritance descending to her own daughter was created in favour of Mithan, were wrong. How far the wajib-ul-arz had the effect of altering the law was open to question, it being merely part of the settlement record, and though entries were presumed to be true under ss. 16 and 17 of the Oudh Land Revenue Act (XVII of 1876), it might be erroneous as in the case of *Uman Parshad* v. *Gandharp Singh* (L.R., 14 I. A., 134; I. L. R, 15 Cal., 20). At all events, the words must receive a reasonable construction, and one could be placed on it that did not conflict with the plaintiff's claims. It could hardly be that the widow could give an **[680]** estate of inheritance which she did not herself possess. And that the words translated, "descendants," meant such descendants as were heirs, rather than that they should allow a daughter's daughter to come in as an heir, was the better construction. If moreover the wajib-ul-arz had authorized a certain exclusion of collaterals in favour of female heirs in a direct line, the gift of 1870 had not proceeded correctly upon the power given. The deed was invalid, at all events, as regarded one of the two donees; and formed but an ineffectual attempt to do more than create an estate for the life of Mithan Kunwar. If it could be taken to be intended to give a joint estate for the life of the daughter, or of both, with survivorship between them, it failed in both cases on the death of Mithan, and the right to inherit the share of Sheo Baksh belonged to his collateral heirs. The gift could not be treated as conferring upon Mithan an estate different from that which had been intended by the donor. Reference was made to *Harvey* v. *Stracey* (1 Drew, 117), *Re Farncombe's Trusts* (L. R., Ch. 652) *Re Brown's Trusts* (L. R., 1 Exch, 74).

The Respondents did not appear.

Their Lordships' **Judgment** was afterwards delivered, on 1st December, by **Sir R. Couch.**—The appellants in this case are the grandsons of one Fatteh Singh, who had two sons, Sardar Singh, the father of the appellants, and Sheo Baksh. The latter married Bichan Kunwar, and died on the 20th April 1869, without leaving any male child. They had a daughter Mithan Kunwar, who was married to Sita Ram, the first respondent. Mithan Kunwar died on the 18th March 1878, leaving a daughter Mussammat Maharaj, the second respondent. Bichan Kunwar died on the 26th March 1874. The suit was brought on 28th September 1883 by the appellants, to recover possession of land in the village, Baboo Rajnan, Pergunnah Harha, District Unao, which was the share of Sheo Baksh in the property inherited by him and his brother, the plaintiffs claiming to be his heirs according to Hindu law, and entitled to succeed to his estate on **[681]** the death of his widow. It was not disputed that the plaintiffs would be entitled if the ordinary law was applicable. The defence was rested upon a custom of the village of Baboo Rajnan as to the right to inheritance, and a deed of gift, dated the 7th March 1870, executed by Bichan Kunwar.

The wajib-ul-arz, which governs the right of succession to the property in dispute, is as follows :—

"*Extract from wajib-ul-arz, of village Baboo Rajnan, Pergunnah Harha, Paragraph 4, of right to inheritance.*

"The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several childern over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance."

The intention appears to be to modify the Mitakshara law which prevails in Oudh by enabling a sharer in family property or his wife to alter the course of succession by introducing a daughter or daughter's son, and their descendants, male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of "descendants" to children, as where they are intended, that word is used, and where a male is intended it is also said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not, as the appellants contended, limited to that interest. Both the lower Courts have understood "descendants" as meaning male and female in any degree.

On the 7th March 1870 Bichan Kunwar executed a deed of gift of the property in dispute to Mussammat Mithan and Sita Ram, the words of gift being followed by "I promise and agree **[682]** in writing that the donee may, from the date of execution of this instrument, take proprietary possession similar to mine over the gifted property. There has been left no claim, right or dispute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was, that the gift being invalid as regards Sita Ram was also invalid as regards Mithan. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Mussammat Mithan. Their Lordships are of this opinion: The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur* (Ambler, 138), Lord Chancellor HARDWICKE said: "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is applicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Young, Jackson* and *Beard.*

C. B.

[16 Cal. 682]

PRIVY COUNCIL.

The 12th, 13th and 16th February, 1889.

PRESENT:

LORD WATSON, LORD HOBHOUSE, AND SIR R. COUCH.

Mahabir Pershad Singh and another............Plaintiffs

versus

Macnaghten and another............Defendants.

[On appeal from the High Court at Calcutta.]

Res judicata--*Code of Civil Procedure, s. 13—Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.*

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the morgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed [683] to the mortgagors a considereble sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees' decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit, brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished by having set off against it the rents which had already accrued, or might afterwards accrue and for possession of the lands on the expiry of the lease:

Held, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exceptione rei judicatæ*.

Nor could the mortgagees be held to have purchased as trustees for the mortgagees, as suggested for the appellant, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any ndependent purchaser.

APPEAL from a decree (12th February 1886), affirming a decree (8th May 1884) of the District Judge of Tirhoot.

The suit, out of which this appeal arose, was brought by the proprietors of mouzas forming part of two taluks, Malik Alipur and Jonapur, in the Tirhoot District, which they had mortgaged to the defendants, who had caused the mortgaged villages to be judicially sold, themselves, by leave to bid granted by the Court executing their decree, becoming the purchasers. The question now raised was whether the mortgagors, notwithstanding the decree obtained against them, and the sales in execution, could now have an account taken of the mortgage debt, and have set-off in their favour, and against such debt, rents due to the mortgagors from the mortgagees; or whether, with reference to the law, as explained (Explanation II) under s. 13 of the Code of Civil Procedure, that any matter which might [684] and ought to have been made ground of defence in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, precluded the mortgagors from now insisting on their right to set off the rents.

The decree which the mortgagees had obtained, upon the mortgage in the Court of the Subordinate Judge, was dated 18th January 1878, and was affirmed by the High Court on appeal on 22nd May 1879.

The appellant, Mahabir Pershad Singh, and his brother Kumla Pershad Singh (the latter now deceased, and represented by the other appellant, a minor), leased to the proprietors of the Khanpur Indigo Factory, Messrs. E. Macnaghten and R. Olpherts, six bigas, part of their shares in the taluks above-mentioned. Their shares, however, in 1867, were sold at a sale for arrears of revenue. This sale was subsequently set aside by a decree of the High Court, affirmed by Her Majesty in Council, in *Bunwaree Lall Sahoo* v. *Mahabir Pershad Singh* (L. R., 1 I. A., 89).

The relations between the parties are set forth in their Lordships' judgment.

The mortgage on which the decree of 1878 was obtained was executed on the 9th december 1871.

On the 15th September 1873, while Bunwari Lal's appeal was still pending, Mahabir Pershad and his brother executed an ikrarnama, agreeing with Macnaghten and Olpherts to grant them further leases, and to give them other land in a mokarari, should the sale for arrears be set aside. Afterwards, on or about the 21st June 1874, pottahs and kabuliyats were executed between them.

On the 29th June 1877, Macnaghten and Olpherts sued Mahabir Pershad and his brother on the mortgage of 9th October 1871 to recover Rs. 34,516. In that suit the defence was, that an express arrangement had been made, whereby the mortgagees were precluded from recovering, without the taking of accounts between the parties; and an issue was raised whether there had been an agreement between the parties that the factory, taking the usufruct of the mortgaged villages, should liquidate in that way what might be due to it. The Subordinate Judge, in his [685] judgment of 18th January 1878, found that the arrangement alleged by the mortgagors had not been proved. He found that an adjustment of accounts between the parties had taken place on 31st December 1873, when the mortgagors were still indebted to the amount for which the mortgage was executed. The High Court affirmed this judgment on 22nd May 1879, observing that it had been proved that, on 31st December 1873, Rs. 25,000 were due on the mortgage, and that the alleged arrangement for rents to be set off had not been proved. The Judges also pointed out that the defendants, in their written statement, declared that the accounts and the sums due to them for rent were to be the subject of another suit, already filed. While that suit on the mortgage was pending, the mortgagors did in fact claim

in another suit Rs. 4,475, rent due on a lease executed by Macnaghten and Olpherts on 21st June 1874. This claim was dismissed in the first Court, but on appeal, the High Court decreed the amount on 21st April 1881. Mahabir Pershad also obtained another decree on 30th June 1879 for Rs. 2,829, in a suit against the present respondents on other kabuliyats.

Meanwhile, the mortgagees enforced the decree on the mortgage; and at judicial sales on 15th September and 20th November 1879, the mortgaged property was sold; and the decree-holders, having previously obtained leave to bid, became the auction purchasers for about Rs. 20,000.

Afterwards the mortgagor, Mahabir Pershad Singh, applied, under s. 311 of the Code of Civil Procedure, to have these two sales cancelled, alleging irregularity and inadequacy of price realized at the sales. This application having been rejected on 25th September 1880, the order rejecting it having been upheld by the High Court was maintained by an order of Her Majesty in Council on 24th November 1882 in *Olpherts* v. *Mahabir Pershad Singh* (L.R., 10 I. A., 25; I. L. R., 9 Cal., 656, nom. *Macnaghten* v. *Mahabir Pershad Singh*).

In the present suit, instituted on the 24th November 1883, the plaint asked that the sales of 15th September and 20th November 1879 might be declared fraudulent and inoperative as against the plaintiffs, whose position as lessors was not, it [686] was contended, changed; and that it should be declared that the plaintiffs were entitled to have rent from the defendants in respect of the leases and mokarari, from the time of satisfaction of their decree by setting off the sums due to the plaintiffs from the defendants; and that it should be declared that, after the expiry of the term of the leases, the plaintiffs were entitled to have khas possession; also for such other relief as might seem just.

The suit was dismissed by the District Judge, and on appeal, the following principal question was thus expressed, and disposed of, in the judgment of a Division Bench, composed of MITTER and NORRIS, JJ.:—

The only ground upon which this appeal has been argued is this, that as on the dates of sale mentioned above, a large amount of money was due from the defendants to the plaintiffs, and as the defendants were the mortgagees, the sale should be declared as null and void, and that an account should be taken between the plaintiffs and the defendants of the moneys due to each other; and if on taking such account anything be found due to the plaintiffs, they should be allowed to sell the mortgaged property for the realization of the same.

The plaintiffs allege, that the amount of money which was receivable by them from the defendants falls into two classes: *First*, the rents of the disputed property which the defendants had in their hands, having been collected by them for the plaintiffs, after possession was taken of the property in dispute in accordance with the decree of the High Court, dated 31st January 1871; *second*, the rents due under the ticca pottahs executed in June 1874.

Now, we find that in the suit which was brought by the defendants upon the bond dated 9th October 1871, the plaintiffs, who were the defendants in it, set up in their written statement that the plaintiffs in that suit were not entitled to recover the amounts sued for unless an account were taken of the two classes of money due to them referred to above. In that written statement they based their defence upon this point upon an express contract between the parties.

In the opinion of the Court of First Instance as well as of this Court, which heard the case in regular appeal, this express contract was not established.

As regards the first class, this Court found that on an adjustment of accounts between the parties, which took place on the 31st December 1873, the plaintiffs in this case were found still indebted, to the extent of the money for which the bond of the 9th October 1871

was executed. Therefore, as regards this amount, it is no longer open to the plaintiffs to con tend [687] that anything was due to them from the defendants. The learned Advocate-General contended, that although the express contract upon which the plaintiffs relied in the former litigation was not established in the opinion of the Courts which dealt with it, yet the plaintiffs are not precluded from relying upon the equity which arises upon the establishment of the fact that on the dates of the respective sales, the defendants were indebted to the plaintiffs on account of the rents due upon the lease executed in June 1874. He further argued, that this equity was not pleaded and dealt with by the Court in the former litigation.

We desire to guard ourselves from being understood to say that, in our opinion, any such equity as is put forward by the learned Advocate-General on behalf of the plaintiffs, does really exist, having regard to the facts stated in the plaint. But conceding this point in favour of the plaintiffs, it seems to us that the result of the former litigation precludes them from relying upon it. The suit upon the bond dated 9th October 1871, was brought to recover the money due under it by the sale of the mortgaged premises. In that suit the equity in question, if it really existed, would have been a valid defence. Therefore the decree which was passed in favour of the plaintiffs directing the sale of the mortgaged premises, precludes the plaintiffs from setting it up again in a subsequent litigation.

We are, therefore, of opinion that the ground urged before us in support of the appeal is not valid. We may notice here a decision cited before us in support of this ground of appeal, *Kamini Dasi* v. *Ramlochan Sirkar* (5 B. L. R., 450). In that case, what was sold by the mortgagee was not the mortgaged property but simply the mortgagor's equity of redemption. There is, therefore, this essential difference between the facts of that case and the present, that in the former the mortgagee bought in the equity of redemption, while in the latter, the mortgagee brought a suit to enforce his mortgage lien, obtained a decree declaring his right to sell the mortgaged property in satisfaction of that lien, and after obtaining sanction of the Court, himself became the purchaser of the property brought to sale in execution of that decree.

The result is that this appeal will be dismissed with costs.

On the plaintiffs' appeal, Mr. *R. V. Doyne*, for the appellants, argued that, as the facts showed that, at the time of the sales in 1879 in execution of the decree upon the mortgage, the respondents were indebted to the appellants in respect of rents, and money had and received; it followed that it was inequitable that the respondents should be allowed to bring the mortgaged lands to sale without coming to an account, and also inequitable that they should become the purchasers. It was also argued, that inasmuch [688] as the decision already given on the mortgage had dealt only with an alleged right of set-off under an express agreement, the appellants were not precluded from establishing facts that might disclose a right of set-off. It was not now alleged that there had been any express agreement to that effect, but it was contended that an equity resulted from the relations between the parties to have an account. Moreover, the respondents having themselves become the purchasers at the judicial sales, should be held under the circumstances to have purchased as trustees for the appellants, notwithstanding that they had purchased after obtaining an order giving them leave to bid.

Reference was made to the Transfer of Property Act (IV of 1882), s. 99, and to ss. 13 and 111 of the Code of Civil Procedure. *Kamini Debi v. Ramlochan Sircar* (5 B. L. R., 450), and *Neerunjun Mookerjee* v. *Oopendro Narain Deb* (10 B. L. R., 60) were cited.

Mr. *T. H. Cowie*, Q.C., and Mr. *C. W. Arathoon*, for the Respondents, were not called upon.

Their Lordships' **Judgment** was delivered by

Lord Watson.—In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and

it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The appellants, members of a joint Hindu family, were owners of certain shares of 20 mouzahs, in taluks Malik Alipur and Jonapur, which were sold, in that year, for arrears of Government revenue, to one Bunwari Lal. An action was brought by them to set aside the sale as irregular, which was dismissed in the District Court; but in January 1871 the High Court gave their decision in favour of the appellants, which was affirmed by this Board in December 1871.

The respondents held six of these mouzahs in lease before the sale to Bunwari Lal. They were proprietors of an indigo factory in the neighbourhood, and they gave the appellants pecuniary and other assistance in their suit, in consideration of which the appellants, in April 1871, during the dependence [689] of Bunwari Lal's appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the 20 mouzas to the respondents for Rs. 25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April 1875. The appellants were restored to possession in April 1871, after the judgment of the High Court in their favour. In September 1873, the parties entered into an agreement by which, in consideration of further assistance already given, and to be given them by the respondents, the appellants undertook, in the event of Bunwari Lal's appeal proving unsuccessful, to renew the lease of the six mouzas, to let to the respondents the remaining 14 mouzahs under a ticca pottah for 15 years, and to grant them a mokarari lease of 13½ bigahs, required by them for the extension of their factory. In February 1874, shortly after the dismissal of Bunwari Lal's appeal, the appellants executed a sunnud, authorizing the respondents to collect the rents of their mouzahs for the year ending in September 1874, the respondents accounting to them for their receipts, under deduction of costs and charges. In July 1874, the appellants, in terms of their previous agreement, renewed the lease of the six mouzas, at a rent of Rs. 645, for 15 years, from September 1874, and granted the respondents a ticca pottah, for the same period, of the remaining 14 mouzahs, at a yearly rent of Rs. 3,527, subject to future adjustment. They also gave, as stipulated, a mokarari lease of the 13½ bigahs.

These transactions between the appellants and respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The respondents began the strife, in June 1877, by bringing a suit upon their mortgage bond. At that date, they undoubtedly owed to the appellants a considerable sum, for past rents of the 20 mouzahs, no part of which had been paid. The appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be [690] set-off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was that, on their failure to establish the alleged agreement, the Subordinate Judge, in January 1878, gave the respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd May 1879. The respondents, in April 1878, sued for execution on the decree of the Subordinate Judge; but in consequence of its being appealed from to the High Court proceedings were stayed. The next step was taken by the appellants, who, in June 1878, raised two actions, one for the rents due in respect of the six and the other for

the rents due in respect of the 14 mouzas. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April 1879, on the ground that the rent payable for the 14 mouzas had never been adjusted in terms of the lease; but the High Court, holding that it lay with the respondents to show what, if any, abatement ought to be made from the rent specified, on the 2nd April 1881 reversed his decision, and gave the appellants a decree for the amount of their claim, which was upwards of Rs. 15,000.

The judgment of the High Court in their mortgage suit having then become final, the respondents, in June 1879, revived the execution proceedings which they had instituted in April 1878. The mortgaged property was exposed for sale on the 15th September and 20th November 1879, when it was purchased in two lots by the respondents, who had obtained leave to bid from the Court, for Rs. 17,000. The regularity of the sale was impeached by the appellants, but their objections were overruled by the Subordinate Judge, and after being sustained in part by the High Court, were ultimately disallowed by this Board on the 24th December 1882.

Having thus failed to make good their statutory objections, the appellants on the 24th November 1883, filed their plaint in the present suit, which prays to have the two judicial sales, of 15th September and 20th November 1879, set aside or treated as nullities; to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue; and for khas possession of the mortgaged property **[691]** after the expiry of the respondents' leases in 1889. The prayer was based upon two grounds: The *first*, which attributed the sales to undue influence and oppressive conduct on the part of the respondents, was abandoned in the High Court, and was not insisted on here. The *second* consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the respondents credited against the sums due by the appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the appellants rely did raise such an equity in their favour. The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the appellants to recover their property from Bunwari Lal, and to secure to the respondents re-payment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the appellants, in November 1883, to the effect of annulling the judicial sales of 1879.

Their Lordships entertain no doubt that the proper occasion for enforcing the equity, now pleaded, would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to which the appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separte action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of s. 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the appellants are therefore barred from insisting on it, *exceptione rei judicatæ*.

[692] It was argued by Mr. *Doyne*, upon the authority of a decision by MACPHERSON, J., *Kamini Debi* v. *Ramlochan Sirkar* (5 B. L. R., 450) that the respondents must be held to have purchased as trustees for the appellants. The same argument, which is not raised in the pleadings, seems to have been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of MACPHERSON, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must bear the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondents: Mr. *S. G. Stevens.*

C. B.

NOTES.

[Leave to bid when granted puts the decree-holder in the same position as any other purchaser:—(1899) 23 Mad., 227; (1900) 4 C. W. N., 474; (1908) 31 All., 82 F. B., (1901) 26 Bom., 88; (1907) 30 Mad., 362.

As to what a mortgagee—decree-holder—purchaser with leave to bid should give credit to, whether to the debt also or not, *see* also (1891) 19 Cal., 4; (1894) 18 Mad., 153; (1895) 18 All., 31; **(1900) 22 All., 284.**

Regarding *Res Judicata* by the application of the rule of '*might and ought,*' C. P. C., 1908, sec. 11 Exp. iv, *see* also the exhaustive judgment of SUNDARA AYYAR J., in *Bommidi* v. *Bommidi* **(1912) 23 M. L. J., 543.**

See also (1900) 23 Mad., 629; **(1901) 24 Mad., 491 P. C.; (1892) 20 Cal., 79 P. C.;** (1902) 31 Cal., 79; (1904) 31 Cal., 428; (1904) 1 C. L. J., 248; (1907) 36 Cal., 193; (1907) **34 Cal.**, 223; (1908) 35 Cal., 979; **(1912) 40 Cal., 1;** (1900) 25 Bom.. 115; 189; (1902) **26 Bom.**, 661; (1897) 20 All., 81; (1897) 20 All., 110.]

[693] PRIVY COUNCIL.

The 16th and 17th November, 1888 and 5th February, 1889.

PRESENT:

LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH AND MR. STEPHEN WOULFE FLANAGAN.

Srinath Das............Plaintiff

versus

Khetter Mohun Singh and others............Defendants.

[On appeal from the High Court at Calcutta.]

Limitation Act, 1877, Art. 135—Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of 1806—Transfer of Property Act (IV of 1882).

A mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date " when the mortgagor's right to possession determined," was barred by article 135 of schedule II of Act XV of 1877.

This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect, on or before 31st March 1873, as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor, down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession.

In a suit brought in 1882 against these purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879: *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, viz., on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under art. 135 as against them.

The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, which he had not appealed.

[694] APPEAL from a decree [18th November 1885, (*Shurnomoyee Dasi* v. *Sreenath Das*, I. L. R., 12 Cal., 614)] of the High Court, reversing a decree (17th June 1883) of the Second Subordinate Judge of the 24-Pergunnahs District.

This suit was brought by the appellant, the transferee of a mortgagee against the mortgagor and twenty-eight other defendants, the latter holding distinct plots of the mortgaged property under purchases from the mortgagor. And the question was whether the suit as against these purchasers, now respondents, was barred, as being a suit brought for possession more than twelve years after the mortgagor's right to possession determined, under Art. 135 of Sch. ii of Act XV of 1877; or fell within Art. 147*, allowing sixty years from the time when the mortgage money became due for the mortgagee's suit.

The plaint was filed on the 6th September 1882, after the Code of Civil Procedure of that year, and the Transfer of Property Act, 1882, had come into force; s. 2 of the latter Act repealing Regulations 1 of 1798 and XVII of 1806, relating to mortgages, their foreclosure and redemption, and the Act substituting its own provisions.

The mortgage deed, which was in the English form, was executed, on the 17th November 1865, by Huri Narain Dey to Shama Sundari Debi, of five holdings of land in the 24-Pergunnahs District, to secure Rs. 15,705, to be repaid with interest at 18 per cent. on 17th February 1866. Besides the usual powers to the mortgagee to enter upon default and to sell, there was a provision enabling Huri Narain Dey "to sell such portions of the mortgaged premises as he might be able to sell to such purchasers, and at such prices as he shall deem advantageous," with an agreement for "the release of the piece or pieces of land so sold from this mortgage." The deed was registered on the 23rd January 1866. Sales of portions of the mortgaged property then took place.

Shama Sundari, as mortgagee, on the 15th February 1872, petitioned the District Court, under Regulation XVII of 1806, ss. 7 and 8, to issue a notice of foreclosure to Huri Narain Dey, alleging that there was then due the sum of Rs. 28,777 on the mortgage. On the same day, the order was made "that the usual notice of one year, together with the copy of the petition, [695] be served on the opposite party." No notice of these proceedings was served on any of the defendants in this suit, other than Huri Narain Dey, although they, with the exception No. 29, purchased before the proceedings were taken. On the 31st March 1873, the Judge ordered as follows: "Whereas one year has elapsed from the date of the service of notice, ordered that this be struck off the file." And no further step was taken by the mortgagee to obtain possession of the mortgaged land, or to enforce any rights against the purchasers. But Shama Sundari, on 10th May 1879, by a conveyance in the English form, duly registered, sold and assigned to this appellant, for Rs. 11,000, all her interest in the mortgage debt and interest due from Huri Narain Dey, and in the mortgaged lands, confirming this by a subsequent deed of 1st April 1880. The prayer of the plaint was that the defendant be ordered to pay, within a time to be specified by the Court, Rs. 63,212, or the sum that might be found due on the taking of accounts and interest for the period of the suit; also a declaration was asked that in default of such payment, the defendants were not entitled to redeem, and that the plaintiff should have possession.

Huri Narain Dey and eight of the twenty-nine defendants made no defence. The others alleged title, each to their several portion of the mortgaged land, under kobalas from the mortgagor; some of them admitting notice of the mortgage,

* [Art. 147 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a mortgagee for foreclosure or sale.	Sixty years	When the money secured by the mortgage becomes due.]

and alleging payment of the purchase-money on account of the mortgagee, Shama Sundari, others denying all knowledge of the mortgage. Some alleged title through mesne or intermediate transfers, others claimed directly through Huri Narain Dey. The latest purchase had taken place in August 1866. All those who defended relied on limitation, alleging that the mortgagor's right to possession having determined on the 17th February 1866, and twelve years from that date having expired in 1878, the suit was barred in the latter year.

On the issue of limitation, as also in other respects, the judgment of the Subordinate Judge was in favour of the plaintiff, to whom he decreed possession. He held Art. 147 to be applicable, and not Art. 135 of Act XV of 1877.

From this decree sixteen of the defendants appealed to the High Court, which reversed it as to all the defendants except the first, **[696]** the mortgagor. The judgment of a Divisional Bench [PIGOT and O'KINEALY, JJ.] [(*Shurnomoyee Dasi* v. *Sreenath Dass* (I. L. R., 12 Cal., 616)] was that as against all the defendants except the first, the plaintiff's suit should have been dismissed, as he had failed to prove his title as against them, and had also failed to prove the identity of the parcels occupied by them with those that he claimed. The only ground however of dismissal that need be stated is limitation, as to which the judgment of the High Court will be found reported in I. L. R., 12 Cal., 616.

On this appeal, which included all the defendants as respondents,

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the Appellant, argued that the period of limitation was given by Art. 147 of Sch. ii of Act XV of 1877, and not by Art. 135, the latter having been wrongly applied by the High Court, which had failed to see the distinction between a claim to possession by the mortgagee, as against the mortgagor, made in the character of mortgagee, and a claim for an account for foreclosure and sale brought by the mortgagee, or as here by his transferee. A mortgagee, after taking proceedings under Regulation XVII of 1806, if entitled by the terms of his mortgage to possession, still had to sue for it, if out of possession, or for a declaration that he was entitled to it, if he was in possession, there being no decree upon proceedings under the Regulation—See the judgment in *Forbes* v. *Ameeroonissa Begum* (10 Moore's I. A., 340). And it followed that such a suit brought by the mortgagee must be brought within twelve years from the date when the mortgagor's right of possession determined, that being the case to which Art. 135 was applicable. But when a suit, as in this instance, aimed at bringing the mortgage to an end, Art. 147 was applicable.

The frame and prayer of the present suit were justified by, and maintainable under, the Transfer of Property Act, 1882, which repealed Regulation XVII of 1806. They were also in accordance with s. 16, cl. (c), of the Code of Civil Procedure (Act XIV of 1882). The Transfer of Property Act came into force on the 1st July 1882, establishing for mortgagees the suit for **[697]** foreclosure; so that the appellant obtained thereunder the right to maintain this suit for foreclosure. It was under this Act that his rights were enforceable against the purchasers, who were no parties to the previous proceedings against the mortgagor. There was nothing in the state of things existing between 1878 and 1882 which excluded the appellant from obtaining the benefit of the law which in the latter year he found in his favour. Referring to the development of the law of mortgage in Bengal, originally land mortgaged by way of conditional sale became the lender's property on non-payment of the money lent; but Regulation XVII of 1806 controlled the mortgagee's right until he should have taken proceedings as the Regulation directed to terminate relations according to his contract. The mortgage in the English form of land, outside the local jurisdiction of the Supreme Court and of the High Court

which had succeeded it, was dealt with by the Courts in the same way. And these proceedings being ministerial, and not judicial, and the so-called foreclosure not resulting in any decree, the mortgagee had, nevertheless, in any case, to sue for possession—see the judgment in *Forbes* v. *Ameeroonissa* (10 Moore's I. A., 340), at page 350 of the report. The provisions of the three successive Limitation Acts were then referred to, the conclusion being drawn that art. 135 applied where the relation of mortgagor and mortgagee subsisted, and did not apply where the suit was to change the character of the relation of mortgage to that of absolute ownership.

Reference was made to *Bhowani Charn Mitre* v. *Joykishen Mitre* (S. D. A., 1848, p. 354), *Forbes* v. *Ameeroonissa Begum* (10 Moore's I. A., 340), *Brojonath Coondoo Chowdhry* v. *Kheiat Chunder Ghose* (6 W. R., 269; and, on appeal, 14 Moore's I. A., 144, and 8 B. L. R., 104), *Huro Chunder Gooho* v. *Gudadhur Koondoo* (6 W. R., 184), *Surasibala Debi* v. *Nand Lal Sen* (5 B. L R., 389), *Denonath Gangooly* v. *Nursing Prosad Dass* (14 B.L.R., 87), *Ghina Ram Dobey* v. *Monaruth Ram Dobey* [7 C. L. R., 580; I. L. R., 6 Cal., 566 (note)], *Burmamoye Dasi* v. **[698]** *Dinobundhoo Ghose* (I. L. R., 6 Cal., 564; 7 C. L. R., 583), *Gokuldass* v. *Kripa Ram* (13 B. L. R., 205), *Mankee Kooer* v. *Munnoo* (14 B. L. R., 315).

None of the respondents appeared.

On a subsequent day, 5th February 1889, their Lordships' **Judgment** was delivered by—

Lord Hobhouse.—The appellant, who was the plaintiff below, is the transferee of a mortgage effected by the first defendant Huri Narain Dey in favour of Shama Sundari Debi. The mortgage bears date the 17th November 1865. It is in the English form, providing for the payment of the debt on the 17th of February 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default. The property mortgaged is in the district of the 24-Pergunnahs.

On the 15th February 1872, Shama Sundari applied to the District Judge of the 24-Pergunnahs to issue as usual a notice of foreclosure to the opposite party, under Regulation XVII of 1806. The opposite party was Huri Narain. The notice was served on him, and, on the 31st March 1873, a year having elapsed from the date of the service, the case was struck off the file. It is clear, therefore, that Huri Narain's right to redeem was foreclosed, and that as against him Shama Sundari became absolute owner, on or shortly before the 31st March 1873.

In the year 1879 the plaintiff acquired Shama Sundari's interest in the mortgaged property, and on the 6th September 1882, he brought a suit against Huri Narain and twenty-eight other defendants whom he alleged to have been holding possession of several plots of the property, claiming by purchase and otherwise from Huri Narain. He stated that they ought to have been made parties to the foreclosure case, but Shama Sundari had not done that; that the defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt; and that the defendants refused to pay. He prayed an order for payment, and, in default, a declaration that **[699]** the defendants would be unable to redeem the mortgaged properties, and an order for possession.

Huri Narain has not made any defence at any stage of the suit. Of the other defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity, and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that

they held plots purchased of Huri Narain at various dates, ranging from November 1865 to August 1866. Some of them stated as to their own plots, that Shama Sundari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August 1866, the difference between the cases of these defendants need not be considered. One defendant, No. 29, stated that he had purchased two plots of Huri Narain's land, one in February 1873 at a revenue sale, the other in December 1876 at an execution sale. This defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the plaintiff really acquired Shama Sundari's interest; whether the defendants' plots are or are not included in the mortgage; whether Shama Sundari was privy to the sale by Huri Narain; whether the purchase-money was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse; all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV of 1877, and the question is whether the case falls within art. 135 or 147. Article 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged, shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines. [700] Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after 60 years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation, his grounds were as follows: that if the foreclosure proceedings were regular, a new starting-point of time was gained in February or March 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were, under the Codes of 1859 and 1877, allowed in the Bengal Mofussil; and that the plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within art. 147, which allows 60 years to sue.

From this decree, sixteen of the defendants appealed to the High Court. The Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February 1878; that, with the right to possession, was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of art. 135, and they dismissed it against all the defendants except Huri Narain. They do not assign their reason for not dismissing it against Huri Narain, but their Lordships presume the reason to be that as against him they took the suit to be one for possession, founded on the title acquired in February or March 1873 under the Regulation. From that decree the plaintiff appeals.

All the defendants, except Huri Narain and another, are made parties respondent to the appeal. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after

taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to **[701]** their Lordships to be as follows: the foreclosure was, as against Huri Narain, perfect on or before the 31st March 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866; therefore, if article 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August 1878 at the latest.

In order to succeed then the plaintiff must show that article 135 is wholly inapplicable to his case. To do that, it is contended that article 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Article 147; that on the 1st July 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for s. 2, cl. (c), of the Transfer Act says that nothing therein shall affect "any right or liability arising out of legal relation constituted before this Act comes into force, or any relief in respect of such right or liability." Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari.

[702] It is therefore unnecessary to discuss what has been so much urged at the bar, viz., the effect to be attributed to Article 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[This was followed in (1912) 15 I. C., 240. See also (1911) 13 I. C., 504 where this case was distinguished.]

[16 Cal. 702]

SMALL CAUSE COURT REFERENCE.

The 15th June, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE TREVELYAN.

Mackenzie Lyall & Co.

versus

Chamroo Singh & Co.*

Sale by auction—Auctioneers —Agent bidding kutcha-pucca—*Usage of trade—Custom —Condition of sale.*

An agent of the defendants made at an auction sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure.

Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent.

In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated "that such an arrangment had never been repudiated:" *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law there was no contract between the parties, and therefore that no suit would lie.

ON the 5th November 1888, Messrs. Mackenzie, Lyall and Co., auctioneers, put up for sale, under their usual conditions of sale, certain cases of zanella cloth.

[703] For lots 287 and 288, two cases of zanella cloth, one Kartick Singh, an agent of the defendants, made a bid of seven annas per yard; for lots 289 and 290 of the same cloth, he made a bid of six annas per yard

At the time of making the above bids, Kartick Singh was informed by the auctioneers, who did not actually knock down the goods to him, that his bids were accepted *kutcha-pucca* and that he would be informed later on, if his offer was accepted, and to this he replied: "All right, when it is made *pucca* inform us." At the trial a *kutcha-pucca* bid was explained as being equivalent to a "firm offer," and it was stated that, by the custom of trade, a man who makes a "firm offer" is bound not to withdraw it at least till a reasonable time, say two or three days, has elapsed for its acceptance, the auctioneers meanwhile undertaking to submit the offer to their principals. The only evidence, however, given on this point was that given by an assistant in the plaintiffs' firm who stated that such an arrangement had never been repudiated.

On 6th November, Messrs. Mackenzie, Lyall & Co., received a letter from the defendants, the principals of Kartick Singh' repudiating the contracts on

* Small Cause Court Reference No. 3 of 1889, made by G.C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 9th of April 1889.

the ground that Kartick Singh had no authority to bid for the goods on their behalf. On the 7th November, the plaintiffs having heard from their principals, wrote to the defendants, informing them that their offer had been accepted. The defendants however refused to take delivery of any of the goods, although requested so to do. The goods were therefore put up again for sale on the defendants' account, the price fetched at such re-sale showing a loss of Rs. 1,003-8-6, and after a request for payment of this amount, Messrs. Mackenzie, Lyall and Co., sued Chumroo Singh and Co., in the Court of Small Causes for the balance due. The conditions of sale made no reference to "*kutcha-pucca*" bids, nor contained any clause stipulating for the procedure relied on.

The learned Chief Judge found that the custom relied on by the defendants if it existed, was unreasonable; and on the question of the repudiation of the contracts by the defendants, he found that Kartick Singh was the defendants' agent, having authority to bid at the sales; that the repudiation or withdrawal by the defendants of the bid made by them, being prior in point of [704] time to the acceptance of such bid by the plaintiffs, the defendants were not liable. He therefore dismissed the suit, but at the request of the pleader for the plaintiffs made his judgment contingent on the opinion of the High Court as to whether or not the defendants were liable, notwithstanding their repudiation of the bid before acceptance of the bid by the plaintiffs was communicated to them.

On the hearing of the reference,

Mr. *Acworth* for the Plaintiffs referred to Pollock on Contracts (4th Edition), p. 24.

Mr. *Bonnerjee* and Mr. *Garth* for the Defendants were not called upon.

The **Opinion** of the Court (PETHERAM, C.J., and TREVELYAN, J.) was delivered by

Petheram, C. J.—The question in this case is, whether there was any contract between the parties.

The plaintiffs in this case are auctioneers carrying on business in this city, and the defendants are merchants, and on some day the plaintiffs published an advertisement of the goods they had to sell, and they also published the conditions of sale. On the occasion of this sale, an agent of the defendants attended the sale and bid for certain lots, and the auctioneer who held the sale did not knock down the lots, but intimated to the bidder that his bid was accepted *kutcha-pucca*.

Now, the first thing that occurs to one to do is to look at the conditions of sale to ascertain whether there are any conditions which deal with an intimation of this kind, and we find that there are not. The plaintiffs say that by the custom of the sale room, an intimation of this kind is an intimation that the goods were put up by them for sale, subject to a reference to the owners of the goods if, I suppose, the bids are below a certain amount. What they undertake to do is, they undertake to submit the bid to the owners within a certain time, but until it has been so submitted there can be no acceptance of the bid. In this case, the defendants withdrew the bids, or repudiated the bids, or at all events they wrote to the auctioneers intimating that they did not intend to purchase the goods. In an [705] ordinary sense, it is clear that a bid made at auction can be retracted before it has been accepted, the reason being that until the goods are knocked down there is no contract with any one. He who makes the offer may withdraw unless he is under a contract not to do it, because until it is accepted there is no contract

between the parties. The defendants having withdrawn the bids before they were accepted, it is clear there was no contract of sale. Mr. *Acworth* admits that what took place could not amount to a contract of sale, but he contends that there is, by the custom of these sale rooms, an implied agreement, or an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promises not to retract his bid until it has been either accepted or refused. It may be that that very often takes place. There is no evidence to show that there was such a contract in this case. Indeed the evidence is the other way, because if it were part of each contract, you would expect to find it mentioned in the conditions of sale, but the auctioneers do not place anything of the kind in the conditions of sale. Then, is there any evidence that there was so universal a custom as to become part of the contract by operation of law? There is no evidence of that kind. The only evidence given on the subject is the evidence of one of the assistants in the sale room, that such an arrangement had never been repudiated. That in my opinion is absolutely insufficient to establish a custom of this kind, and I think, therefore, that, under these circumstances, there was no contract, and there being no contract there could be no breach and no cause of action, and the learned Judge of the Small Cause Court was right in dismissing the suit so far as the goods were concerned.

I think it right to add that if any persons in the position of auctioneers wish to incorporate any such special arrangements as this in their contracts, it ought at least to be made a portion of the conditions on which they sell.

In the result, the questions referred to us will be answered in the negative.

T. A. P.

---

[706] APPELLATE CIVIL.

The 18th June, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Surya Kant Acharya Bahadur............Defendant

versus

Hemant Kumari Devi............Plaintiff.[*]

Land Registration Act (Bengal Act VII of 1876), s. 78--Suit for rent by unregistered proprietor--Application for registration as proprietor.

Section 78 of the Land Registration Act 1876 precludes a person claiming as proprietor from suing a tenant for rent until his name has been actually registered as such under the Act. A mere application to be registered is not sufficient for the purpose.

[*] Appeal from Original Decree No. 62 of 1888, against the decree of Baboo Kali Churn Ghosal, Officiating Subordinate Judge of Mymensingh, dated the 9th of January 1888.

THIS was an appeal against a decree for arrears of rent obtained by the respondent Rani Hemant Kumari Devi, as zamindar, against the appellant Raja Surya Kant Acharya, as the holder of a tenure in her zamindari.

On the 23rd Bhadro 1294 (13th September 1887) Rani Hemant Kumari brought a suit to recover from Raja Surya Kant Acharya the arrears of rent and road and other cesses, for the years 1292 and 1293 (1885 and 1886). The plaintiff was the widow of the late Raja Jotindro Narain Roy, and as such claimed the whole of his estate, and to have come into possession upon the death of Rani Sarat Sundari Devi, the mother of the late Raja and the executrix of his will. On the 16th Pous 1294 (30th December 1887), subsequently to the institution of her suit, the plaintiff applied for the registration of her name as proprietor of the estate of her late husband under the Land Registration Act (Bengal Act VII of 1876).

Several objections, more or less technical, were taken to the suit by the defendant, all of which the Subordinate Judge overruled, giving the plaintiff a decree for a portion of her claim. The only objection material to this report was whether the plaintiff could recover rent from the defendant inasmuch as her name had not been registered under the Land Registration Act, [707] 1876. Regarding this objection the Subordinate Judge observed: "There is no doubt whatever as to the plaintiff's right to receive rent from the defendant, for the latter has already deposited rent to her credit. Then plaintiff has very recently succeeded to her zamindari, and she has, as will be seen from the copy of the petition (Exhibit III), filed on her behalf, already applied under the Land Registration Act for the registration of her name. I see no valid objection why she should not be allowed to sue for the rents claimed. It is true that her name has not been registered as yet, but it may take a good deal of time to have that effected, and is the plaintiff on that account to allow her claim for rent to be barred. I think not, when the plaintiff's title is not denied. I suppose her application for the registration of her name is quite sufficient to satisfy the requirements of law." Accordingly the Subordinate Judge decided this objection against the defendant. The defendant appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the Appellant.

Baboos *Sreenath Das* and *Kishori Lal Sircar* for the Respondent.

The **Judgment** of the High Court (TOTTENHAM and BANERJEE, JJ.) was as follows :—

This is an appeal against a decree for arrears of rent obtained by the respondent as zamindar against the appellant as holder of a tenure in her zamindari.

The plaintiff, respondent, claimed the whole of the estate as widow of the late Raja Jotindro Narain Roy, and to have come into possession upon the death of Rani Sarat Sundari Devi, who was the executrix under the will of the late Raja. It is not quite clear upon the pleadings on what date the plaintiff succeeded to possession, but it must have been either at the extreme end of the year 1292 or sometime in 1293.

The Court below over-ruling several objections, more or less technical, taken by the defendant, gave the plaintiff a decree.

The same objections have been urged in the appeal before us; and we are forced to the conclution, we must say somewhat unwillingly, that as to one of these objections, technical as it is, the appellant is entitled to succeed. That objection is that when this suit was brought and when the decree was passed, the [708] plaintiff was not registered under the Bengal Council Act VII of 1876. The lower Court got over this objection by saying that it appeared

that, before the suit was decided, the plaintiff had made an application to have her name registered, and that that might, in the Subordinate Judge's opinion, be taken as quite sufficient to satisfy the requirements of the law. The law says in s. 78 :—" No person shall be bound to pay rent to any person claiming such rent as proprietor or manager, etc., unless the name of such claimant shall have been registered under this Act." It seems to us quite clear that the lower Court is wrong in supposing that an application to be registered is the same in effect as having been registered; for, if an application to be registered is the same in effect as having been registered, then in respect of every estate, there might be half-a-dozen claimants suing at the same time; and one of the objects of the law is that tenants should not be harassed by suits for rent by landlords who have no title thereto. The words of the law appear to us clearly to require before a person sues for rent, claiming as proprietor, that such person must be registered under the Act; for if a tenant is not bound to pay rent to an unregistered proprietor, he is not liable, we think, to be sued for it.

This observation has been made before in a similar case before this Court. The decision, which has been cited, is *Dhoronidhur Sen* v. *Wajidunnissa Khatoon** decided on the 10th January 1888. If the law tells a tenant that he is not

* SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE TOTTENHAM.

Dhoronidhur Sen and others............Defendants

versus

Wajidunnissa Khatoon............Plaintiff.†

Land Registration Act Bengal (Act VII of 1876), s. 78—Suit for rent by unregistered proprietor.

It is a condition precedent under s. 78 of the Land Registration Act, 1876, that a person must be registered as proprietor or manager before he can bring a suit for arrears of rent.

SUIT for arrears of rent.

The fact of this case are sufficiently set out in the judgment of Tottenham, J.

The Advocate-Geneal (*Sir Charles Paul*) and Baboo *Golap Chunder Sarkar* for the Appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Jogesh Chunder Roy* for the Respondent.

The following **judgments** were delivered by the High Court (PETHERAM, C. J., and TOTTENHAM, J.) :—

Tottenham, J.—This was a suit brought to recover the rent of a patni. It was brought against nine persons, upon the ground that they being a joint family were all joint owners of the patni.

The patni is registered in the plaintiff's books in the name of the defendant No. 1 only, Dhoronidhur Sen, who had purchased it at an auction sale under Regulation VIII of 1819 in the year 1873. The plaintiff alleges herself to be the matwalli of the estate to which this patni belongs. The estate is said to have been created a waqf by one Hafizunnissa, and Hafizunnissa is said to have constituted herself the first matwalli, and afterwards, in the month of Cheit 1291 to have appointed the present plaintiff, Wajidunnissa, matwalli in her stead. Wajidunnissa therefore brought this suit to recover the patni rent for the years from 1289 to 1292.

The objections taken in the defences were, first that the plaintiff, not being registered as a manager or proprietor under Bengal Act VII of 1876, was not competent to sue for the rent at all. It was also contended that only one of the defendants, Dhoronidhur, was liable to pay the rent, he being the sole patnidar, the other defendants having no concern with it, that is to say, not being liable for the rent by any agreement between themselves and the plaintiff. Another plea was added on the part of Dhoronidhur that, as regards a great portion of the claim, payment had been made.

† Appeal from Original Decree No. 268 of 1886, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Jessore, dated the 25th June 1886.

bound to pay any [709] person who is unregistered, it follows that it was not intended that an unregistered person should be able to sue him, not only to recover the amount of rent, but also the costs and possibly damages for non-payment.

[710] In the present case, there appears to be really no question that the plaintiff was entitled, as widow of her late husband, to receive the rent payable by the defendant; and probably if the rent claimed had not been at an enhanced rate, the present objection would not have been taken. As it has been taken, we think we are bound by law to give effect to it.

The lower Courts decided all the points in favour of the plaintiff, except as to the sum of Rs. 100, for which the Court gave credit to the defendants in diminution of the amount of the claim. The defendants have appealed, and the same objections have been repeated in this Court.

It appears to us that the first objection is fatal to the suit, the objection, namely, that the plaintiff, not having been registered under Bengal Act VII of 1876 at the time the suit was filed, was not competent to institute it. It is true that, during the pendency of the suit and before the decree was made, she had got herself registered, but s. 78 of the Act provides that "no person shall be bound to pay rent to any person claiming rent as proprietor or manager of an estate or revenue-free property, in respect of which he is required by this Act to cause his name to be registered, or his mortgagee, unless the name of such claimant shall have been registered under this Act." It seems to follow from the facts that no person is bound to pay rent to such person that such person is not competent to sue him until registered.

For the respondent, it has been contended by Baboo *Mohesh Chunder Chowdhry* that this objection, if valid at all, could only apply to the rent accruing due subsequent to the death of the previous matwalli. He contends that, as regards the rents previously due, they were assigned to the present plaintiff under the deed by which she was created matwalli.

This contention appears to us to be fallacious, inasmuch as the rents which accrued due in the lifetime of Hafizunnissa were, upon the plaintiff's own showing, not due to *her*, but to the waqf estate ; and the present plaintiff's position is not that of an assignee from Hafizunnissa, but of a manager recovering the debts due to the estate. The section of Bengal Act VII of 1876 appears to me to apply equally to both kinds of arrears, those due before and those accruing due after the incumbency of Hafizunnissa. We think therefore that this suit should have been dismissed on this ground.

In this view, it is not necessary that we should determine the other objection, whether the plaintiff is entitled to sue all the defendants or not, the question being whether they are all proprietors of the patni or only Dhoronidhur. But we may observe that, in the state of the evidence on the present record, we should not be prepared to hold that the plaintiff is entitled to recover a decree from them all We think that the evidence adduced by the plaintiff does not show that they are all holders of the patni. The presumption of law that because the family was generally joint, the purchase-money for the patni must have come from joint funds, is not we think by itself sufficient to override the facts disclosed by the documents of title under which Dhoronidhur is the registered patnidar, and in the Court below, the issue whether or not the patni was acquired by joint funds was not distinctly raised between the parties.

However that may be, we think that, for the reasons given above, the present suit must be dismissed. The plaintiff being now the registered manager or owner will be at liberty, if he thinks fit, to bring a fresh suit in which all these questions could be fully decided between the parties.

As the lower Court ought not to have tried this suit at all, none of its findings can have binding effect.

PETHERAM, C.J.—With reference to the liability of all the defendants jointly in this case, all that we say is that, as the record at present stands, we do not think there is sufficient evidence to charge them all jointly. Whether it would be or is possible, or whether it is the fact and could be proved by any other evidence, that the whole of this joint family are in possession of the patni is a different matter, but as the record at present stands, we do not think there is sufficient evidence to support the finding of the learned Judge, but we decree this appeal on the ground that the plaintiff cannot sustain this suit by reason of her not having been the registered proprietor at the time when the suit was brought, and by reason of the provisions of s. 78 of Bengal Act VII of 1876. We express no opinion whatever as to any finding of the learned Judge with reference to the joint liability of the defendants except we think that the evidence at present on the record is not sufficient to sustain it. The appeal will be decreed with costs.

C. D. P. *Appeal decreed.*

[711] The result is that that portion of the plaintiff's suit, in respect of which this appeal has been preferred, must be dismissed.

The appellant will be entitled to his costs in this Court on the sum at which this appeal is valued, and in the lower Court on the whole amount claimed by the plaintiff.

C. D. P. — *Appeal allowed.*

NOTES.

[This was **dissented** from in **(1895) 23 Cal., 87 F. B.**: (1898) 2 C. W. N., 493; (1899) 26 Cal., 712; in (1898) 25 Cal., 717 registration was held to be necessary in whatever way, the title had devolved.]

[16 Cal. 711]

APPELLATE CIVIL.

The 14th June, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

G. Chisholm............Defendant

versus

Gopal Chunder Surma............Plaintiff.*

Set-off—Cross-demand arising out of the same transaction—Civil Procedure Code (Act XIV of 1882), s. 111.

When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under s. 111† of the Civil Procedure Code.

Bhagbat Panda v. *Bamdeb Panda* (I. L. R., 11 Cal., 557) relied on; *Clark* v. *Ruthnavaloo Chetti* (2 Mad. H. C., 296) referred to.

SUIT for the recovery of arrears of salary.

---

* Appeal from Appellate Decree No. 1474 of 1888, against the decree of H. Luttman Johnson, Esq., Judge of the Assam Valley Districts, dated the 8th of May 1888, affirming the decree of Baboo Madhub Chunder Bardolai, Munsif of Tejpur, dated the 31st January 1887.

† [Sec. 111:—If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off.

Particulars of set-off to be given in written statement.

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other.

Inquiry.

Such set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but it shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.]

Effect of set-off.

The defendant, who was the Agent of the Rivers Steam Navigation Company at Behali, on the 28th November 1882, [712] appointed the plaintiff his mohurir at the Steamer Ghat on a salary of Rs. 40 per mensem. The plaintiff was at first allowed the services of three chowkidars on Rs. 6 per mensem each, but in March 1883 this number was reduced to two by the defendant. In July 1884 the plaintiff tendered his resignation, and on the 1st September following was relieved of his duties. After repeated demands for payment, the plaintiff brought this suit to recover the sum of Rs. 890 which he claimed on account of arrears of his salary and the wages of the chowkidars up to the end of August 1884, after giving credit to the defendant for various sums of money amounting to Rs. 204 paid from time to time.

The defendant contended that on account of goods and property damaged, lost, or not accounted for by the plaintiff, he was entitled to set-off the sum of Rs. 624-6-3 made up of the following items:—

		Rs.	As.	P.
(1)	Tea-lead, damaged through plaintiff's negligence, value	188	0	0
(2)	A boat lost while in charge of the plaintiff, value	50	0	0
(3)	Timber in plaintiff's charge not accounted for, value	138	0	0
(4)	Kayah's stores received from steamer and not delivered or accounted for, value ...	84	12	0
(5)	Advance paid when plaintiff was serving as Garden Mohurir	25	15	0
(6)	Freight on goods landed from steamer realized, but not paid to defendant	7	11	3
(7)	Amount received from the Steam Navigation Company on account of salary	130	0	0
	Total Rs. ...	624	6	3

As regards the last item the defendant alleged that the plaintiff had received this sum of money from the Rivers Steam Navigation Company on account of his salary in addition to the sum of Rs. 204 which the plaintiff admitted had been paid to him on the same account by the defendant.

[713] Both the Extra Assistant Commissioner of Tejpur and the Judge of Assam on appeal decreed the plaintiff's claim in full, holding that inasmuch as the items claimed as set-off were not ascertained sums of money within the meaning of s. 111 of the Civil Procedure Code, they could not be set off against the plaintiff's claim. The defendant appealed to the High Court.

Baboo *Pran Nath Pundit* for the Appellant.

Baboo *Jogendro Nath Ghose* for the Respondent.

The **Judgment** of the High Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

This appeal has been preferred by the defendant in a suit brought against him by the plaintiff to recover arrears of salary. The defendant disputed the amount due. In his written statement he has set out a number of items for which he claimed credit; and the total of which, if allowed, would reduce the plaintiff's claim by Rs. 624 odd.

Both the Courts below decreed the plaintiff's claim in full, holding that none of the items set out by the defendant in his defence came within the scope of s. 111 of the Code of Civil Procedure and could not be claimed as a set-off. Against this decision the present appeal has been brought. As regards

most of the items set out by the defendant we concur with the lower Court in thinking that they do not come within the scope of s. 111, for most of them are not ascertained amounts due by the plaintiff. It is true that they are all specified amounts, but specified amounts are not necessarily ascertained debts. As regards, however, one of the items, it was not pleaded as a set-off, but it was alleged to be payment on account of salary for which the suit is brought. The plaintiff has given credit for Rs. 204, as having been paid from time to time. The defendant pleaded a further payment of Rs 130. That payment he did not allege to have been made personally to the plaintiff, but he alleged that the plaintiff had received it from the Steamer Company whose servant the defendant was, and which was in a sense, therefore, employer of the plaintiff also, although it may be that the defendant had employed the plaintiff without any reference to the Steamer Company. Be that as it may, if the plaintiff actually received Rs. 130 [714] from the Steamer Company on account of monthly salary, that amount will have to be credited in the present suit. At all events the Court should have enquired into this item, and not treated it as a claim to set-off, under s. 111 of the Code. Then as regards the other items set out in the first Court's judgment as claimed by the defendant, although most of them may not, and do not, come within the scope of s. 111, still we think, independently of that section, that the defendant was entitled to bring them forward, and have an adjudication in respect of them in this suit. They were in the nature of cross-claims, and were so connected with the plaintiff's claim for salary as servant and agent of the defendant, that it would seem inequitable to compel the defendant to have recourse to a separate suit to recover them. This has been laid down in *Clark* v. *Ruthnavaloo Chetti* (2 Mad. H. C., 296). It was there said "that the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit." That decision was followed not only in later cases in the Madras Court, but also followed in this Court, in a case of *Bhagbat Panda* v. *Bamdeb Panda* (I. L. R., 11 Cal, p. 557); and we think that the law there laid down is applicable to the present suit. The claims as made by the defendant arise for the most part out of the relation set up by the plaintiff in this suit, as a suit of master and servant, or principal and agent; and so far as these items are claimed in respect of the alleged neglect or misconduct of the plaintiff in his capacity of servant of the defendant, we think that the defendant was entitled to have the claims enquired into. Of course there may be, as regards each item, several reasons why the defendant may fail in recovering, still those are matters which will have to be enquired into.

We therefore direct that the case be sent down to the Court of First Instance to be re-tried.

Costs will abide the result.

C. D. P. *Appeal allowed and Case remanded.*

NOTES.

[*See* also (1892) 15 All., 9; (1896) 21 Bom., 126; (1899) 19 A. W. N., 143; (1903) 8 C. W. N., 174; (1906) 11 C. W. N., 215.]

---

[715] CRIMINAL MOTION.

The 3rd June, 1889.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Golap Pandey............Petitioner

versus

R. H. Boddam............Opposite party.*

Summary Trial—Magistrate, power of, to try case summarily—Criminal Procedure Code (Act X of 1882) s. 260—Criminal Trespass—Penal Code (Act XLV of 1860), s. 447.

A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148, and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily and convicted one of the accused. It was contended that he had no power so to try and dispose of the case.

Held, that the Magistrate had power to try the case summarily.

When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences.

During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) and without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting,

Held, their actions amounted to criminal trespass.

THE facts of this case were as follows:—

Mr. R. H. Boddam, the complainant, was the lessee of a tract of land from the Raja of Palganj on the Parasnath Hill, which was a hill sacred to the Sitambari Society of the Jain community, [716] and on and about which were situate temples belonging to that society. The complainant had originally a tea garden on his land, but finding that it would apparently be a profitable business he set up a hog's lard manufactory on his land. This action gave offence to the society, and various proceedings were taken with a view to put a stop to the manufactory which ultimately resulted in a civil suit being filed against Mr. Boddam and his lessor, which suit was pending at the time of these proceedings. On the 23rd March 1889, Mr. Boddam laid a complaint before the Deputy Magistrate of Giridih, charging the petitioners Golap Pandey and others

* Criminal Motion No. 192 of 1889, against the order passed by W. H. Thomson, Esq., Deputy Magistrate of Giridih, dated 22nd of April 1889.

with offences punishable under ss. 447, 146, 148 and 149 of the Indian Penal Code, and asking that they might be bound down to keep the peace under s. 106 of the Criminal Procedure Code.

The complaint was based on a petition of Mr. Boddam in which he set out the facts leading up to the civil suit,, and the annoyance he had suffered in consequence, and stated that on the 24th February, when he was away in Calcutta, a large party under the leadership of Golap Pandey, acting under the orders of the temple authorities, trespassed on to his garden, and made a survey of his lands, that two of the party were armed with swords and a number of the others with *lathies*; that they threatened his servants, and in spite of their objections, proceeded to make a survey of the land; and that their proceedings nearly resulted in a breach of the peace. Mr. Boddam's deposition was recorded by the Magistrate in support of his application, and it appeared that his knowledge of the occurrence was derived from information received from his servants, as he himself was away in Calcutta at the time.

The Magistrate, on this application, issued summonses against the persons named, under the sections named in Mr. Boddam's petition.

On the 6th April, the returnable date of the summons, none of the accused appeared owing to their inability to reach the Court on that day. The Magistrate on that day appeared to have examined one witness named Bhuttu Maji, who was an eye-witness of the occurrence complained of by Mr. Boddam, and upon his evidence issued fresh smmonses to the accused under s. 447 of the Penal Code only.

[717] On the 13th April, the case came on before the Magistrate, who tried it summarily and convicted the accused Golap Pandey of an offence under s. 447, and sentenced him to pay a fine of Rs. 100.

The judgment of the Deputy Magistrate was as follows:—

Mr. R. H. Boddam, of Parasnath, states on oath, that he has the lease of a large tract of land from the Raja of Palganj, on an eastern spur of the Parasnath Hill, a hill which is sacred to the Sitambari Society of the Jain community. This society has temples at Madhuban, the foot of the hill, and on the top of the hill; they have also several shrines on the several peaks. These temples and shrines are visited at various times of the year by Jain pilgrims. The leaders of the society are Rai Budrinath Das of Calcutta and Rai Dhunput Singh of Moorshedabad. Accused Golap Pandey is their agent at Madhuban, and is manager of the various temples and shrines. Mr. Boddam does not know the other two defendants. Mr. Boddam has a tea garden on the lands leased him, and in the midst of this garden he has recently established a piggery and a lard manufactory. This action on the part of Mr. Boddam seems to have given the Sitambari Society great offence, and whereas the former and the representatives of the latter used to be very friendly before, they are now, I may say, rancorous enemies. The Sitambari Society have for some time been trying to force Mr. Boddam to close up his piggery and lard manufactory. They at first worked through the Bengal Government, and then instituted a civil suit. An injunction was issued by the Deputy Commissioner of Hazaribagh, directing Mr. Boddam to stop all business at his manufactory, until the disposal of the civil suit. Mr. Boddam appealed to the High Court, and on the 12th February the injunction was set aside. Mr. Boddam at once issued orders for the resumption of operations, and he says that the Sitambari Society almost simultaneously adopted ways and means to terrorize his workmen, and induce them to desert, and thus smash up his (Mr. Boddam's) business. While Mr. Boddam was away at Calcutta, a large party, acting under the orders of the temple authorities, trespassed into Mr. Boddam's garden and made a survey; Mr. Boddam says this took place on the 24th February, but the evidence heard by me, shows it was on Monday, the 25th February. Mr. Boddam insinuates that the survey was all sham, that the party simply came to intimidate his workmen, and they succeeded in this, some of his workmen have run away, and his munshi, Bhattu, has

served a notice to quit. Mr. Boddam also states, that the leaders of the society have often told him that if he persisted in carrying on the lard manufactory, he would be jeopardizing his life. Mr. Boddam wants defendants to be punished for their trespass, and also to be bound down to keep the peace under s. 106, Criminal Procedure Code. I find that, under Mr. Boddam's lease, he is bound to give up to the Sitambari Society any portion or portions of the lands [718] leased him, if it is needed by them for the purpose of erecting temples, shrines or dharmsalas ; Mr. Boddam is entitled to an abatement of rent for each such relinquishment. There is a Government road from Madhuban to the top of the hill. This road runs through Mr. Boddam's garden. Mr Boddam's bungalow is a good way off the road, and a private road leads to it from the Government road. This private road continues on to the lard manufactory, which is further interior. *Bona fide* visitors are allowed access to the garden, but Mr. Boddam says that the public have no right to make use of his private roads and paths for any and every purpose they may choose. Recently Mr. Boddam has made a cart tract, which passes by his lard manufactory ; this track acts as a short cut for his workmen who come up from the foot of the hill ; it is also admitted by Mr. Boddam's witnesses that jungle people take their carts along the track.

Bhattu Manji, aged 35, son of Gopal, is Mr. Boddam's munshi, and is in charge of the lard manufactory ; in general matters he is second in authority to Kishen Manji, aged 25, son of Bilsi. The latter remains in charge of the garden during Mr. Boddam's absence. Hulas Singh, aged 30, son of Bhavani, is Mr. Boddam's bungalow peon. These three men have been examined as witnesses by the prosecution. Bhattu's deposition shows that, on a Monday, Golap Pandey Lukshmi Chand and a Bengali Amin all of a sudden turned up in doolies at the lard manufactory. Each dooly had four bearers ; defendants Gonder and Amrit accompanied the party and also a flag bearer. The party came up by the jungle cart track, referred to above, and not by the Government road. Witness insinuates that this route was adopted, because the party wished to avoid being observed by Mr. Boddam's workmen and labourers, whom they would have met, had they come up by the regular road. Gonder and Amrit had each a sword, and there was also a sword in Lukshmi Chand's dooly. The party began a survey ; witness remonstrated with them for attempting such a thing in his master's absence, and without his previous permission ; he was scolded into silence, and was told that the party were acting under the orders of the Bengal Government. He withdrew further opposition, and the party after taking bearings to a peak on the top of the hill, and making a survey of the piggery and the lard manufactory, proceeded towards the bungalow, measuring the road as they went. Witness did not follow them. Witness gives some hearsay evidence regarding the threats to the workmen, referred to by Mr. Boddam, and says that two workmen, Birbal and Roopun, have run away, and he himself intends leaving. Witness says that before the survey began, an offering of a pice was made to a stone near the piggery, he does not remember having seen any offering made to the stone previous to this, nor has he heard it styled "Bhoirubsthan." On reaching Mr. Boddam's bungalow, the party were confronted by Hulas Singh, and a scene similar to what occurred between them and Bhattu again took place. Witness snatched the flag and refused to give it up. Matters stood thus, when Kishen Munshi, [719] appeared on the scene, he bid the peon stand aside, and entered into a conversation with the party himself. This witness, Hulas, says that the stone to which offerings are made, is not on Mr. Boddam's land. Kishen Manji says the party boasted of having received orders from the Bengal Government to make the survey ; witness asked for the order ; it was not produced, but he was told that Rais Dhunput Singh and Budri Dass were great friends of Government, and had ordered the survey. While this conversation was going on, the party finished their work and left. Witness at first said that, when he appeared on the scene, Hulas was having a peaceful conversation with the trespassers, but he corrected himself immediately after, and said that angry words were passing between them.

Such is the case for the prosecution, a very much tamer affair than I had supposed it to be. Golap Pandey says that private business took him to the vicinity of the piggery ; an

amin was going up to survey the piggery and the "Bhoirubsthan" in it, and he accompanied him to show him the latter place. The other two defendants simply acted as attendants. Golap Pandey seems to think his action quite legal; he says he has always had free access to Mr. Boddam's house, lands and premises, and that he was not legally bound to take previous permission for the purpose of an entry to make a survey. The presence of the sword is ascribed to the practice of jungle travellers always having such weapons with them for the purpose of defence against wild beasts. Prosecution witness, Bhattu, distinctly says, that the object of the trespassers was to make a survey. The evidence of Ishri Pershad, aged 28, son of Tejnarain, shows that the Deputy Commissioner's injunction was set aside because in the plaint which accompanies the application made by the Jains for the injunction the boundaries of the tract in lease to Mr. Boddam were not given, nor were the interior details of his garden and piggery fully and properly described. The High Court transferred the civil suit to the Subordinate Judge of the 24-Pergunnahs, and the legal advisors of the Jains advised the making of another attempt for an injunction after obtaining all the necessary materials. They directed Lukshmi Chand to have the tea garden surveyed and to prepare a map, showing its boundaries and the position of the piggery, lard manufactory, and Mr. Boddam's bungalow in it. Witness cannot say whether the leaders of the community were consulted in this matter, or whether their permission was obtained to the making of a survey; so far as witness' knowledge goes, Lukshmi Chand was given full powers to exercise his discretion in this matter by the legal advisers, and he appointed an amin, whose name witness does not know, and had the survey made. Witness files the map prepared by the amin which is marked Exhibit I. On all the facts before the Court, there is hardly a doubt that the real object of the trespass was to make a map of Mr. Boddam's lands and premises for the purpose of the civil suit, but they ought to have known that doing this in the illegal way they did would cause Mr. Boddam annoyance.

[720] Poran Chand, aged 28, is one of the managers at Madhuban. He swears to the existence of the most friendly relations between his community and Mr. Boddam, prior to these complications; when the lard business was first started, witness, under orders from his principals, visited the place without obtaining previous permission, and was shown over the works by the *chota sahib* and afterwards by Mr. Boddam himself. Witness says that Mr. Boddam's garden paths are used as a short cut by him and pilgrims; that he has never been stopped while passing through the garden. He says there is a "Bhoirubsthan" near the piggery, which pilgrims visit while descending from the shrines on the top of the hill; witness says he has seen offerings being made to this idol, which, he says, is in Mr. Boddam's compound. To a question put by the Court, witness said that pilgrims have a right to visit the "Bhoirubsthan," but Mr. Boddam may send them away, if he finds them straying about in other portions of his lands without his permission. Witness was asked whether the Jain community had a right to enter on Mr. Boddam's lands, and do any act they pleased; after a deal of hesitation he gave a reply in the affirmative, and said they could build temples and shrines on any portion of Mr. Boddam's lands, without taking his previous permission. Witness says he was away at Moorshedabad when the amin visited the place, and he cannot say under whose orders the survey took place.

Admitting all that defendants urge, which are: (1) that the Jain community have a right to make Mr. Boddam deliver to them lands they may need for sacred purposes; (2) that they use the garden paths as a short cut; (3) that they have a right to visit a "Bhoirubsthan" near the piggery; (4) that they are admitted into Mr. Boddam's lands as sight-seers; (5) that previous to these complications the temple people were allowed to go in and out of Mr. Boddam's lands without any let or hindrance, nevertheless, it is very clear that they have not the right to go on Mr. Boddam's lands, and do any or every act they please. Defence witness, Poorno Chunder, distinctly says that Mr. Boddam would be perfectly justified in sending out of his premises any member of the community he may find straying about portions of his lands other than that occupied by the "Bhoirubsthan."

Defendants' vakil urges that all the facts set forth by the prosecution do not constitute criminal trespass, for proof of motive to annoy on the part of his clients is absent. He urges that a survey for the purpose of a civil suit pending was absolutely necessary, and an entry for the purpose of such a survey does not amount to criminal trespass. A distinct provision is made in the Civil Procedure Code for such a case ; if the vakil's interpretation of the law were correct, the Code would have said that the person wishing to make the survey was at liberty to enter his adversary's land and make the survey, without being liable to be treated as a trespasser ; on the contrary, the Code lays down that survey in such a case is to be done through the Court. Defendants admit having acted all along under legal advice, **[721]** and they ought to have known what the correct procedure is; they departed from the correct procedure wilfully, and it is absurd for them to argue, that they had no idea that their conduct would cause Mr. Boddam annoyance. Their action did cause annoyance ; they must have known very well that they would cause annoyance, and the Court holds that all the elements necessary to make a trespass—criminal trespass—existed. The Court is distinctly of opinion that defendant Golap Pandey ought to have taken Mr. Boddam's permission before he made the survey, and that his having done so without permission, amounts to an entry for the purpose of causing annoyance. The Court finds Golap Pandey guilty of criminal trespass to cause annoyance, and, under s. 447 of the Penal Code, sentences him to a fine of Rs. 100. As regards the other two defendants, the evidence shows they followed Golap Pandey simply as attendants, and on the facts before the Court, it would not be fair to hold that they were participators in the offence committed by Golap Pandey ; the Court therefore acquits them under s. 245, Criminal Procedure Code.

The Court does not consider action under s. 106,* Criminal Procedure Code, needed.

Golap Pandey thereupon applied to the High Court under its revisional power for a rule, calling on the Deputy Magistrate and the opposite party to show cause why the conviction and sentence should not be set aside, upon, amongst others, the following grounds :—

(1) That the Deputy Magistrate had no jurisdiction to try the case under s. 260, Criminal Procedure Code, and the said trial was illegal and improper, and as such ought to be set aside.

(2) That the proceedings and the judgment of the Deputy Magistrate did not comply with the provisions of s. 264, † Criminal Procedure Code, and therefore the conviction and sentence based thereon ought to be set aside.

(3) That the lands in dispute being the subject-matter of the civil suit in which the complainant had been sued as a trespasser on the said lands, the petitioner, the servant of the plaintiffs therein, was not guilty of an offence under s. 447, Penal Code, for a *bona fide* entry therein for the purpose of a

*[Sec. 106 :—Whenever any person accused of rioting, assault or other breach of the peace, or of abetting the same, or of assembling armed men or taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation by threatening injury to person or property, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

Security for keeping the peace on conviction.

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.]

†[Sec. 264 :—In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

Record in appealable cases.

Such judgment shall be the only record in cases coming within this section.]

survey, under legal advice, for the purpose of the said suit without any intention of either committing any offence or intimidating or insulting or annoying the complainant.

(4) That there being no evidence or finding that the complainant was the owner of the lands (and, as a matter of fact, a **[722]** *bona fide* civil suit being pending in the Civil Court with respect to the title thereto) the conviction under s. 447 was illegal.

(5) That, admittedly the Jain Sitambari Society having a right to go over the Hills for the purpose of worshipping or selecting a site for any new temple thereon, the entry, as alleged and found against your petitioner, did not constitute any offence under s. 447, Penal Code.

(6) That as there was no evidence that the petitioner entered the land with the intention of committing any offence or intimidating or insulting or annoying the complainant or his men, the learned Deputy Magistrate was wrong in convicting the petitioner under s. 447, Penal Code.

(7) That the findings of the Deputy Magistrate do not support a conviction under s. 447, Penal Code.

Upon this application, a rule was issued, which now came on to be heard.

Mr. *Woodroffe* and Baboo *Dwarka Nath Chuckerbutty* for the Petitioner.

Mr. *Hill* and Baboo *Dwarka Nath Mookerjee* for the Opposite Party.

The arguments advanced at the hearing of the rule are sufficiently stated in the **Judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.), which was as follows:—

The first question which we must decide in this case is whether we ought to hold that the Magistrate had no power to try this case summarily, and that his proceedings are illegal.

Learned counsel for the accused cited to us cases to show that the offence was, for the purposes of s. 260 of the Criminal Procedure Code, determined by the complainant, and that if a complaint be made of an offence not triable summarily, the Magistrate cannot under any circumstances investigate the complaint summarily.

Although there are expressions used in some of the cases sufficient to justify this argument, we do not think that the cases are so unanimous as to force us to the same conclusion.

We say this as it appears to us that there may frequently be cases in which the charge has been exaggerated, and is, on exami- **[723]** nation by the Magistrate before process is issued, reduced to its proper proportions. This is notoriously the case in respect of many charges, which, according to the complaint, would be triable exclusively by a Court of Session, but which when shorn of their exaggeration the Magistrate very properly finds to be comparatively slight offences within his own cognizance.

If the complainant does not complain of this course, it is difficult to see why the Magistrate should adopt the procedure applicable only to the exaggerated charge.

In the case of *The Empress* v. *Abdool Karim* (I. L. R., 4 Cal., 18 cf. p. 20), Mr. Justice AINSLIE, with the concurrence of Mr. Justice BROUGHTON, says: "If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggerations and not to be believed." In another case, *The Queen* v. *Aboo Sheikh* (23 W. R., Cr., 19), where a man was charged

with rioting, and the Magistrate tried the case summarily as one of mischief and unlawful assembly, PHEAR and AINSLIE, JJ., declined to interfere at the instance of the accused person.

In the matter of Mewa (6 N. W., 254), it was held that a Magistrate has a discretion to enquire into and try a person on any charge which he may consider covered by the facts reported without reference to the particular charge which may have been pressed, and without reference to the procedure, which, when he has determined the offence with which he will charge the accused, it will be competent for him to adopt. In the two latter of these cases the Judges do not seem to have heard any argument, but the same observation can be made with regard to the cases of *The Queen* v. *Johrie Singh* (22 W. R. Cr., 28), and *Ram Chunder Chatterjee* v. *Kanye Laha* (25 W. R., Cr., 19), cited to us by Mr. *Woodroffe* for the petitioner.

In the present case the complaint was made by Mr. Boddam, who did not pretend to be an eye-witness of what had occurred. The Magistrate, before issuing process against the accused, exa-[724]mined an eye-witness, one of Mr. Boddam's servants, and his statement showed what the real complaint was. We think that this case comes within the class of cases contemplated by Mr. Justice AINSLIE, and that when the Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily. The mere fact that the complainant enumerates sections of the Penal Code relating to offences not triable summarily, does not, we think, affect the jurisdiction of the Magistrate unless the facts of which he really complains disclose such offences.

We think that this case was triable summarily. It has also been urged before us, that no offence has been committed, the object of the intruders only being to survey the premises.

No doubt that was their primary object, but when we find them going on to the premises in Mr. Boddam's absence and without his leave, and taking three swords with them, we think it clear that they intended to intimidate Mr. Boddam's servants into not opposing their entering upon the premises, which, from their relation with Mr. Boddam, they must have known he would have objected to their entering. It is true that they seem to have to some extent attempted to avoid discovery, but when accosted by Mr. Boddam's servants they persisted in their trespass, and endeavoured to prevent opposition by the false statement that they had been sent by the orders of the Bengal Government.

The trespass was most unwarrantable, and if it were to be tolerated that while two persons are litigating as to a property, one may go armed on to the property of which the other is in possession for the purpose of getting materials for an hostile application, breaches of the peace would be frequent.

We think, therefore, that the conviction must stand, and we do not think that the fine was under the circumstances excessive.

The rule is, therefore, discharged.

H. T. H. *Rule discharged.*

NOTES.

[*See* also 22 Mad., 459; 1 Bom. L.R., 683; 29 Cal., 409; in (1911) 2 M.W.N., 71 this case was referred to as regards the inference about intent.]

---

[725] CRIMINAL MOTION.

The 12th June, 1889.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

In the Matter of the Petition of Mohur Mir and others

versus

The Queen-Empress

and

In the Matter of the Petition of Kali Roy and others

versus

The Queen-Empress.*

Sentence—Cumulative Sentences—Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate Conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV of 1860,) ss. 147, 323, 325.

Six accused persons were charged with and convicted of rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the Penal Code.

Held, that the sentences were legal.

During the course of a riot, in which *X* was attacked and beaten by several of the rioters, one of them *K* inflicted grievous hurt on *X* by breaking his rib with a blow struck with a *lathi*; *K* and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code and *K* was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on *K* and also on the other three for each of the offences.

Held, that the sentences on *K* were legal, but that as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted *X*, the conviction of them under s. 325 read with s. 109 could not be supported.

THE accused in the two cases which gave rise to these two rules were peons employed by a large zamindar named Mohunt Gopal Das, and the complainants in both cases were ryots of his, residing in a village called Damra. It was alleged that for a considerable time the zamindar had been trying, though unsuccessfully, to enhance the rents of his ryots, and this had led to numerous cases between him and the ryots. It was alleged that having failed to attain his object in the Civil Courts, he endea-[726] voured to break down the resistance by a system of petty persecutions, and that he kept a number of peons, amongst them the accused, for the purpose of watching the jungle and waste-lands of his villages, impounding the cattle of the ryots, and charging the ryots with theft when grass or bamboos were taken from the jungle. The occurrences which formed the subject-matter of these two cases were alleged to have taken place in carrying out the object of the Mohunt, and they took place on the same day. Some of the accused were charged in both cases.

* Criminal Motions Nos. 202 and 203 of 1889, against the orders passed by J. Whitmore, Esq., Sessions Judge of Birbhoom, dated the 21st April 1889, modifying the orders passed by W. B. Brown, Esq., Sub-Divisional Magistrate of Rampore Haut, dated the 1st of April 1889.

In Rule No. 202, the following persons were charged: (1) Mohur Mir, (2) Kali Rai, (3) Tenu Sheikh, (4) Umed Sheikh, (5) Murad Sheikh, and (6) Makhan Singh or Rai.

In that case, it was alleged that the accused had been deputed to bring two ryots, named Prankristo and Lal Behary, to the zemindary cutcherry. The story told by the witnesses for the prosecution was shortly to the effect, that Prankristo, Lal Behary, and a woman named Khiroda were returning home from Futtehpore Hat to Damra in a cart, along with some others, when they were stopped by the accused and other peons of the zemindar, and after a conversation they were assaulted and beaten in a savage manner. Both Prankristo and Lal Behary were stripped of their clothes and beaten with *lathies*, and Rs. 21, which were tied up in Prankristo's *dhoti*, were taken away. On Khiroda calling for help, some of the peons attacked her and pulled off her ornaments, which they took away. After the assault the three persons named were left lying wounded on the spot of the occurrence. The defence consisted of *alibis* and was also based on the fact that no persons were named in the first information.

The Sub-Divisional Magistrate convicted all the accused of rioting, coming to the conclusion that the common object was the causing of hurt to Prankristo and Lal Behary. He further found that there was nothing to show that robbery was contemplated by the assembly, or that there was any idea of assaulting Khiroda till she raised an alarm. He convicted and sentenced the various accused as follows :—

Mohur Mir under s. 147, two years' rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, six months' rigorous imprisonment.

[727] Kali Rai under s. 147, one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo one year's rigorous imprisonment.

Tenu Sheikh under s. 147, one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, six months, and under s. 392 to an additional six months.

Umed Sheikh and Murad Sheikh under s. 147, to one year's rigorous imprisonment and a fine of Rs. 200, or six months.

Makhan Singh or Rai under s. 147, to one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323, for causing hurt to Khiroda, six months, and under s. 392, to an additional six months.

All the accused were further ordered to be bound over to keep the peace for three years.

The accused all appealed to the Sessions Judge who set aside the conviction of, and sentences passed against, Kali Rai, Tenu Sheikh, and Makhan Singh, under s. 392, but upheld all the other convictions and the sentences passed thereon, with the exception of reducing the fines inflicted on all the prisoners save Kali Rai from Rs. 200 to Rs. 30, and in the case of Kali Rai, and three others, he reduced the fine from Rs. 200 to Rs. 50.

In Rule No. 203, the persons charged were—

(1) Makhan Singh, (2) Tenu Sheikh, (3) Murad Sheikh, and (4) Kali Rai.

In that case the prosecution alleged that one Kuree Ram was going alone from upper to lower Damra, when some 12 or 14 peons came up to him and asked him to go to the cutcherry. On his refusal to go, on the ground that it was too late, he was immediately attacked. He was mauled and knocked down by Mohur Mir and beaten with *lathies* by Tenu Sheikh and Kali Rai, the latter

of whom hit him a blow on the side which fractured one of his ribs. Then all the peons fell on him and gave him a miscellaneous beating, and stripped him of his clothes and left him. The defence in this case was practically the same as in the other. The Sub-Divisional Magistrate convicted all the accused under s. 147 and sentenced them each respectively to six months' rigorous imprisonment and a fine of Rs. 200, or six [728] months. He convicted Kali Rai of causing grievous hurt under s. 325 and sentenced him to one year's rigorous imprisonment and he convicted the other three under s. 325 and 109 of abetting the causing of grievous hurt by Kali Rai, and sentenced them to three months' rigorous imprisonment; and he further ordered all the accused to be bound over to keep the peace for three years.

On appeal, the above convictions and sentences were upheld by the Sessions Judge, except that the fines in all cases were reduced from Rs. 200 to Rs. 30.

In both cases, an application was made to the High Court under its revisional powers to send for the records and set aside the convictions and sentences upon numerous grounds, and amongst them upon the ground that separate punishments for component parts of the same offence ought not to have been inflicted, and that the sentences were illegal.

Two rules were issued which now came on to be argued.

Mr. *Woodroffe* and Baboo *Rajendro Nath Bose* for the Petitioners in both cases.

Mr. *Kilby* for the Crown.

The only question argued at the hearing of the rules material for the purpose of this report, was that relating to the legality of the sentences.

The **Judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

We have heard these two rules together.

In the first of them (Rule 202), six prisoners have been convicted and sentenced by the Magistrate. On appeal to the Sessions Judge, the sentences were in some respects modified. As they stand at present, four of the accused have been convicted of, and sentenced for, offences falling under ss. 147 and 323, Indian Penal Code, and the only question which we have to consider is whether those sentences were legal.

Mr. *Woodroffe* contended that separate sentences under those sections could not be imposed, relying upon a decision of a Full Bench of this Court, given in the appeal of *Nilmoni Poddar* v. *Queen-Empress* (I. L. R., 16 Cal., 442). That decision has, we think, no [729] application to the facts of the present case. The decision in question dealt with the liability of one rioter for offences actually committed by another rioter. It in no way affects the question of the liability of a rioter for the acts committed by himself. The Judges who referred that case to the Full Bench did not refer the appeals of the persons who actually committed acts of grievous hurt, but dismissed the appeals of those persons. In the Full Bench case, TOTTENHAM, J., says: "The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits," and for this proposition of law there is ample authority —see *Queen-Empress* v. *Ram Sarup* (I. L. R., 7 All., 757).

In the present case the accused have been separately convicted and punished for acts committed by themselves in the course of the riot. Kali Roy is convicted of having voluntarily caused hurt to Prankristo by hitting him with a *lathi*. Makhan Roy is convicted of having caused hurt to Khiroda by hitting

her with a *lathi*. Tenu Sheikh, of having caused hurt to Prankristo, by hitting him with a stick, and Mohur Mir, of having caused hurt to Prankristo, by hitting him with a shoe.

We are of opinion, therefore, that the sentences passed upon those persons are legal.

Mr. *Woodroffe* further drew our attention to a passage in the judgment in *Lokenath Sarkar* v. *Queen-Empress* (I. L. R., 11 Cal., 349), which runs as follows: "If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting; but the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted, and the two men wounded." Without assenting to the proposition of law, as thus laid down we would remark that in this case also the evidence shows that the offence of rioting was committed before Prankristo and his companions were actually struck. The accused who appeared to be zemindary peons, were deputed to bring Prankristo and Lal Behary to the zemindary [730] cutcherry; and they appear to have used considerable violence to them in attempting to do so before they struck them.

In the second case (Rule 203), Kali Rai has been convicted and sentenced both for rioting under s. 147 and under s. 325 for voluntarily causing grievious hurt to Kuree Ram by breaking one of his ribs; and the other three accused have been convicted and sentenced under ss. 147 and 325 read with s. 109, that is to say, for abetting the causing of grievous hurt to Kuree Ram by Kali Rai. We do not think that the conviction under this latter section was right, inasmuch as although the evidence shows that they themselves beat Kuree Ram, there is nothing to show that they abetted Kali Roy in inflicting the particular blow which broke his rib. We think, therefore, that these three accused should have been acquitted on that head of the charge, and we accordingly set aside that portion of the conviction and the sentence of three months' rigorous imprisonment imposed in respect of it.

In other respects we discharge the two Rules.

H. T. H. *Rule 202 discharged.*
Rule 203 made absolute in part.

NOTES.

[*See* also 19 Cal., 105. This subject is very clearly dealt with by Mr. *Boys* in his Criminal Procedure Code 1898, 1 Edn. (1914) pp. 91 *et seq.*]

[16 Cal. 730]

CRIMINAL MOTION.

The 24th June, 1889.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

In the matter of the Petition of Khepu Nath Sikdar and others.........Petitioners

versus

Grish Chunder Mukerji............Opposite Party.*

Criminal Procedure Code (Act X of 1882), ss. 195, 439, 476 · Sanction for prosecution- Order for prosecution— Jurisdiction of High Court in revision to quash orders under s. 476 of the Criminal Procedure Code.

The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, whether made under s. 195 or under s. 476 of the Criminal Procedure Code, directing the prosecution of any person for offences referred to in those sections. The High Court, under s. 439, has the powers conferred on a Court of Appeal by s. 423 to alter or reverse any such order.

Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, **[731]** fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section, or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted.

When a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute.

Queen v. *Baijoo Lal* (I. L. R., 1 Cal., 450), and *In the matter of the petition of Kali Prosunno Bagchee* (23 W. R., Cr., 39) followed.

On the 19th of December 1888 one Khepu Nath Sikdar, a hotel-keeper at Nattore, lodged an information at the police-station that he had missed from his box in his hotel certain gold and silver articles, and that he suspected one Grish Chunder Mukerji and the other lodgers of having committed theft in respect thereof. The local police investigated the case and sent up Grish Chunder Mukerji, in whose house it was alleged one of the stolen articles was found. In the course of the trial before the Deputy Magistrate of Nattore, Grish Chunder Mukerji set up the defence that the charge was a false one, preferred at the instigation of the Mohunt of Tarkeshar in the District of Hughli, because he, Grish Chunder Mukerji, had refused to permit his wife to go to the Mohunt who wanted her for an immoral purpose. Before the case for the prosecution against Grish Chunder was closed, the Deputy Magistrate examined witnesses tendered by the accused, and rejected the prayer of the complainant Khepu Nath Sikdar for summoning all his witnesses. Thereupon Khepu Nath Sikdar moved the District Magistrate of Rajshahi (Mr. H. A. D. Phillips) to transfer the case to the file of some other Magistrate, but the District Magistrate refused the application, and in his order of refusal, dated the 23rd April 1889, made the following remarks:—

"The issues are no doubt of grave importance, but I see no reason for transferring the case from the file of the Sub-Divisional Magistrate, and I

* Criminal Motions Nos. 241, 242, and 243 of 1889, against the orders passed by Baboo Mohim Chunder Ghose, Deputy Magistrate of Nattore, dated the 7th of May 1889.

accordingly reject the application. At the same time I feel sure the Sub-Divisional Magistrate will [732] recognise the extreme gravity of the case and do his best to sift the matter to the bottom and get at the truth. If the case is false it is one which should certainly be followed by the prosecution of Khepu for false charge, and of the Mohunt also for abetment of the same were there any chance of proving such an abetment. On the other hand, if the theft be true and the allegation about the Mohunt be false, then Grish deserves to be punished for wanton defamation."

The case was then again taken up by the Deputy Magistrate, who, after examining some more witnesses on the 7th May 1889, acquitted the accused; his judgment being in the following terms :—

"On the 20th December last, Khepu Sikdar, a hotel-keeper of Nattore Upper Bazar, instituted a case of theft in a building, at the Nattore Police-station, and stated that the stolen property consisted of a new pair of golden balas and four pieces of silver anklets. He charged Abinash Chunder Bayragy and Kalachand Acharji, of Tarkeshar, and the present accused, Grish Chunder Mukerji, of Bhanjipore, near Tarkeshar in the district of Hughli, with the theft, alleging that they had been lodgers in his hotel from the day before that on which the theft occurred. Head Constable Dino Bandhu Ghose, of Nattore Station, took up the investigation. He went to Tarkeshar with Khepu Sikdar. On searching the house of Grish Chunder Mukerji, he obtained a piece of bala under a window, which Khepu Sikdar identified as one of the pair that had been stolen. The Head Constable, however, reported the case to be entirely false for reasons set forth in the "B" Form, in which the case was reported. After the receipt of the Head Constable's report I communicated the matter to the District Magistrate, and, at the same time, having regard to the important issue involved in the case, suggested to him the desirability of having an enquiry made through the Magistrate of Hughli by some trustworthy police officer under him. The Sub-Inspector of Haripal made the investigation, and reported Khepu's case to be true. It would have been a good thing, if some officer other than the Sub-Inspector of Haripal, had made the investigation, for Tarkeshar is within [733] Haripal, and the Sub-Inspector of that place did not, in my opinion, act quite independently in this matter. After receipt of his report the District Magistrate ordered the original case to be tried. No reliable witness has been produced by Khepu Sikdar: but, on the contrary, the evidence of certain witnesses examined by me and a consideration of the entire circumstances leave no room for doubt in my mind that Khepu's case is entirely a got-up one, the result of a deep-laid conspiracy to ruin Grish and others.

"Grish has a handsome-looking young wife, and the Mohunt of Tarkeshar was anxious to get hold of her. Here is something like history repeating itself in connection with the Mohunt, for who has not heard of the incidents connected with the Mohunt, Elokeshi, and Nobin? In order to keep her out of the Mohunt's way Grish had to remove his wife to her paternal residence at Sonamukhi, in the district of Bankura. I have examined the wife of Grish, Kristokamini by name. She is a tender girl of about 16, and is now *enciente*. In spite of her delicate condition, Grish produced her before me, fetching her from Sonamukhi, as it had been alleged by Baboo Mohim Chandra Moitra, Mukhtear, under instruction from Khepu Sikdar, for whom he appeared, that the wife of Grish was a girl of only 7 or 8 years of age. Baboo Mohim Chandra Moitra, when he came to know that Khepu had given him false information as regards the age of Kristokamini, declined to act on his behalf. The deposition of Kristokamini shows how the vile woman 'Chotaginni' acted as a pimp to win

her over to the Mohunt. There is some writing of Grish in a *khata* produced by Khepu Sikdar (*vide* Exhibit A). Grish has explained how he was made to write in the *khata* by Khepu Sikdar. It was done after Grish was released on bail from the *hajut*. It should be mentioned that I put Grish into *hajut* when the Police first produced him before me. Grish stated from the very beginning that he had never been to Nattore before the institution of this case. I find no possible reason why Grish should come to Nattore. Can it be supposed that he came merely to commit the theft and then fly off? If so, what made him give his true address, and he was a stranger to this place? Is it possible that, after giving his address, he [734] would be so careless as to take the ornament home, and not dispose of it somewhere on the way? The ornament was found under a window under very suspicious circumstances, and where anybody might have thrown it. Khepu has no wife; he lives here with a mistress, and is altogether a notorious character. It is said that he made the ornaments for his brother's wife; what could he say, having none of his own? I consider the allegation to be entirely false, for he does not seem to be such a rich man as to invest money for ornaments for his brother's wife. Again, is it possible that he kept the ornaments in a broken box in the midst and in the presence of strangers? The evidence leaves no doubt in my mind that Khepu acted as a mere tool in the hands of Mohendra Mukerji, employed under the Chotataraf Rajbati. It is in evidence that he had deposited a considerable sum of money with the Rajbari treasurer, and that it was under his order that Rati Kanta Karmakar prepared the ornaments. Mohendra, it should be mentioned, is a relative of the present Sub-Inspector of Nattore, and has a relative in the person of Panchcowrie Mukerji, of Dhaniakhali, employed under the Mohunt. It is in evidence that Panchcowrie happened to be in Nattore about the time when Khepu's case was instituted. He is a resident of Dhaniakhali, in the district of Hughli, and the report of the Sub-Inspector of Haripal was sent from that place. Witness Prasannanath Bhaduri, who was given evidence as to how the plot was hatched by Mohendra, has produced a letter marked A, with its envelope, with the post-mark of Haripal on it. The letter purports to have been written by Panchcowrie to Mohendra in connection with the case. If Khepu's case was true, what business had Mohendra and Panchcowrie to mingle in it, and what business had they to get up a false case unless it was to further the interests of the Mohunt, who had cause to be annoyed with Grish, not only for his failure to get hold of his wife, but also for his giving evidence against him in a certain case. I need not enter into further details. The plot, to say the least, is the most mischievous and nefarious that I have ever come across: its sole object was to wreak vengeance on a supposed enemy, if not also to put Grish out of the way, and so facilitate the [735] Mohunt's intrigue with his wife. I consider Grish to be an innocent man, as far as Khepu's case is concerned. As some evidence for the defence has been taken, the prisoner ought to be acquitted. He has therefore been formally charged to-day, and he has pleaded not guilty. I acquit Grish Chunder Mukerji under s. 258, Criminal Procedure Code, and direct that he be set at liberty. The records of the case will be submitted to the District Magistrate for prosecution of Khepu Sikdar under s. 211, Indian Penal Code, and of Mohendra Mukerji and Panchcowrie Mukerji for abetting the same. All these persons may be tried under any other section of the Penal Code that may be found applicable. A list of witnesses for the prosecution will be attached to the record."

After the above order was passed, the case was taken up by Mr. Ainslie, Deputy Magistrate of Rampore Baulia, who described himself in his order as "Deputy Magistrate in charge," and he issued warrants for the arrest of the

three persons referred to in the above order. Those three persons accordingly moved the High Court to quash the sanction or direction given by the Deputy Magistrate of Nattore, for their prosecution under s. 211 of the Penal Code. On those applications three rules were issued, calling upon the Deputy Magistrate to show cause why his order should not be set aside; and similar rules were issued upon Grish Chunder Mukerji, because it appeared from the affidavit of one of the petitioners that the Deputy Magistrate had asked the pleaders of Grish Chunder Mukerji whether he would like to prosecute the complainant in the event of a prosecution under s. 211 being sanctioned, and that thereupon the pleader had replied in the affirmative. These three rules now came on for disposal.

In Rule No. 241—Mr. *Woodroffe*, Baboo *Umbica Churn Bose* and Baboo *Gopi Nath Mookerjee* for the petitioner, Khepu Sikdar.

In Rule No. 242—Mr. *M. Ghose*, Baboo *Jogendro Nath Bose* and Baboo *Kamini Kumar Gohu* for the petitioner, Panchcowrie Mukerji.

In Rule No. 243 - The Advocate-General (Sir *G. C. Paul*) and Baboo *Gopi Nath Mukerjee* for the petitioner, Mohendra Mukerji.

[736] Baboo *Ram Charan Mitter* for the Deputy Magistrate in all three rules.

Mr. *Hill* and Baboo *Iswar Chunder Chuckerbutty* for Grish Chunder Mukerji, the opposite party, in all three rules.

Baboo *Ram Charan Mitter*, in showing cause, contended that the Deputy Magistrate of Nattore had given no sanction to any individual under s. 195 of the Criminal Procedure Code, and that therefore the High Court had no power to quash the order under the provisions of that section. If an order under that section had been passed, the petitioners ought to have gone to the Sessions Judge in the first instance. Moreover, the High Court had no power to quash an order for prosecution, which did not amount to a sanction. *Queen-Empress* v. *Rachappa* (I. L. R., 13 Bom., 109).

On the merits he contended that, though the Deputy Magistrate was not justified in referring in his judgment to the previous history of the Mohunt of Tarkeshar, which was not in evidence before him, the evidence recorded by the Deputy Magistrate was sufficient to justify him in directing a prosecution under s. 476 of the Criminal Procedure Code.

Mr. *Hill* claimed the right to address the Court on behalf of Grish Chunder Mukerji, who had been called upon to show cause.

TREVELYAN, J., enquired if Mr *Hill* intended to argue that no sanction had been given by the Deputy Magistrate under s 195, Criminal Procedure Code.

Mr. *Hill* informed the Court that it would be his contention that no sanction had been accorded by the Deputy Magistrate to any private individual.

TREVELYAN, J.,—In that case, Mr. *Hill*, you have no *locus standi* on your own showing, and we rule that you are not entitled to be heard.

Mr. *Woodroffe* on behalf of Khepu Sikdar in Rule No. 241.—Whether the order of the Deputy Magistrate is to be regarded as a sanction under s. 195, Criminal Procedure Code, or as a direction by the Court under s. 476, the High Court is equally [737] competent to deal with it. If the order is to be regarded as a sanction, it can be revoked by the High Court under the provisions of s. 195, Criminal Procedure Code; and if the order be one made under s. 476, the revisional powers of the High Court are large enough to enable it to set it aside. Any order in a judicial proceeding is liable to be altered or reversed by the High Court in its revisional jurisdiction—section 439. Similar orders have been quashed in the case of *Queen* v. *Baijoo Lal* (I. L. R., 1 Cal., 450),

following the earlier case of *In the matter of the petition of Kali Prosunno Bagchee* (23 W. R., Cr., 39). On the merits, the case has been so irregularly and improperly tried by the Deputy Magistrate, that no weight ought to be attached to his conclusions. There is nothing to show that a theft had not really occurred, and that the charge of Khepu Nath Sikdar was false.

Mr. *M. Ghose*, who appeared on behalf of Panchcowrie Mukerji in Rule No. 242, was stopped by the Court on the ground that there was no evidence against his client.

The *Advocate-General*, who appeared on behalf of Mohendra Mukerji in Rule No. 243, contended that his client never having been examined in the case by either side, the Deputy Magistrate had no right to direct his prosecution; and that the evidence against him was wholly inadmissible and incredible on the face of it.

The following **Judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was delivered by—

Trevelyan, J.—This is an application to set aside an order of the Deputy Magistrate of Nattore, dated 7th May 1889, by which he directs that the records of a case, brought by Khepu Nath Sikdar against Grish Chunder Mukerji, be submitted to the District Magistrate for the prosecution of Khepu Sikdar under s. 211 of the Indian Penal Code, and of Mohendra Mukerji and Panchcowrie Mukerji for abetting this offence. He then goes on to say:—"All these persons may be tried under any other section of the Penal Code that may be found applicable. A list of witnesses for the prosecution will be attached to the record." That order being made, and the record being sent, whether to the Magistrate or where does not appear, an [738] order was made by Mr. E. F. AINSLIE, who describes himself as "Deputy Magistrate in charge," directing issue of warrants against these three persons for their arrest, and fixing a day for the hearing; and directing, furthermore, that the case should remain on his file.

This case has been argued at some length. The *first* question is as to what this order of the 7th May means: the *second* is whether we have jurisdiction under the revision powers conferred upon us to set aside this order: and the *third* question is whether, under the circumstances of this case, we ought to exercise such powers in favour of the persons who have applied to us.

One view of this order of the 7th May is that it amounts to a sanction to prosecute. Another view of this order is that it is an order made by the Deputy Magistrate under the provisions of s. 476 of the Criminal Procedure Code, sending the case for inquiry or trial to the Magistrate of the district. There is a third view of this order: it is one that is sought to be supported by an order of the Magistrate of the district, dated 23rd April, on an application made to transfer the case from Nattore. In that order, after some observations having no reference to the matter of the application made before him, the Magistrate said this:—"At the same time, I feel sure the Sub-divisional Magistrate will recognize the extreme gravity of the case, and do his best to sift the matter to the bottom, and get to the truth. If the case is false, it is one which should certainly be followed by the prosecution of Khepu for a false charge, and of the Mohunt also for abetment of the same, were there any chance of proving any such abetment. On the other hand, if the theft be true, and the allegation about the Mohunt be false, then Grish deserves to be punished for wanton defamation." It has been urged that the order made by the Deputy Magistrate has been suggested by the order of the Magistrate, and is intended to be in compliance with it. With regard to the first view, we think it clear that this order

does not mean to give Grish Chunder sanction to prosecute. It does not purport to do so; and unless it did, it is difficult to see how it amounts to a sanction to prosecute. It only really submits [739] the case to the District Magistrate to be dealt with under s. 211, if he thinks proper to do so, and the remark,—" All these persons may be tried under any other section of the Penal Code that may be found applicable,"—really means that, if a prosecution is instituted under s. 211, and it turns out that there are other sections under which these persons can be tried, they may be so tried. That does not assist us in construing the order. It does not show that sanction was given to Grish Chunder to prosecute. Whether this order may be construed in either of the two other ways that I have pointed out, is, we think, immaterial. In either case, we think it is an order that we can deal with, and we think that we can also deal with the order that has resulted from it, viz., the issue of warrants. The practical effect of either of these two constructions is the same. If we have power to interfere with an order under s. 476, we have equally power to interfere with a matter of this kind in which the Deputy Magistrate, having tried the case, makes an order sending the record with an invitation to the District Magistrate to prosecute. If this amounts to simply sending the case to the District Magistrate to deal with it under s. 211 of the Penal Code, then it is not a sanction to prosecute. If it is an order under s. 476 of the Criminal Procedure Code, then the considerations arise to which we will presently refer, viz., whether there was any necessity for a preliminary inquiry, and whether the absence of such preliminary inquiry has vitiated the inquiry purporting to be made under that section. We have ample jurisdiction to interfere on a question of this kind. In the first place we have the terms of the Criminal Procedure Code, which clearly show that we have such jurisdiction. Under s. 439, the High Court, in exercising its powers of revision, has the powers conferred on a Court of Appeal by s. 423 to alter or reverse an order of the lower Court. So that we have the same power to alter or reverse an order of this description as an Appellate Court would have in a case of appeal. This construction, we think, is confirmed by the cases cited in which different benches of this Court have interfered with orders made under this section, or under the corresponding section in the earlier Act. The cases to which we have been referred are first [740] the case of *Queen* v. *Baijoo Lall* (I. L. R., 1 Cal., 450) decided by MACPHERSON and MORRIS, JJ., and there is an earlier case, namely *In the matter of the petition of Kali Prosunno Bagchee* (23 W. R., Cr., 39).

There being jurisdiction, and the order being in the way described, the question arises whether this is a case in which we ought to interfere. We think that the Magistrate ought not to have made this order, and that there is no ground for his order. There is no doubt that before proceedings under s. 476 can be instituted, either there must be a preliminary inquiry held by the Magistrate, and in such inquiry there must be direct evidence fixing the offence upon the persons whom it is sought to charge, or in the earlier proceedings out of which this enquiry arises, there must be direct evidence charging these persons with an offence. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that these persons had been guilty of an offence. The law as laid down in the cases clearly shows, that before a Magistrate can proceed at all under that section, he must either in the case before him or in the inquiry which he must make have distinct evidence on the commission of an offence. If the order is to be construed in accordance with the third view we have mentioned, we equally think that it could only be made upon the footing that there was, before the Magistrate, direct and substantial evidence of the commission of an offence.

The learned Judges then proceeded to consider the evidence in all the rules, and concluded as follows: —

It is clear to us that on the evidence in this case, the Magistrate was not justified in taking steps beyond the acquittal of Grish Chunder.

That being so we must set aside the order made by him of the 7th May 1889, beginning with the words,—"The records of the case will be submitted * * * * *"——down to the end.

And further we direct that the order made by Mr. Ainslie and the warrants issued by him be quashed.

H. T. H. *Rules made absolute.*

NOTES.

[The Court granting sanction must be *primâ facie* satisfied as to the commission of an offence: - 1 C. W. N., 400; (1889) P. R., 35; (1890) P. R., 33; 7 Bom. L. R., 732; 11 Bom. L. R., 1164; 11 C. W. N., 195.

As regards the revisional powers, see the very full notes of Mr. *Boys* in his Criminal Procedure Code, 1898 (I Edn. 1914) pp., 772 etc. *See* also 20 Cal., 319; 474; 23 Cal., 532; 40 Cal., 477; 33 Mad., 48, overruling 26 Mad., 98; 21 Mad., 124; 26 Bom., 785; 4 A.L.J., 811; 26 All., 249; 16 All., 80; (1902) P.R., 18.

All these cases recognise the power to revise orders in Criminal proceedings.]

[741] APPELLATE CIVIL.

The 26th April 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR JUSTICE HILL.

Saraswati Dasi............Defendant No. 1

versus

Horitarun Chuckerbutti and another............(Plaintiffs) and Sriram Shaha and others (Defendants.)*

Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Suit by occupancy ryot to recover possession after dispossession by landlord—Question of title—Possessory suits—Bengal Act VIII of 1869, s. 27

A suit by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord, in which the title of the tenant is denied and put in issue, is governed by the special period of limitation prescribed by the Bengal Tenancy Act, Sch. III, Art. 3, namely, two years from the date of dispossession.

It was intended by that enactment to provide for all suits to recover possession of land brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff; and not to provide only for suits of a possessory nature such as were previously dealt with by s. 27 of Bengal Act VIII of 1869.

THE plaintiffs sued to recover possession of a *jote*, alleging in their plaint that their father, and they themselves after him, had been in possession of the *jote* until 1291 (1884); that the *jote* was a permanent and transferable one; and that they had acquired a right of occupancy, but the defendants had, in 1291, illegally dispossessed them. In the plaint their cause of action was alleged to have accrued from the year 1291; in their evidence they stated it to have arisen from Assar 1291 The suit was instituted on the 16th June 1886.

* Appeal from Appellate Decree No. 1225 of 1888, against the decree of W. H. Page, Esq., Judge of Moorshedabad, dated the 24th of April 1888 reversing the decree of Baboo Bunkim Chunder Mitter, Munsif of Kandi, dated the 27th of June 1887.

The defendants pleaded that the plaintiffs' father had relinquished the *jote*, and that the plaintiffs had not acquired a right of occupancy; they also pleaded that the suit was barred by limitation, having been instituted more than one year from the date of dispossession.

The Munsif dismissed the suit on the ground of limitation, holding that the suit ought to have been brought within one year [742] from the dispossession, under s. 27, Bengal Act VIII of 1869, the period of one year having expired before the Bengal Tenancy Act (which repealed Bengal Act VIII of 1869) came into operation.

The Judge on appeal reversed this decision on the point of limitation which is the only one material to this report. He said:

(1) "The Munsif grounds his judgment chiefly on the decision of Sir RICHARD GARTH. C.J., in the case of *Imam Buksh Mundul* v. *Momin Mundul* (I. L. R., 9 Cal., 280) but there is in my opinion an important difference between that case and the present one which the Munsif has overlooked. In that case the plaintiffs sued, alleging that their father had been in possession of a certain *jote*, and that on his death the plaintiffs and other co-sharers succeeded to the *jote* and had been in possession until the time when they were illegally dispossessed by the landlord; the landlord apparently did not dispute the possession either of the plaintiffs' father or of the plaintiffs and their co-sharers, but alleged that the plaintiffs and their co-sharers had voluntarily relinquished the *jote*. In the present case the landlord denies that the plaintiffs were ever in possession, alleging that their father voluntarily relinquished possession: here is a distinct denial of the plaintiffs' title, and therefore under the rulings cited by the plaintiffs' pleader [*Joyunti Dasi* v. *Mahomed Ali Khan* (I. L. R., 9 Cal., 423) and *Basarut Ali* v. *Altaf Hosain* (I. L. R. 14 Cal., 624)] I am bound to hold that the ordinary rule of limitation applies, and that the suit is not barred by any special rule under the provisions of the former Rent Law."

From this decision the first defendant, Saraswati Dasi, appealed to the High Cout.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Srish Chunder Chowdhry* for the Appellant.

Baboo *Karuna Sindhu Mukerjee* for the Respondents.

The **Judgment** of the Court (PRINSEP and HILL, JJ.) was as follows:—

This is a suit brought by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord. [743] Under the decisions of this Court, it is settled law that the suit could have been brought within twelve years from the date of dispossession, inasmuch as the title of the tenant was disputed and put in issue in the case. The matter which we are called upon to decide is whether this rule, which has been long in force in this Court, has been affected by the limitation prescribed in the Bengal Tenancy Act, Sched. III, Art. 3. It is there enacted, that a suit to recover possession of land claimed by the plaintiff as an occupancy ryot must be brought within two years from the date of dispossession. Section 184 of the Bengal Tenancy Act declares that suits specified in Sched. III of the Act shall be instituted within the time prescribed in that schedule for them respectively. It seems to us that by this enactment, it was intended to provide for all suits to recover possession of land which might be brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff. There is nothing in the terms of the law to lead us to suppose that the Legislature provided only for suits of a possessory nature, such as were previously dealt with by s. 27 of Bengal Act VIII of 1869. There

is no saving clause in the Bengal Tenancy Act in favour of suits which might have been brought under the law previously existing by occupancy ryots, to recover possession of lands of which they had been dispossessed. Consequently, we are of opinion that even if the plaintiff had twelve years or a portion of twelve years to bring this suit when the Bengal Tenancy Act came into operation, he was, by its operation, restricted to two years from the date of his dispossession. The cause of action, that is to say, the date of dispossession, has not been clearly stated by the plaintiff in his plaint. It is stated to be from the year 1291. In the evidence given, it is made more precise and stated to be from Assar 1291. It is contended by the plaintiff that the expression 'up to Assar 1291' necessarily implies, from the end of Assar, which would bring this suit within the period prescribed by the Bengal Tenancy Act; but this was clearly not so understood by the first Court, and we are not prepared to say upon this vague expression that the suit is not barred. It is rather for **[744]** the plaintiff to show that his suit has been brought within time and in the absence of evidence to the contrary, we must take it that the dispossession took place from the commencement of Assar. In this view the suit would be barred. We accordingly dismiss the suit, setting aside the judgment of the Lower Appellate Court, and restoring that of the first Court, with costs of this and the Lower Appellate Court.

J. V. W. *Appeal allowed.*

NOTES.

[*See* also (1890) 17 Cal., 926 where this was followed; and in (1913) 17 C.L.J., 816 this case was accepted as still authoritative. *See* also (1912) 14 I.C., 54 (Cal.,).]

[16 Cal. 744]

APPELLATE CIVIL.

The 17th June, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Nilmony Singh Deo............Decree-holder

versus

Biressur Banerjee and others............Judgment-debtors.*

Civil Procedure Code, 1882, s. 230—Application to transfer decree for execution—Application for execution of decree—"Granting" application, Meaning of—Issue of process.

An application to the Court which passed a decree for a certificate to allow execution to be taken out in another Court, is not an application for the execution of the decree within the terms of s. 230 of the Code of Civil Procedure.

The "granting" of an application under that section includes the issue of process for execution of the decree.

THIS was an application for execution of a decree obtained on the 7th August 1875, in the Court of the Collector of Manbhoom. Between 1875 and

* Appeal from Order No. 82 of 1889, against the order of R. F. Rampini, Esq., Judge of Burdwan, dated the 12th of December 1888, affirming an order of Baboo Madhub Chunder Chuckerbutty, Subordinate Judge of Burdwan, dated the 16th of August 1888.

1887, applications were, from time to time, made in the Manbhoom Court for execution of the decree, in two of which applications some money was realized. On the 26th July 1887, the decree-holder applied to the Manbhoom Court for a certificate to enable the decree to be executed in the district of Burdwan. The decree having been transferred to the Burdwan Court, an application was made to that Court on 23rd May 1888, for the issue of a warrant of arrest against the judgment-debtor, and he was, under the provisions of s. 245-B of the Civil Procedure Code (see s. 2, Act VI. of 1888), called upon to show cause why he should not be committed to jail in [745] execution of the decree. The judgment-debtor objected that the execution of the decree was barred by lapse of time under s. 230, Civil Procedure Code, and the Subordinate Judge upheld this objection, and dismissed the application on that ground; and the Judge, on appeal, came to the same conclusion. The decree-holder appealed to the High Court on the grounds that the application of the 23rd May 1888 was in continuation of the application of the 26th July 1887; that no previous application had been made and granted under s. 230 of the Civil Procedure Code; and that therefore the execution of the decree was not barred under that section.

Mr. *Woodroffe* and Baboo *Upendro Chundra Bose* for the Appellant.

Baboo *Rash Behari Ghose* and Baboo *Srish Chundra Chowdhry* for the Respondents.

The **Judgment** of the Court (PRINSEP and HILL, JJ.) was as follows :—

The decree in this suit was passed on the 7th August 1875. It was kept alive from that time until the 26th July 1887. On that date, an application for a certificate was made to the Deputy Collector of Manbhoom, the Court by which the decree was passed, to allow execution to be taken out in the Civil Court at Burdwan. The application, no doubt, was made in the form prescribed in s. 235, but the last column, clause (*i*), was necessarily vague in respect of the attachment of particular properties. The decree was sent for execution to Burdwan by a proceeding dated 13th April 1888, and was received on the 4th May following. Execution has been refused under s. 230 of the Code, it being found that more than twelve years have elapsed from the date of the decree, and that this matter fell within that section, inasmuch as a previous application had been made to execute the decree under s. 230, and had been granted. It is contended in second appeal by Mr. *Woodroffe*, first, that the application to the Deputy Collector of Manbhoom, dated 26th July, was an application to execute the decree within the terms of s. 230, and that the subsequent proceedings at Burdwan could only be properly regarded as proceedings in continuation [746] and in furtherance of that application. In our opinion the application made at Manbhoom was not an application to execute the decree, but an application to send the decree for execution by a Court which alone was competent to execute it in the manner desired. The Court at Manbhoom could have no power to execute a decree at Burdwan. The law, in our opinion, contemplates that in such a case the Court which passed the decree is competent only to transfer it for execution in the manner directed by s. 224, but that the application for execution should be made to the Court which has jurisdiction to issue processes in order to enforce payment of the money decreed. We therefore regard the application of the 26th July 1887, as an application merely to transfer the decree for execution, and not an application for the execution of the decree itself. The District Judge relies upon the case of *Dewan Ali* v. *Soroshibala Dabee* (I. L. R., 8 Cal., 297) as explaining the meaning of the granting of an application to execute within s. 230. It is unnecessary for us to discuss this matter, and to consider whether it is, as found in that case, to be equivalent

to admitting an application within the terms of s. 245, or something beyond that, because we have no doubt that it includes the issue of a process for execution of the decree. In this case we have had brought to our notice two instances in which such processes issued and money was realized in part satisfaction of the decree, so that it is clear that the applications to execute, which were applications before the present application, were granted within the terms of s. 230. The decree-holder may or may not have cause to complain of the delay in the transmission of the decree from Manbhoom for execution to Burdwan, but that is not a matter which is relevant in the case now before us. Section 230 of the Code of Civil Procedure permits of no extension of the term specified, except for reasons which do not apply to this case. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[In (1904) 8 C.W.N., 575 it was held that such an application came within sec. 47 C. P.C. 1908. In (1892) 20 Cal., 29 it was held that it would be a step in aid of execution. *See* also (1895) 22 Cal., 375; (1895) 22 Cal., 921; 24 Cal., 244; (1912) 14 I.C., 277; (1911) 9 I.C., 246; (1910) 35 Bom., 103 where the rulings were similar to this case.]

---

[747] APPELLATE CIVIL.

The 18th June, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Umesh Chunder Dutta and others............Decree-holders

versus

Soonder Narain Deo and others.........Judgment-debtors.*

Limitation Act, 1877, art. 179 - Application to take a step in aid of execution— Opposing application to set aside sale in execution of decree.

The appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of art. 179 of sch. ii of the Limitation Act to take a step in aid of execution. The application contemplated by that article is an application to obtain some order of the Court in furtherance of the execution of the decree (*see Shib Lal* v. *Radha Kishen*, I. L. R., 7 All., 1898).

THIS was an application for execution of a decree, dated 8th March 1877. The only question was whether or not execution was barred by lapse of time. The previous proceedings in execution, so far as they are material, were as follows:—

On the 26th June 1883, up to which time the decree had been kept alive, an application was made to execute it, and on the 17th August 1883, an order was passed for the issue of proclamation of sale of certain property which had been attached. On the 21st November, the sale of the property took place. On the 14th December 1883, the judgment-debtors applied that the sale should be set

*Appeal from an Order No. 96 of 1889, against the order of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 17th of December 1888, affirming an order of Baboo Bhuban Mohan Ganguli, Munsif of Midnapore, dated the 18th of August 1888.

aside on the ground of irregularity, and on the same day an order was made to serve notice on the decree-holders, the 19th of December being fixed for hearing the application. On that day the application was heard, the decree-holders appearing by pleader, and opposing the application, but it was allowed and the sale set aside.

The next application was filed on the 7th December 1886, but this, after various orders had been made upon it, was struck off for default. The present application was made on the 21st May 1888, within three years of the last previous application of 7th December 1886. To support the decree, however, it became necessary to show that the application of [748] 7th December 1886 was not barred and for this purpose it was now contended that the period of three years should be calculated from the appearance of the decree-holder by pleader on the 19th December 1883, and that that opposition was an application to take some step in execution of the decree within art. 179, sch. II of the Limitation Act. Both the lower Courts held that execution of the decree was barred.

The decree-holders appealed to the High Court.

Baboo *Nilmadhab Sen* for the Appellants.

Baboo *Umbica Charan Bose* and Baboo *Umakali Mukerjee* for the Respondents.

The following cases were referred to:—*Radha Prosad Singh* v. *Sundur Lall* (I.L.R., 9 Cal., 644), *Kewal Ram* v. *Khadim Hosain* (I.L.R., 5 All., 576), *Kristo Coomar Nag* v. *Mahobat Khan* (I.L.R., 5 Cal., 595), *Rajkumar Banerjee* v. *Rajlakhi Dabi* (I.L.R., 12 Cal., 441), and *Shib Lal* v. *Radha Kishen* (I.L.R., 7 All., 898).

The **Judgment** of the Court (PRINSEP and HILL, JJ.) was as follows:—

The lower Courts have concurrently held that this application to execute is barred by limitation.

The appellants' pleader contends that the application is within three years, inasmuch as it was within three years from the date of the appearance of his pleader to oppose an application made by the judgment-debtor to set aside the sale held in execution. We agree with the lower Court that the appearance of the pleader to oppose the proceedings taken by the judgment-debtor cannot properly be regarded as an application within the terms of art. 179 to take some step in aid of execution. It seems to us rather that the application, contemplated by that article of the Limitation Act, is an application to obtain some order of the Court in furtherance of the execution of the decree. The appearance of the pleader cannot be regarded as any such application. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[*See* also (1903) 30 Cal., 761 : 8 C. W. N., 251.]

---

[749] PRIVY COUNCIL.

The 20th February, 1889.
PRESENT:
LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Muhammad Yusuf Khan............Defendant
versus
Abdul Rahman Khan............Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Superintendence of High Court—Code of Civil Procedure (Act XIV of 1882), s. 622.

A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code.

APPEAL by special leave (31st December 1886) from an order (June 22nd, 1886), of the Judicial Commissioner of Oudh.

The suit out of which this appeal arose was brought on the 2nd April 1883, by the present respondent, in the Court of the Subordinate Judge of the Lucknow District, against the appellant, for a declaration that a document purporting to have been signed by the plaintiff on the 1st June 1882, and undertaking that he should pay Rs. 30 a month to the defendant, was a forgery. The defence was that the document was genuine, and to this was added that it had been decided, in a previous suit, so to be.

The Subordinate Judge, on 17th December 1883, found the document genuine, and dismissed the suit. This decree was upheld by the District Judge of Lucknow on the 11th June 1884. According to his judgment, two words, not however material to the effect of the writing, had been added. No appeal (ss. 584 and 585 of Act XIV of 1882) lay to any Appellate Court against these concurrent judgments, but the Judicial Commissioner, on application by the plaintiff, consented, as he conceived himself to be empowered by s. 622 of the Code of Civil Procedure to do, to revise the proceedings of the District Judge. He did so, reversing the decree which had been made in the defendant's favour, and granting to the plaintiff the relief which he sought, on 10th November 1884. His ground for doing so was that, as the District Judge had found that two [760] words had been added to the disputed document, this threw upon the defendant the burthen of showing when they had been added, and as he had offered no evidence upon the point, it was the duty of the District Judge to assume that they had been added after execution, and therefore that he should have cancelled the document. This Judicial Commissioner, Mr. Young, left the Court shortly after this decision, and his successor, Mr. Tracy, on 23rd February 1885, reversed the decision of predecessor, being of opinion that, even if the District Judge had been wrong, his error was not one that could be set right under s. 622. The Courts had found that the document which the plaintiff had sought to cancel was genuine. He quoted the judgment in *Amir Hassan Khan* v. *Sheo Baksh Singh* (I.L.R., 11 Cal., 6; L. R., 11 I. A., 237) as follows: "It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." This gave to him, as he considered, no alternative but to find that the order of 10th November

1884 was passed without jurisdiction, and obliged him to set aside this order, which seemed to have followed an erroneous ruling of a Full Bench of the Allahabad High Court, viz., *Moulavi Muhammad* v. *Syed Hussan* (I. L. R., 3 All., 203). The result was to restore the decision of the District Judge dismissing the suit.

In 1886, Mr. Young resumed charge of the office of Judicial Commissioner and to him the plaintiff applied to set aside the last order, viz., that of 23rd February 1885. This application was granted on 22nd June 1886, by the order now under appeal. The Judicial Commissioner pointed out that the application was for the review of an order made in review, prohibited by s. 629; he also considered s. 622 to be inapplicable. But he referred to two cases in which orders made were revised, viz., *Tafazzal Hossein Khan* v. *Raghonath Pershad* (7 B. L. R., 186) and *Rajender Narain Rae* v. *Bejai Govind Singh* (2 Moore's I. A., 209, 252); and on the supposed ground that the order of 23rd February 1885 was one which the Court [761] would not have made, if it had been duly informed, reversed it, and restored the order of 10th November 1884.

Special leave to appeal was granted, in regard to the law, by order dated 31st December 1886.

Mr. *J. D. Mayne* for the Appellant, submitted that, even if the decision of the District Judge of 11th June 1884 was wrong (which it was not), still his error could not be taken to be within the meaning of s. 622. The order of 23rd February 1885 was accordingly right. The final decision of the Judicial Commissioner of 22nd June 1886 was wholly without jurisdiction.

After his statement of the case, their Lordships called on Mr. *C. W. Arathoon*, for the Respondent, who argued that Mr. Young's first order, viz., that of 10th November 1884, was right. The question of the materiality of an addition to a document was a question of law—*Yame* v. *Lother* (L. R., 1 Ex. D., 176); and the point that the District Judge had omitted to consider afforded ground for revision. He referred to *Amrit Lal* v. *Madho Das* (I. L. R., 6 All., 292); *Amir Hussan Khan* v. *Sheo Baksh Singh* (I. L. R., 11 Cal., 6; L. R., 11 I. A., 237).

No reply was called for.

The **Judgment** of their Lordships was delivered by

Lord Macnaghten.—In this case, on the 10th of November 1884, Mr. Young, the Judicial Commissioner of Oudh, set aside the judgment of a competent Court, which by law was final, and without appeal. In so doing, he proceeded on an erroneous interpretation which had been placed on s. 622 of the Civil Procedure Code by the Court of Allahabad, and in ignorance of the fact that the error had been corrected by a judgment of this Board in the case of *Amir Hussan Khan* v. *Sheo Baksh Singh* (I. L. R., 11 Cal., 6; L. R., 11 I.A., 237), to which Her Majesty gave effect by Her order of the 26th of June 1884. The order of Mr. Young was brought before Mr. Tracy, who happened at the time to be officiating as Judicial Commissioner in his place. On the 23rd of February 1885, Mr. Tracy, having regard to the decision of the Privy Council, discharged the order of Mr. Young. Fifteen months afterwards the matter was again brought before Mr. Young on an application purporting to be [762] made under s. 622. That application was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects.

On the 22nd of June 1886, Mr. Young discharged the order of Mr. Tracy on the singular ground that it was made *per incuram*, and that it was an order which the Court would not have made if it had been duly informed. From

that order of Mr. Young, special leave to appeal to Her Majesty has been granted.

Mr. *Arathoon*, who appeared for the Respondent, admitted that he could not contend that Mr. Young had any jurisdiction to pronounce the order of the 22nd June 1886, but he argued that Mr. Tracy's order was wrong, and that Mr. Young's first order was right.

Their Lordships, however, are of opinion that Mr. Tracy was perfectly right in discharging the first order of Mr. Young; and that neither of Mr. Young's orders can be supported upon any ground whatever.

Their Lordships therefore are of opinion that the order of the 22nd of June 1886 ought to be reversed, and the order of the 23rd of February 1885 affirmed, and that the respondent should pay the costs of the proceedings before Mr. Young, in which the order of the 22nd June 1886 was made. They will therefore humbly advise Her Majesty accordingly; and the respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Young, Jackson and Beard.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[See the Notes to **11 Cal., 6** in the 'LAW REPORTS REPRINTS.']

---

[753] PRIVY COUNCIL.

The 21st and 22nd February, 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Luchman Singh............Defendant

versus

Puna and another............Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

Second Appeal—Code of Civil Procedure (Act XIV of 1882), ss. 584, 585—Jurisdiction to hear a second appeal, on what matters—Admission of secondary evidence—Evidence Act (I of 1872), ss. 65, 66.

Under ss. 584 and 585 of the Code of Civil Procedure, 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure.

On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the original Court, the only questions were (1), whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2), whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document.

Held, that (no special leave to appeal from the judgment of the Commissioner, the First Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of fact of the First Appellate Court.

Both the above questions were decided in the affirmative by their Lordships: the *first*, on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (I of 1872), ss. 65,66: the *second* also in the affirmative, because, the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine.

APPEAL from a decree (13th February 1886) of the Judicial Commissioner modifying a decree (12th May 1885) of the Commissioner of the Jubbulpore Division, which varied a decree (9th March 1885) of the Deputy Commissioner of the Jubbulpore District.

The suit giving rise to this appeal related to a question of title, and the main question of fact between the parties was decided [754] by the Courts in succession * in favour of the plaintiffs, respondents. They alleged that Ramchandra their father, by gift from one Kali Baboo, was the proprietor of village Natwara, and upon their father's death his widow Massammat Munna, who succeeded, allowed the defendant appellant to manage for her; with the result that he purchased in his own name other villages out of the profits of Natwara. Such villages they claimed as the heirs of their father on the death of their mother in 1884. They claimed also buildings and moveables.

The defendant's case was that Natwara descended from Kali to his daughter Munna, who made a gift of it on 23rd August 1870 to the defendant, with other property. He had other matters of defence; but this much is all that is necessary to explain what was the deed of gift alleged to have been made by Kali.

Both the original Court, the Deputy Commissioner, and the Court of First Appeal, the Commissioner, found the alleged gift to Ramchandra to have been made. But the original deed of gift was not forthcoming, and a copy was admitted in evidence.

As to this, the Judicial Commissioner, in his judgment on appeal preferred to him under ss. 584 and 585 of the Code of Civil Procedure 1882, expressed the opinion stated in their Lordships' judgment; and refused to hold that the Courts below had been wrong in admitting it in evidence.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant for whom the argument mainly was that there was no legal proof that Kali had made the gift in question.

The Respondents did not appear.

Their Lordships' **Judgment** was delivered by—

Lord Hobhouse.—The sole question raised in this appeal is a question of fact, whether Kali Baboo made a gift of his estate to Ramchandra, under whom the respondents claim. If there [755] was no such deed of gift, the title of the appellant is a good one, but if there was, then the respondents being the heirs of Ramchandra, are entitled to the decree which they have got.

* When the suit was filed, 23rd July 1884, the Act giving the series of the Courts was XIV of 1865, then in force. On the 1st January 1886, when the suit was pending in the Judicial Commissioner's Court, Act XVI of 1885, the Central Provinces Civil Courts Act came into operation, repealing the former, and again stating the Courts in their order.

The question has been before three Courts, and they have all decided in favour of the gift. They have held that it is proved by a deed of which secondary evidence was given.

The case is not only within the general rule which this Committee observe, that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure. The third Court was the Judicial Commissioner, and to him the appeal was what is called in the Code a second appeal. Section 585 of the Code of 1882 says:—"No second appeal shall lie except on the grounds mentioned in s. 584." Those grounds are: "The decision being contrary to some specified law or usage having the force of law, or the decision having failed to determine some material issue of law or usage having the force of law," or for substantial defect in procedure. It in not alleged here that there is any defect of procedure. Therefore, in order that this appeal may succeed, there must be some violation of law.

This Committee is sitting on appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. No special leave to appeal from the decree of the Commissioner has been applied for, and their Lordships find that they are bound by his findings of the facts. Therefore the only questions here are, *first* whether a case arose for admitting secondary evidence, which was a proper question of law; and, *secondly*, whether the evidence that was admitted was really and truly secondary evidence.

With regard to the case for admitting secondary evidence their Lordships refer to the Evidence Act of 1872. It says:—"Secondary evidence may be given of the existence, condition, or contents of a document in the following cases." Two of the cases are: "When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when the original has been destroyed or lost, or when the party offering evidence of its **[756]** contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

In this case there is evidence of two witnesses, of whom certainly one, and probably both, assisted at what they call a ceremony, in which Kali Baboo made over the property to Ramchandra, and told the people present, the villagers, the ryots or cultivators, that Ramchandra was the malik. There is the evidence of one witness that he was present at the signing of a deed, which he says was stated to be a deed of gift from Kali Baboo to Ramchandra, and there is the evidence of another witness that Kali Baboo told him that there had been such a deed of gift. Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence, cannot be doubted. The Courts below have found that all the documents belonging to the estate passed into the hands of the appellant, and therefore that the deed in question is in his power, or has been destroyed or lost.

Then what is the secondary evidence which is let in? It is a copy of a deed which was filed in another suit, and is still on the records of the Court. That deed is endorsed: "Copy in accordance with the original," and it is signed by the Judge presiding in the Court. Their Lordships accept the opinion of the Judicial Commissioner upon the value of that copy. His words are these: "There can be no doubt that the Judge, in the course of the suit in 1864, did accept and file, with the proceedings, a copy of a deed of gift by Kali Baboo and the only question is whether that copy had been compared with the original

when the copy is enfaced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorized to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy." Their Lordships entirely concur with that opinion. When the copy is looked at it establishes the deed of gift on which the respondents rely.

There was another question raised with respect to some goods and chattels —some moveable property. It was said that the [757] appellant, having been in possession of the estate rightfully under a deed of gift from Ramchandra's widow, was entitled to the income during that time, and the Judicial Commissioner has, to a certain extent, given effect to that contention by adjudicating to the appellant the ownership of some villages which it appears that, during that period, he purchased out of the surplus or savings from the income. But besides the land, he received a certain quantity of chattels, which we may call stock and plant, and it is now contended that, as the original stock and plant must have worn out, and the appellant was not under any obligation to replace it, therefore that which he has in fact brought in to replace it belongs to him, and not to the estate. So far as there is stock and plant belonging to the three villages, which the Judicial Commissioner has adjudicated to the appellant, that he takes. But with regard to the other property which forms part of the estate which is adjudicated to the respondents, their Lordships think that the appellant is in the position of an ordinary tenant for life who enjoys furniture and plant which wears out from time to time, and which he replaces, and that that which is found attached to the property which the respondents receive must follow the title to that property, and that the decree of the Judicial Commissioner is right in not giving to the appellant any more stock or plant than belongs to the three villages which he has given to him.

The result is that the appeal fails in every respect, and their Lordships, therefore, must humbly recommend Her Majesty to dismiss it. There will be no costs, as the respondents do not appear.

Solicitors for the Appellant : Messrs *T. L. Wilson and Co.*

C. B. *Appeal dismissed.*

[758] PRIVY COUNCIL.

The 23rd and 27th February and 3rd April 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Hemangini Dasi.........Plaintiff

versus

Kedarnath Kundu Chowdhry............Defendant.

[On appeal from the High Court at Calcutta.]

Hindu Law- Partition—Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavahana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is the mother.

Jeeomony Dossee v. *Attaram Ghose* (Macnaghten's Cons. H. L., p. 64) referred to and approved.

APPEAL from a decree (29th July 1886) of the High Court (I. L. R., 13 Cal., 336), reversing a decree (11th April 1885) of the Second Subordinate Judge of the Hughli District.

The question raised on this appeal related to the rights of a widow to maintenance, her deceased husband having left sons, of one of whom she was the mother, and a partition taking place among them.

The object of the suit was to establish against the whole estate of the deceased, Taracharan Kundu Chowdhry, who died in April 1865, the right of the plaintiff as his widow to maintenance; and when it was instituted on the 13th September 1884, there had been no partition among his sons, who were Hurrish Chunder, his son by the plaintiff, and two other sons by a wife who predeceased her husband, viz., Kedernath and Annoda Pershad. The latter dying in 1882, left a widow and two minor sons, whose guardian was Kedarnath. The latter, the present respondent, represented when this suit was brought two-thirds of the paternal estate.

[759] On the 11th November 1884, after the institution of this suit, Hurrish Chunder brought two other suits against Kedarnath himself, and in his capacity of guardian of the wards, for an account and a partition of the joint estate of Taracharan deceased. Hemangini Dasi, the Plaintiff in this suit, was stated in Hurrish Chunder's plaints to have been made a party by reason of her having instituted this suit; but no issue was recorded, or decided, as to her rights to maintenance; and, on the 20th February 1886, decrees in those two suits, declaring Hurrish Chunder's right to one-third of his father's estate generally, directed an account and partition.

In the present suit the widow claimed a decree for Rs. 300 for her maintenance, and Rs. 200 for religious observances, and that these sums might be

declared charges on the whole estate of the late Taracharan. By the effect, however, of the decrees for partition obtained by Hurrish Chunder, whom his mother had made a defendant along with Kedarnath (though Hurrish Chunder did not defend or appeal), two principal questions arose in the present suit, which had been instituted before the other two suits. These questions were the following :—

The first of them was whether the Courts below, when dealing with the question as to the plaintiff's right as a widow to have suitable maintenance awarded to her out of the entire estate of her late husband, were justified in taking into their consideration a state of facts, viz., the decrees above referred to for partition which did not exist till after the institution of the present suit. And the second question was, assuming the affirmative of the first, whether the effect of a partition between the plaintiff's step-son and step-grandchildren on the one side, and her own and only son on the other, by which partition the latter took a separate third share, was or was not, by Hindu law, to discharge Kedarnath's and his wards' two-thirds shares from the plaintiff's claim for maintenance, limiting that claim to the share of Hurrish Chunder, her own son, both in matter of amount and as regards security.

As to the first of these questions, the Subordinate Judge was of opinion that, as the present suit was instituted before the partition proceedings, the latter would not affect the plaintiff's [760] claim. And as to the second, he referred to the case, relied on by the respondent, of *Jeeomony Dossee* v. *Attaram Ghose*, cited at p. 64 of Sir F. Macnaghten's Considerations on Hindu Law, where a point is stated as to whether a mother (not a party to that suit) of an only son, her husband having left other sons was entitled on partition between her son and the other sons to a separate share; and it was determined that she was not so entitled, but must look to her son for maintenance. And the Subordinate Judge was of opinion that as the mother referred to in that case was not a party to the suit, the question as to her right never properly rose in her absence, and the decision could not guide him.

He made a decree for what he considered to be a suitable maintenance (allowing no arrears or back maintenance) viz., Rs. 180 by the year; and he directed that the appellant might realize two-thirds of this amount from the respondent, as representing two-thirds of the entire estate, and the remaining one-third from the share of her son, Hurrish Chunder.

Kedarnath appealed to the High Court, the plaintiff cross-appealing, because the decree gave her less than she claimed.

The High Court (PETHERAM, C. J., and GHOSE, J.) did not maintain the judgment of the first Court, but, as to the first of the above questions, held that they were bound to take the subsequent partition into consideration, and to make such a decree as would be consistent with the true estate of the family, as it existed at the time they were dealing with it.

As to the second question, they held that, up to the time of the decree for partition defining the separate shares of the members of the family, the plaintiff was entitled to claim her maintenance against the whole estate; and subsequently thereto, to claim her maintenance only against the share allotted to her son: but that, as after a separation between the sons and Hemangini in February 1883, the latter had received her maintenance from her own son Hurrish Chunder alone, she had no claim for maintenance against her step-sons; with the result that so far as Kedarnath and his wards were concerned, the suit ought to be dismissed.

Accordingly, reversing the decree of the lower Court, the High Court dismissed the suit against him; and their decree declared [761] the plaintiff

entitled, from the time of her separating from her son Hurrish Chunder, to be paid by him out of that portion of the estate of his late father Tarachand Kundu now in his hands, Rs. 150 a month as maintenance. The judgment of the High Court is reported in I. L. R., 13 Cal., 336

The plaintiff, having obtained a certificate that the suit fulfilled the requirements of s. 596 of the Civil Procedure Code, appealed to the Queen in Council, on the ground that she had a right to maintenance out of the whole estate of her deceased husband, upon which the charge for her maintenance should continue, even after partition amongst her son and step-sons.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the Appellant, argued that the High Court was wrong in holding the effect of the partition to be to make the maintenance of this widow a charge only on her own son's share in the family estate, and proportionate only to the value of that share. They contended that, on the contrary, by the Hindu law, the widow's maintenance was regarded as a charge upon, and proportionate to, the whole estate of her deceased husband. It was in conformity with the family distribution made by that law that the widows should share, and share alike, in the whole estate. It had been rightly taken as beyond a doubt, in the High Court, that her maintenance, if she had been childless, would have been a charge on the whole estate not affected by any partition. Also, a widow having sons but no step-sons, and having lived with them whilst the family continued joint, would be on a partition entitled to a share equal to that allotted to a son, and her rights might be shown by supposing a case of a widow having three sons of her own, there being three other sons not by her; in such a case her right would be to have a one-seventh share in the whole estate, and not merely a one-fourth of a half. There was no authority for a change being made in the widow's position, as a consequence of a partition which she could neither bring about nor avert. The right of a widow to her maintenance arose by marriage. It existed during the life of the husband, who could not free himself from it, and it attached upon the whole inheritance which he left, immediately upon his death.

Reference was made to Strange's Hindu Law, Edn. 1830, Vol. [762] I, pp. 171, 291, Vol. II, Appendix to Chap. VIII, pp. 290, 307 ; Dayabhaga, Chap. III, sec. 1, para. 12, and sec. 2, paras. 29, 30 and 31 ; Macnaghten's Principles of Hindu Law, Vol. I, Chap. IV, of Partition, Vol. II, Chap. V ; Jaganatha Colebrooke's Transl., Book V ; Macnaghten's Cons. on Hindu Law, p. 60 : *Jeeomony Dossee v. Attaram Ghose* (Macnaghten's Cons. H. L., p. 64) ; *Sheodyal Tewaree* v. *Jadunath Tewaree* (9 W. R., 62) ; *Nittokissoree Dossee* v. *Jogendronath Mullick* (L. R., 5 I. A., 55, 56) ; *Madhavkeshav Tilak* v. *Gangabai* (I. L.R., 2 Bom., 639)

It was in regard to the mother's rights over the father's estate that she had her claim to maintenance and to a share ; and there was no authority for the opinion that the mother took a share of her son's share. It was incorrect to say that a widow's maintenance was a charge on a son's share ; it being, on the contrary, a charge that took priority of any rights upon partition, that dated from her marriage, that affected the whole estate of her husband as a charge thereon ; and a charge which like the husband's debts must be provided for. More than one text supported the view that it was a charge upon the whole estate.

Strange's Hindu Law, Vol. I, Chap. Partition; Vol. II, Precedent at pp. 351, 352, 353, with notes by Ellis, Colebrooke, and Sutherland, at the latter page ; West and Bühler, Hindu Law (Bombay) p. 791.

Her share, if she took a share, was a charge on the whole property in the hands of all the sons. She was an inchoate heir till she had issue, and with her original right to charge the whole estate she remained, that right being

paramount to the son's right to partition. This was not, in effect, contravened by the decision in *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (I. L. R., 15 Cal., 292). The mother's right was to maintenance attaching over the whole estate; but, if she took a share in lieu, her right was to a share equal to that of her son, and this was the measure of it.

Mr. *T. H. Cowie*, Q.C., and Mr. *J. H. A. Branson*, for the Respondent, argued in support of the decision of the High Court. The question was completely covered by the authority of decided cases, according to which the plaintiff, on the partition of the family estate, was entitled to have her maintenance charged [763] upon and paid out of the share of her own son only, she not being entitled to charge the shares of her step-sons, as well as that of her own son. Upon the partition, the widow ceased to belong to one family with the step-sons, and had no claim upon their shares in the divided estate

Reference was made to "Jaganatha's Digest" ("Colebrooke"), Book V, Chap. II, para. 89, and a sentence in the Commentary thereon referring to the opinion of Jímútaváhana and the rest; " Dayabhaga," Chap. III.

Sir F. W. Macnaghten, in his " Considerations " published in 1824, cited decisions of 1809, 1811 and 1813, (see p. 39; also pp. 48, 51, 60, 66 and 75) showing that this was the settled law in 1814.

In 1821, there was the decision in *Krisnanund Chowdree* v. *Rookeenee Dibia* [3 Sel. Rep. (1827), p. 70], and in 1866, there was a case to the like effect in *Kally Churn Mullick* v. *Janova Dassee* (Ind. Jur., N. S., 284) decided by Mr. Justice PHEAR.

Mr. *R. V. Doyne* replied.

Their Lordships' **Judgment** was delivered on a subsequent day (3rd April) by

Sir R. Couch.—The appellant is the widow of Taracharan Kundu, who died on the 19th of April 1865. He left one son, Hurrish Chunder, by the appellant, and two sons, Kedarnath (the respondent) and Annoda Pershad, by another wife who died before him. Annoda Pershad died in June 1882, leaving a will by which Kedarnath was appointed executor of his estate. The suit was brought on the 13th September 1884 by the appellant, against Kedarnath in his own right and as executor to the estate of Annoda Pershad, and against Hurrish Chunder, and the plaint prayed to have it held that the plaintiff was entitled to get Rs. 500 a month from the properties left by her husband, for the expenses of her religious acts and her maintenance, and that the Rs. 500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs. 3,016-9-3 on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing on [764] the 6th December 1884, of a written statement by Kedarnath, Hurrish Chunder, who attained his majority on the 3rd November 1882, instituted two suits against Kedarnath, and others, members of another branch of the family, who were co-sharers with Taracharan in different properties, for a partition of the joint family property. This was stated in the written statement of Kedarnath, and it was pleaded that, if the plaintiff was entitled to any maintenance, her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th February 1886, decrees for partition were made in those suits. The judgment of the High Court, on appeal from the Subordinate Judge, was given on the 29th July 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition, the plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had separated in food and worship, she having been maintained in the family of

her son could not claim maintenance from her step-sons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against Kedarnath.

The decision as to the arrears has not been questioned before their Lordships and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by Taracharan remained joint and undivided, the plaintiff was, no doubt, entitled to claim her maintenance out of the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of her son's share? According to the Dayabhaga, Ch. III, sec. 1, v. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives, the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow [765] that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to Jimútaváhana, it is a settled rule that a widow shall receive from sons who were born of her, an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. ("Colebrooke's Digest," Book V, Ch. II, v, 89, 3rd Ed., vol II, p. 255). In Sir F. Macnaghten's "Considerations on Hindu Law," p. 64, a case in the Supreme Court of *Jeeomony Dassee* v. *Attaram Ghose* is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, Attaram, by Luchapriah the other; and it is said that it was understood and admitted that Luchapriah was not entitled to any separate property upon a partition made between her only son and his three half-brothers, and that she was to look to him for her maintenance.

The Subordinate Judge, in his judgment, said the question who was to give the maintenance never properly arose in that suit in the absence of Luchapriah, and if any such question was then decided, it was an *obiter dictum*. The question did arise between Attaram and his half-brothers, and if the contention of the present appellant, that the maintenance is a charge upon the estate and to be taken into account in making the partition, is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75, where a man had three sons by his first wife, two by his second, and two by his third, and all survived him. In a suit for partition, it was declared, in accordance with the authority in "Colebrooke's Digest," before noticed, that the first wife was entitled to one-fourth of the three-seven parts of her sons, and the second wife to one-third of the two-seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

[766] The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate; and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance.

Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Barrow & Rogers.*

C.B.

NOTES.

[*See* also (1891) 19 Cal., 26; (1899) 27 Cal., 77; (1906) 11 C. W. N., 239. In *Debi Mangal Prasad* v. *Mahadeo Prasad*, **34 All., 234** the Privy Council overruling 24 All., 82 held that such property would not devolve as *stridhan.*]

[16 Cal. 766]

FULL BENCH.

The 15th July, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
MR. JUSTICE TOTTENHAM, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE AND MR. JUSTICE BEVERLEY.

Queen-Empress
versus
Sarat Chandra Rakhit.*

Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—Penal Code, s. 196.

A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196† of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure.

[767] *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (I. L. R., 16 Cal., 121), overruled; *Empress* v. *D'Silva* (I. L. R., 6 Bom., 479) referred to.

THIS was a reference to a Full Bench by Mr. Justice TREVELYAN and Mr. Justice BEVERLEY; the referring order was as follows:—

"The appellant before us has been convicted under s. 196 of the Penal Code of using as genuine evidence which he knew to be false. He has also been convicted under s. 471, read with s. 467, of the Penal Code; but, in our

* Full Bench on Criminal Appeal No. 327 of 1889, against the decision of F. H. Harding, Esq., Officiating Sessions Judge of Chittagong, dated the 11th March 1889.

† [Sec. 196—Whoever corruptly uses or attempts to use as true or genuine evidence, any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.]

Using evidence known to be false.

opinion, the alleged offence falls under s. 196, and the conviction under s. 471 should be set aside. The conviction under the latter section made no difference in the punishment.

"The sanction to prosecute was given by Mr. F. Harding acting as District Judge of Chittagong.

"The appellant has been tried and convicted of this offence by Mr. Harding acting as Sessions Judge of Chittagong.

"One of the grounds of appeal is as follows: 'While the Judge accorded a sanction to bring a case against me in the Criminal Court, it has been illegal on his part to convict and punish me against himself.'

"This question has been argued before us by the *Deputy Legal Remembrancer*, who cited the case *In the matter of Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (I. L. R., 16 Cal., 121), and we have had to consider the terms of ss. 477 and 487 of the Criminal Procedure Code. We have grave doubts as to the correctness of the above-mentioned decision, and as the matter is one of importance, we refer to a Full Bench the following question:—

"'Can a Sessions Judge try a person for an offence punishable under s. 196 of the Indian Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?'

"If this question is decided in the affirmative, the appeal should, in our opinion, be dismissed. If it be decided in the negative, the appellant will have to be re-tried by another Sessions Judge."

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.—There being only one Court in each district, which can try **[768]** Sessions cases, or hear most appeals, great inconvenience must be occasioned when such cases are transferred. In the present instance the nearest Sessions Court is at Tipperah; the most convenient perhaps at Alipore. In the one case witnesses would have to march 200 miles during the rains to Tipperah and back, or else re-cross the Bay of Bengal. A Bench of this Court has decided that if the Judge had jurisdiction to try, the conviction and sentence are right: upon a re-trial then either the same-sentence will be repeated, or there will be a miscarriage of justice. The law could not have intended to prescribe a course entailing such consequences unless there exists an imperative reason for so doing. That reason can only be the fear that the Judge may have prejudged the case and condemned the prisoner before trial; but the District Judge in this case merely amended a sanction previously granted by an inferior Civil Court.

If an appeal admitted after hearing the judgment and argument, if a rule to show cause why an order could not be set aside, are not prejudged, how can it be said that a Judge granting a sanction to prosecute (where he merely has to consider whether he ought to remove an artificial obstruction put in the way of a man's ordinary right to complain of an offence) has condemned the accused before the hearing.

It would be more plausible to say that the Sessions Judge had prejudged the case, when, after reading the proceedings of the commitment, he alters or adds to the charge. The prisoner has been acquitted of all the charges framed by the Magistrate, but sentenced upon the one which the Judge has framed in this case. And as to this there is no objection, for the law prescribes it. Section 477 clearly shows that where the offence is committed in the presence of the Judge, and where he has himself committed the offender for trial, the Legislature does not consider that a sufficient reason to justify the removal of the case from his jurisdiction.

So under s. 487 the Sessions Judge may try offences which have been committed in his presence as District Judge and where the preliminary enquiry and commitment have been made by himself. Clearly it was not contemplated that he should be debarred from trying a case like the present.

[769] I submit that s. 487 does not debar him. The words "no Judge of a Criminal Court" in s. 487 apply to an assistant Sessions Judge (s. 31) but not to a Sessions Judge. The Sessions Judge (ss. 477, 478) may try any case committed to his Court, whether by himself or by any Civil or Revenue Court that thinks he ought to try it; *a fortiori* he may try any case committed to his Court in the ordinary way by a Magistrate. If it be argued that s. 477 is restricted to cases in which the Sessions Judge himself makes the commitment, such a narrow construction is inconsistent with s. 478. I also submit that the words "judicial proceedings" in s. 487 do not include a sanction under s. 195 granted or revoked by a Superior Court. In dealing with such sanction, such Court has no authority to take evidence; and it cannot therefore be a judicial proceeding [see s. 4 (*d*)]. Whenever in any proceeding evidence may be legally taken the Code provides for it, as in appeals (Chap. XXXI, s. 428); but no such provision is to be found in Chap. XV, or as applicable to the Superior Courts mentioned in s. 195. The case of *Krishnanund Das* v. *Hari Bera* (I. L. R., 12 Cal., 58) decides that notice need not be given to the accused when sanction is granted for his prosecution. How then could evidence be taken in such a case? Again, an offence which is brought under the notice of the District Judge in a proceeding, as in this case, is not brought under the notice of the Sessions Judge "as such Judge." The Court of Sessions which tries the offence, whether with Assessors or Jury, is a different Court from that of the Civil Judge—*Empress* v. *D'Silva* (I. L. R., 6 Bom., 479).

I contend that s. 487 only applies to cases which can be tried by more than one Judge or Magistrate in the District: and that it does not apply to Sessions Judges or to appeals involving for trial a transfer to another district. The words in s. 487 "shall try" do not apply to appeals; trials and appeals are quite distinct under the Code. The word "try" is confined to trials; appeals are heard under s. 407, rejected under s. 409, and dealt with under s. 428. —See *Weir*, 1081.

No one appeared for the prisoner.

[770] The **Order** of the Court (PETHERAM, C.J., TOTTENHAM, TREVELYAN, GHOSE and BEVERLEY, JJ.) was as follows:—

The facts of this case are sufficiently set out in the ORDER OF REFERENCE The question referred to us for our decision is the following:—

"Can a Sessions Judge try a person for an offence punishable under s. 196 of the Penal Code, when he has, as a District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?" The reference has been rendered necessary in consequence of the decision in *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (I. L. R., 16 Cal., 121).

Section 487 of the Code of Criminal Procedure now in force runs as follows:—

"Except as provided in ss. 477, 480 and 485, *no Judge of a Criminal Court or Magistrate*, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in s. 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice *as such Judge or Magistrate* in the course of a judicial proceeding."

We are of opinion that in this section effect must be given to the words *as such Judge or Magistrate*, and the meaning of the section, we think, must be taken to be that when an offence referred to in s. 195 has been committed before a Judge of a Criminal Court or Magistrate, or in contempt of his authority, or brought under his notice in the course of a judicial proceeding, he cannot himself try such offence. That this is so, we think, is clear from the exception made in regard to the provisions of s. 477, under which a Court of Session is empowered to charge and commit, or admit to bail and try, any person who has committed before it any offence of the kind referred to in s. 195. It appears to us that it would be inconsistent to hold that a Sessions Judge may try an offence committed before him as Sessions Judge, and that he may not try such an offence if committed before him as District Judge.

This view appears to have been taken by the Bombay High Court in the case of *Empress* v. *D'Silva* (I. L. R., 6 Bom., 479). That was a decision under s. 473 of the Code of 1872, which [771] section ran as follows: "Except as provided in ss. 435, 436 and 472, no Court shall try any person for an offence committed in contempt of its own authority." Under that section it was held that a Sessions Judge was not debarred from trying a case of forgery in which he had sanctioned the prosecution as a District Judge. The *ratio decidendi* in the case was much the same as that which has been indicated above. The learned Judges who decided that case said:—

"The Legislature seems to have been impressed by the sense of this inconvenience, and, consequently, in enacting s. 472 of the Code, it gave jurisdiction to the Court of Sessions to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Session. It would be difficult to suppose that the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Session in his Civil capacity, and certainly s. 473 is not so worded as to oblige us to hold that there was any other intention."

It will be seen that s. 487 of the present Code, which corresponds to s. 473 of the Code of 1872, is couched in more definite language. The prohibition is restricted to a "Judge of a Criminal Court," and that being so, we think we must place a strict construction on the words "as such Judge," and hold that they do not include a Judge of a Civil Court or District Judge.

For these reasons we are of opinion that the Sessions Judge was not debarred by this section from trying the case which was the subject of this reference.

T. A. P. *Appeal dismissed.*

NOTES.

[*See* also **18 Bom. 380 F.B.**; 7 C.W.N., 708; 14 All., 354.]

[16 Cal. 771]

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

The 8th July, 1889.

PRESENT:

MR. JUSTICE NORRIS.

Jotendronauth Mitter

versus

Raj Kristo Mitter and another.*

Transfer of Suit—Practice—Minor defendant, Application by next friend of, for transfer of suit when no guardian ad litem *has been appointed—Civil Procedure Code (Act XIV of 1882), ss. 440, 441, 443, 449.*

A suit was instituted in a Mofussil Court against two defendants, one of them being a minor. Before a guardian *ad litem* had been appointed for [772] the minor defendant, an application was made to the High Court to transfer the case from the Mofussil Court to the High Court in its ordinary original civil jurisdiction by the minor defendant through a next friend. It was contended that the application was informal, and could not be granted and that no such application could be made on behalf of the infant defendant until a guardian *ad litem* had been appointed, and that it should be made by him.

Held, that the objection should not prevail, and that this application could be made through the next friend.

In a partition suit, instituted in the Second Subordinate Judge's Court of the 24-Pergunnahs, the parties being residents of Calcutta, when the property sought to be partitioned consisted of (*a*) moveable property situate in Calcutta, (*b*) immoveable property, 49/85ths of which was in Calcutta, the rest being in the immediate vicinity, and when it appeared that, if tried in Alipore, an Ameen would have to partition the Calcutta property, and that the suit could be more expeditiously and cheaply tried in the High Court.

Held, that the case was a proper one to be transferred to the High Court to be tried on the original side, and an order was made accordingly.

THE facts which gave rise to the issue of this rule were as follow:—

Khetter Mohun Mitter, the paternal grandfather of the plaintiff, Jotendronauth Mitter who was an infant, died intestate in Calcutta, on the 28th day of March 1888, leaving two sons, Nilmadhub Mitter and Raj Kristo Mitter, one of the defendants an infant, and a widow Nobin Kissory Dassee the second defendant, and his mother, Bama Soondary Dassee. Nilmadhub Mitter was tried for and convicted of the murder of his father, Khetter Mohun Mitter, and sentenced by the High Court to transportation for life.

After the trial, Jotendronauth Mitter, who was the infant son of Nilmadhub, and his mother Nerodemoney Dassee, were ignored by the other members of the family of Khetter Mohun, and accordingly the above suit was instituted in the Court of the Second Subordinate Judge of the 24-Pergunnahs by Jotendronauth, through his mother as next friend, for a declaration of his right to a third share in the estate left by Khetter Mohun, and for partition. The suit was based on the contention that Nilmadhub was excluded from the right to succeed to his father's estate, and that his share devolved on the plaintiff.

The estate consisted of property, both moveable and immoveable, the latter being situated partly in Calcutta, within the original [773] jurisdiction of the High Court, and partly in the district of the 24-Pergunnahs.

* In the matter of s. 13 of the Letters Patent of 1865, and in the matter of a Suit No. 62 of 1889, in the Court of the Second Subordinate Judge of the 24-Pergunnahs.

Shortly after the suit had been instituted, an application was made to the High Court in the exercise of its extraordinary original civil jurisdiction on behalf of Nobin Kissory Dassee, the widow of Khetter Mohun, to have the suit transferred from the Court of the Second Subordinate Judge to the original side of the High Court. That application was resisted on behaf of the plaintiff on the ground that no guardian *ad litem* had been appointed on behalf of the infant defendant, Raj Kristo Mitter, and therefore that the application was informal, and could not be granted. The application was refused.

On the 6th June, another application was made by Mr. *Pugh* on behalf of the infant defendant Raj Kristo, for a rule calling on the plaintiff to show cause why the case should not be transferred to the High Court for trial. The application was based on a petition of Raj Kristo Mitter by Mohendronauth Ghose, his maternal uncle and next friend, and an affidavit of the said Mohendronauth Ghose.

Upon the application being made, a rule was directed to issue, calling on the plaintiff and the defendant, Nobin Kissory Dassee, to show cause why the tranfer should not be made, and pending the hearing of the rule all proceedings in the suit in the Court of the Second Subordinate Judge were stayed.

At the time that application was made, and when the rule came on to be heard, no guardian *ad litem* had been appointed for the infant defendant, Raj Kristo Mitter, in the suit.

The rule now came on to be argued.

Mr. *Hill* on behalf of the Plaintiff.

Mr. *Pugh* on behalf of the Defendant, Nobin Kissory.

Mr. *Bonnerjee* on behalf of the Defendant, Raj Kristo.

Mr. *Hill*, showing cause against the rule, contended that there was a preliminary objection to the form of the application, and the rule being made absolute, inasmuch as no guardian *ad litem* of the infant had yet been appointed, neither under the procedure in England nor that of this country could an appli- [774] cation of this kind be made by a next friend. For the procedure in England, he referred to Daniel's Chancery Practice, Vol. I, page 174. And as regards the procedure in this country, he pointed out that Chapter XXXI of the Code of Civil Procedure distinguished between next friends and guardians for the suit; the former term being used in respect of plaintiff minors, and the latter when the minors were defendants. He referred in particular to ss. 440, 441, 443, and 449, and to Belchambers' Rules and Orders (Rules 572 and 583), and contended that there was no precedent for an application such as this being made by a next friend on behalf of an infant defendant, and that no such application could be entertained till a guardian *ad litem* had been appointed.

On the merits, he contended that the suit should not be transferred. A portion of the property being situate in the 24-Pergunnahs, the plaintiff had a right to institute his suit there; and, as he considered that he would be put to much less expense there than if he had sued in the High Court, he had chosen to exercise that right, and there was no reason why the suit should be transferred.

Mr. *Bonnerjee*, in support of the rule, pointed out that the application was not made in a suit which was pending in the High Court, but in the matter of a suit pending in another Court, and therefore was one which was properly made by the infant defendant through a next friend. Even if a guardian *ad litem* had been appointed, this application would have had to be made by a next friend. Section 441 was clear on that point. An application could only be

made by a guardian *ad litem* on behalf of an infant to a Court when the suit was actually pending in that Court. This application was therefore in order.

On the merits, he contended that the suit ought to be transferred. The parties all resided in Calcutta. The widow had received letters of administration to the estate from the High Court, limited during the minority of the plaintiff and Raj Kristo, and was accountable to the High Court. The whole of the moveable property was in Calcutta and immoveable property of the value of about Rs. 49,000 was also situtate in Calcutta against about Rs. 36,000 [775] worth situate in the district of the 24-Pergunnahs, and that was situate in the immediate Suburbs and close to Calcutta. There seemed no reason why the suit had been filed in the Subordinate Judge's Court other than that a relative of the plaintiff, who was looking after the case, was a pleader of that Court, and it suited his convenience to have it tried there. As to expense, he contended that this particular suit could be much better and more cheaply determined by this Court, with the machinery at its disposal, than in a Mofussil Court, and as the only question to be decided in the case was one of law, that could be decided on settlement of issues, and the expense of such suit in the High Court would be less than it would be in a Mofussil Court. This certainly was a case for the Court to exercise its power and transfer the suit to the High Court.

Mr. *Pugh* supported the application.

The **Judgment** of the Court (NORRIS, J.) was as follows :—

This is an application to transfer a suit from the Court of the Second Subordinate Judge of the 24-Pergunnahs to this Court. The suit was instituted by a minor through his mother as next friend against his grandmother and uncle. The facts are of an extremely unusual character. The minor plaintiff is the son of one Nilmadhub Mitter, who was convicted last year at the criminal sessions, presided over by WILSON, J., of the murder of his father, Khetter Mohun Mitter, and sentenced to transportation for life. He now sues for partition of the family estate, alleging that his father, by virtue of his conviction, is disentitled to succeed to the estate, being civilly dead, and that he, his infant son, is entitled to step into his father's shoes, and is entitled to a partition. The suit is defended by the widow of the murdered gentleman and by the uncle, the uncle being a minor; and the defence is that, under Hindu law, the plaintiff is as much excluded from the inheritance as his father, and entitled to nothing more than maintenance. No guardian *ad litem* has been appointed to the infant in the suit at Alipore, and Mr. *Hill* objects that the application is not properly framed, because it is made by the next friend instead of the guardian *ad litem*. This is a new question. I have considered the authorities referred to by Mr. *Hill*, and am of opinion that the [776] objection ought not to prevail. If a guardian had been appointed, he might have applied; but none having been appointed, it is open to the next friend to apply.

The next question is as to the transfer of the suit. On the evidence, I think I ought to make the order, and I will state the grounds on which I make it. The major portion of the property, *i.e.*, 49/85th, is in Calcutta. The remaining, 36/85th, though not within the ordinary original civil jurisdiction of this Court, is in the immediate vicinity of Calcutta. Secondly, if the plaintiff obtains a decree declaring his right to partition, the effect would be to make an Ameen of the Alipore Court the person to partition Calcutta property. I can hardly think of anything more inconvenient than that a Mofussil Ameen should be introduced into Calcutta to partition Calcutta property. In the third place, though I do not lay much strees on this reason, I believe this suit is one

which can be more cheaply and expeditiously tried in this Court than in the Mofussil. On the whole, I think, for these reasons, that I ought to make the order.

Rule made absolute.

Attorney for Nobin Kissory Dassee and Raj Kristo Mitter: Baboo *Shama Dhone Dutt.*

Attorney for Jotendro Nath Mitter: Baboo *Kali Das Bhunjo.*

H. T. H.

[16 Cal. 776]

ORIGINAL CIVIL.

The 13th July, 1889.

PRESENT:

MR. JUSTICE NORRIS.

In the Goods of A. J. Primrose (Deceased).

Practice—Power of Attorney —Evidence Act (Act I of 1872), s. 85—Letters of Administration, Application for.

On an application for letters of administration to the estate of a deceased, who was domiciled in Scotland, and to whose estate one had been appointed executor *dative qua Father* the application being made by one *K* under a power of Attorney granted by *P*, such power not having been executed and authenticated in the manner provided by s. 85* of the Evidence Act:

Held that the application must be refused.

THIS was an application in Chambers made on the 11th July for letters of administration (with effect throughout the whole of British [777] India) to the property and credits of one Arthur John Primrose The petitioner was one Andrew James Ker, a resident of Calcutta, and in his petition he stated that the deceased was in his life-time and at the time of his death a British subject domiciled in Scotland, a member of the Bengal Civil Service, and latterly residing at No. 22, Moray Place, Edinburgh, Scotland, and was not a person exempted under s. 332 from the operation of the Indian Succession Act; that he was drowned while crossing from Ostend to Dover on or about the 12th day of September 1888, leaving property and effects within the Presidency of Bengal to be administered unto; that he died without issue, and without having been married, and without having made any will or testament, or any other deed or deeds, instrument or instruments in writing, whereby the property he was possessed of, previous to his death, could be legally disposed of; that

*[Sec. 85 :—The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public or any Court, Judge, Magistrate, British Consul, or vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.]

Presumption as to powers of attorney.

Bouverie Francis Primrose, who was the father of the deceased, had been appointed executor *dative quâ Father* of the said Arthur John Primrose, conform to decree dative of the Sheriff of the Lothians and Peebles, dated 22nd February 1889, and duly confirmed as such conform to Testament Dative in his favour by the said Sheriff, dated the 4th day of May 1889, as appeared from the Testament Dative sealed with the seal of the Commissariat of the County of Edinburgh, and signed by the Clerk of the Court at Edinburgh, a copy of which was annexed to the petition; that the said Bouverie Françis Primrose was residing beyond the jurisdiction of the High Court, and had, by his power of attorney (annexed to the petition), appointed one Harold Robertson King and the petitioner jointly and severally his attorneys and attorney, for him and in his name and on his behalf, to apply for and obtain a grant of letters of administration to the estate of the said deceased from the High Court, or any other competent Court in British India, and do and sign all things necessary for obtaining such letters of administration, and generally to do all such acts, deeds, matters and things as should be requisite and necessary in and about the premises; that the petitioner was therefore desirous of obtaining letters of administration to the property and credits of the said deceased; that such property and credits, which were likely to come into his hands, consisted of shares and [778] other moveable property, of the value of Rs. 27,326, or thereabout; and that no previous application had been made for a grant of probate or letters of administration to the estate of the said deceased, with effect througbout the whole of British India.

The manner in which the power of attorney, executed by Bouverie Francis Primrose in favour of the petitioner and Harold Robertson King, was executed, appears sufficiently stated in the judgment of the High Court.

The application was made by Mr. *Cowie* (Messrs. *Sanderson & Co.*), and the Court took time to consider whether the power of attorney could be be accepted as sufficient to act on.

On the 13th July the following **Judgment** was delivered by :—

Norris, J.—On Thursday, an application was made to me in Chambers by Mr. *Cowie* for letters of administration to this estate to be granted to the Hon'ble Bouverie Francis Primrose under these circumstances:

It appears that Mr. Arthur John Primrose, who was a member of the Bengal Civil Service, was drowned in crossing from Ostend to Dover, and on application to the Sheriff of the Lothians and Peebles, his father, Bouverie Francis Primrose, was appointed, what is called in Scotch law, Executor *Dative qua Father*, and executed a power of attorney in Scotland in favour of the applicant here, authorizing him to take out letters of administration. The power of attorney was executed in the presence of Mr. Rutherford, a writer to the Signet, and J. McGillawie, a law clerk. Mr. Rutherford makes a declaration before the Lord Provost of Edinburgh, in which he declares that the power of attorney is signed by Mr. B. F. Primrose, and that the signatures of the witnesses are of their own proper hand-writing. The Lord Provost certifies, under the seal of the Corporation of the City of Edinburgh that Mr. Rutherford had made the declaration before him. Upon this, I have been asked to grant letters of administration. TREVELYAN, J., granted an application for letters of administration in the goods of Emma Louisa Algeo, when one of the witnesses to the power of attorney made a declaration before the Lord Mayor of London. He has informed me that he was told it had been the practice to accept such declaration, and he did not feel at liberty to depart from the practice. Section 85 [779] of the Evidence Act provides that the Court shall presume that every document purporting to be a power of attorney, and to have been executed before

and authenticated by a Notary Public or any Court, or Judge, Magistrate, British Consul or Vice-Consul, or Representative of Her Majesty or of the Government of India, was so executed and authenticated. This power of attorney is not executed before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney must be executed before or be authenticated by one of those persons. Therefore, I am reluctantly obliged to refuse this application. I have considered it necessary to say these few words in order that the profession might know what the practice is in future to be. The two cases, namely, *Anonymous* case (Fulton, 72) and *In the goods of Macgowan* (Morton, 370) confirm the view I have taken.

Application refused.

Solicitors for Applicant Messrs. *Sanderson & Co.*

H. T. H.

NOTES.

[In (1898) 21 Mad., 492 it was pointed out that the assumption that sec. 85 was exhaustive was wrong.]

[16 Cal. 779]

CRIMINAL MOTION.

The 23rd July, 1889.

PRESENT :

MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

In the Matter of the Petition of Aslu and others.

Aslu

versus

The Queen-Empress.*

Security for keeping the peace—Magistrate of the District—Appellate Court—Criminal Procedure Code (Act X of 1882), ss. 106, 423.

The Magistrate of a District when acting as an Appellate Court is not competent to make an order under s. 106† of the Criminal Procedure Code (Act X of 1882), requiring the appellant to furnish security for keeping the peace.

---

* Criminal Motion No. 291 of 1889, against the order passed by C. Vowell, Esq., District Magistrate of Midnapore, dated the 25th of April 1889, affirming the order passed by Stevenson Moore, Esq., Assistant Magistrate of Midnapore, dated the 18th of March 1889.

† [Sec. 106 :- Whenever any person accused of rioting, assault or other breach of the peace, or of abetting the same, or of assembling armed men or taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation by threatening injury to person or property,

Security for keeping the peace on conviction.

is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.]

In this case the petitioners and one Abdul Wahed Khan were charged before the Assistant Magistrate of Midnapore with rioting under s. 147 of the Penal Code. They were all convicted and sentenced to fines of various amounts, or, in default, to various terms of rigorous imprisonment.

[780] Against the convictions and sentences an appeal was preferred to the District Magistrate, who set aside the conviction of Abdul Wahed Khan, but dismissed the appeal of the petitioners. The District Magistrate further considered that, as there was a probability of further breaches of the peace, the petitioners should be bound over to keep the peace, and he accordingly directed that they should each give one surety in the sum of Rs. 100 to keep the peace for one year.

The petitioners then applied to the High Court to exercise its revisional powers and set aside the convictions, sentences, and order upon various grounds, and amongst them, that the order of the District Magistrate directing them to give a surety to keep the peace was illegal.

A rule was issued which now came on to be heard.

Mr. *Dass* and Baboo *Joygopal Ghose*, for the Petitioners, in support of the rule.

No one appeared for the Crown.

The **Judgment** of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows: -

This rule must be made absolute. The question raised in this case is whether an Appellate Court affirming a conviction and sentence has power, under s. 106 of the Criminal Procedure Code, to order the appellant to execute a bond for keeping the peace. In the Court below the learned Magistrate seems to have thought that he had power to pass such an order under that section, upon the authority of a Full Bench ruling in the case of *Empress* v. *Kanta Prosad* (I. L. R., 4 All., 212). But that was a case under the Criminal Procedure Code (Act X of 1872), s. 489, and that section provided that if "the Court or Magistrate by which, or by whom, a person is convicted, or the Court or Magistrate by which or by whom, the final sentence or order in the case is passed is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace, such Court or Magistrate may direct the taking of a bond to keep the peace." Now, the words "or the Court or Magistrate by which, or by whom, the final sentence or order in the case is passed" [781] have been left out in s. 106 of the present Criminal Procedure Code; and it is further provided by the last-mentioned section that such Court may, at the time of passing the sentence, order the person convicted to execute a bond. Section 423* of the present Criminal Procedure Code expressly lays down what

*Sec. 423—The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may—

Powers of Appellate Court in disposing of appeal.

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial; or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or (3) with or without such reduction, and with or without altering the finding, alter the nature of the sentence, but not so as to enhance the same;

(c) in an appeal from any other order, alter or reverse such order:

(d) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him.]

the powers of an Appellate Court are, and the power to take security for keeping the peace is not mentioned there: and there is no other provision of the law which enacts that the Appellate Court shall have the same powers as the Court of original jurisdiction has; and that being so, we do not think that, under the provisions of the Criminal Procedure Code (Act X of 1882), the Appellate Court has the power to order a security-bond to be taken; and we accordingly direct that the order of the District Magistrate, so far as it directs that each of the appellants, except Abdul, do give one surety of one hundred rupees to keep the peace for one year, be set aside.

H. T. H. *Rule made absolute.*

NOTES.

[The Legislature, in the Criminal Procedure Code 1898, sec. 106 (3) adopted the opposite view to that in this and similar decisions contained in (1890) A.W.N., 170; 1890 A.W.N., 201; 17 All., 67; (1888) P.R., 23.]

[16 Cal. 781]

CRIMINAL MOTION.

The 9th July 1889.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Nur Mahomed............Petitioner

versus

Bismulla Jan............Opposite Party.*

Criminal Procedure Code (Act X of 1882,) s. 488—Evidence Act (Act I of 1872) s. 120—Bastardy proceedings—Order of affiliation—Evidence.

Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120† of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf.

Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his *nika* wife whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section.

Held, that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant, [782] but as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not.

THIS rule was obtained for the purpose of getting an order set aside which had been passed under s. 488 of the Criminal Procedure Code, directing the

* Criminal Motion No. 270 of 1889, against the order passed by Syed Abdul Jubber, Presidency Magistrate of Calcutta, Northern Division, dated the 3rd of June 1889.

† [Sec. 120:—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.]

Married persons in civil and criminal proceedings.

petitioner to pay the sum of Rs. 15 a month for the maintenance of a child, named Nur Ahmed, aged about 3½ years.

The charge, as laid in the summons, was as follows : "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years' old, the said child is by your *nika* wife, Bismulla Jan, whom you have subsequently divorced." The summons was issued at the instance of Bismulla Jan, the mother of the child, and both parties were represented by counsel before the Magistrate, Nur Mahomed being exempted from appearing personally by an order made by the Magistrate, and not being present in Court on any of the various occasions on which the case was heard.

The judgment of the Magistrate was as follows :—

This is an application under s. 488, Criminal Procedure Code, for an order against the defendant Haji Nur Mahomed for the maintenance of a child aged about 3 years and 9 months, and named Nur Ahmed. The complaint's version of the case is that five years ago the defendant married her in the *nika* form ; that the child was born in wedlock ; and that seven or eight months after the birth of the child he discontinued his visits to her. The marriage is denied by the defendant, and the evidence adduced in support of it by the prosecution is wholly unworthy of credit. The only individuals who are said to have been present at the ceremony are the complainant's brother, her sister, and a man who gives lessons in the family. Although it is not necessary for the validity of a marriage under the Mahomedan law that there should be a good number of persons present, yet, according to custom, not only a man is nominated to perform the functions of a Kazi but friends on both sides are invited to witness a marriage. In this case not a single friend, not even Ahmed Sahib, who, according to complainant's own evidence, used to be with the defendant on other occasions, was present at his marriage with the complainant. There was none to act the part of a Kazi. The dower is said to have been Rs. 10 only. This sum is, no doubt, more than the minimum fixed by law, but it is not possible that the complainant, who was a dancing-girl should have surrendered her liberty for a consideration which is less than what she expected as her wages for a night's performance. When a left-handed marriage takes place between a dancing girl [783] and a respectable man of position, the proposal for an alliance generally emanates from the latter, and the former is not, therefore, satisfied with a moderate dower. The witness Haji Abdullah Dugmar has married a dancing-girl on payment of a dower of Rs. 2,500 and the complainant has herself got a dower of Rs. 1,000 at her subsequent marriage with a Hindu. It is not easy, therefore, to believe that, if the defendant had married her, she would have been satisfied with a trifling sum of Rs. 10, or would not have made him execute a deed of dower. It is also incredible that a man of the defendant's position in society would have allowed his wife to stay at the house of a professional songstress, such as her mother is, if he had led her to the altar ; he would have naturally taken her to his own house, or, if that was not possible, would have removed her to some place where she would not be subject to the gaze of her mother's visitors. Under the above circumstances, I consider the story of her marriage with the defendant as a fiction. The story, I think, has been invented to create a right of inheritance for the boy.

The next question for determination is, whether the child is an illegitimate issue of the defendant? The mother of the child asserts that the defendant is its father, and there is sufficient proof that he was in the habit of visiting her about the time she became pregnant. No evidence is adduced by the defence to rebut her statement that she was in his keeping. It is contended that she had tried to father the child on one Jogendro Mullick, who was also, at one time, the complainant's paramour. I do not think the evidence which has been given on this point is deserving of any weight. There is no doubt that Jogendro kept the complainant for a certain period, but I am not satisfied that he kept her at the time of her conception. The evidence of Jogendro Nath's mushahib or companion, Aga Mahomed Ali, is anything but trustworthy. If Jogen was threatened with exposure and he had to pay a large sum of money to prevent her from carrying out her threat, there would

certainly be taken some precautionary measure by Jogen or his friend, Aga Mahomed Ali, against the repetition of the threat. The death of Jogen, as Mr. Henderson argued, has led the defence to hint that he was the father of the child. There is no evidence that Jogen was the child's natural father. While, on the other hand, the evidence of the mother that the defendant is the father of the child, is corroborated by the ocular proof which the child itself furnishes. Although the witness for the defence, Aga Mahomed Ali, says that the child resembles the defendant in thinness only, no one who has seen Haji Nur Mahomed and sees the child can fail to observe a strong resemblance between the two. The child is, in fact, a miniature representation of the defendant. There is another matter which, in my opinion, confirms the statement of the complainant that the defendant is the father of the child. It is not disputed that the child was christened Nur Ahmed, and the name shows that within six days of its birth, when the ceremony of **[784]** giving a name generally takes place, it was believed and known who the child's progenitor was. Not only the word "Nur" exists in both the names, but there is a correspondence of sounds in the terminal words Mahomed and Ahmed. Taking, therefore, all the circumstances of the case into a careful consideration, I am of opinion that the child is an illegitimate offspring of the defendant Haji Nur Mahomed. Mr. Garth contended that, as the complainant based the claim of the child to maintenance on the legitimacy of its birth, the Court can grant no allowance to it when its legitimacy was not established. I do not think this contention is right. Under the Statute quoted above, both legitimate and illegitimate children are entitled to maintenance, and although in this case the child is not proved to be legitimate, but is proved to be an illegitimate issue of the defendant, the law makes it obligatory upon the father to maintain it.

Suppose a child *X* sues its father *Z* for maintenance. Is it to have no maintenance because the Court, which tried the suit, declared that the marriage of *X*'s mother with *Z* was void, owing to a certain legal defect in the marriage contract? The section quoted imposes on a husband or a father the duty of maintaining his wife or helpless children, both legitimate or illegitimate, and he cannot claim exemption from it except on the ground of poverty.

I direct that Haji Nur Mahomed pay Rs. 15 per month for the maintenance of his illegitimate child Nur Ahmed.

Against that order, the petitioner moved the High Court, and a rule was issued which now came on to be heard.

Mr. *Phillips* and Mr. *Roberts* for the Petitioner.

Mr *M. P. Gasper* and Mr. *Henderson* for the opposite party.

Mr. *Gasper* (showing cause).—The fact that Nur Mahomed was not called as a witness to deny the paternity of the child raises an almost irresistible presumption against him, and there can be no doubt that in such proceedings the person sought to be charged is a competent witness. Although there is no express decision to that effect in this country, the case of *In the matter of Tokee Bibee* v. *Abdool Khan* (I L. R., 5 Cal., 536), decided by WILSON, J., shows that such proceedings are in their natural civil proceedings, and not criminal.

[**Trevelyan, J.**—There can be no doubt that in England the defendant is a competent witness.—See Paley, 5th Edition, p. 113.]

[785] Mr. *Gasper*.—I submit that here also he is a competent witness, and that Nur Mahomed might have given evidence himself to deny the paternity, and not having done so, the Court is entitled to presume that he could not do so. In England, the Act requires corroboration of the evidence of the mother, but the amount of corroboration required by the Courts is very slight—see *Cole* v. *Manning* (L. R., 2 Q. B. Div., 611) and *Lawrence* v. *Ingmire* (20 Law Times Rep., N. S., 391); and the Courts will not interfere if there be any corroboration whatever of the mother's testimony. Here then is ample evidence against the defendant, and the Court ought not to interfere. The Magistrate would have been perfectly justified, had the defendant been present before

him at the hearing, in comparing the similarity of his features with those of the child, and taking such similarity into account, and the mere fact that the defendant was exempted from personal attendance does not, I submit, preclude such comparison, when, as stated by the Magistrate, Nur Mahomed's features were well known to him.—See *Bamundoss Mookerjea* v. *Mussamut Tarinee* (7 Moore's I. A., 169, see page 203).

Mr. *Phillips* (in support of the rule) did not contend that the defendant was not a competent witness, and might have been called, but argued that the evidence did not justify the order, and that the Magistrate should not have acted on the similarity of the features and the name of the child with those of the defendant, and referred to *Bamundoss Mookerjea* v. *Mussamut Tarinee* (7 Moore's I. A., 169, see page 203) as not supporting the proposition contended for by the other side. He further contended that the case the defendant was called to meet, being the charge that the child was his child by a *nika* wife, the whole case stood or fell on the question as to whether or not the marriage was proved, and it was not open to the Magistrate to pass an order on the assumption that the child was the illegitimate offspring of the defendant.

Mr. *Roberts* followed on the same side.

The **Judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

In this case the Officiating Magistrate of the Northern Division made an order against Nur Mahomed, the applicant before **[786]** us, directing payment of Rs. 15 a month for the maintenance of a child, which the Magistrate found to be his child by one Bismulla Jan. We were asked, in the exercise of the revisional jurisdiction of this Court, to set aside that order. We gave a rule, and we were to a very great extent, if not entirely, induced to grant that rule by the circumstance that the Magistrate had compared the child, produced in Court, with what he recollected of the lineaments of Nur Mahomed, who had not appeared in Court, and thus acted upon the information, which he had obtained otherwise than in his Magisterial capacity, and also by the circumstance that he relied on the resemblance of name between the infant and the putative father. In granting the rule, we stated that the fact that Nur Mahomed had not been called as a witness was a circumstance weighing so strongly against the applicant that, although we sent for the record, we could not hold out to the applicant much hopes of success. Now we have heard Counsel on both sides; and the main contention placed before us by Mr. *Phillips* is that the suggestion of marriage having failed, the whole case failed. We however think that the basis of an application for the maintenance of a child under the provisions of s. 488* of the Code of Criminal

* [Sec. 488. —If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Order for maintenance of wives and children.

Such allowance shall be payable from the date of the order.

If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month.

Enforcement of order.

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her; and may make an

Proviso.

Procedure is the paternity of the child irrespective of its legitimacy or illegitimacy. The fact of the marriage of the parents may be not only strong evidence to show paternity, but also raises a presumption which has a very strong bearing upon the question of paternity. The summons, which is in the record called a charge, runs thus: "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years' old." This would have been quite sufficient for the present purposes, but the summons then states further "the said child is by your *nika* wife Bismulla Jan whom you have subsequently divorced." The statement, as to the child being by his *nika* wife, is not at all a necessary statement, and the failure to prove marriage, does not, in our opinion, destroy the case altogether. The case for the plaintiff was that originally, when a child, she was in the keeping of Nur Mahomed; this relationship between them ceased to exist a short time after, when she went to a man called Ashgar; and after that, to Jogendro Churn Mullick. Subsequently she left Jogendro Mullick and married [787] Nur Mahomed: and this child was the fruit of that marriage. The Magistrate, after hearing the evidence, came to the conclusion that the marriage was not proved; and we think that the Magistrate was right in coming to that conclusion. It appears however from the evidence that since the day on which the marriage is said to have taken place, this woman lived with Nur Mahomed and Nur Mahomed alone, until the child was born. She speaks to it, and there are witnesses who corroborate her statement. That would show, if uncontradicted, that this man was the father of the child. In fact they both lived together, and during this period the child was conceived. Evidence was given suggesting that Jogendro Mullick was the father of the child; but the evidence on this point has been disbelieved by the Magistrate, and we cannot say that the Magistrate was wrong. The evidence on the record shows, in the opinion of the Magistrate, that Nur Mahomed only could have been the father of the child, and there is evidence from which the Magistrate could arrive at such finding. Nur Mahomed was not called in the Police Court to contradict the case for the prosecution; and, except his Counsel in Court, no one on his behalf seems to have denied the paternity, and he never denied it. In England, it has been held more than once that, under the provisions of 14 and 15 Vic., c. 99, s. 2, bastardy proceedings are regarded as civil proceedings and the parties to them are capable of giving evidence; and, according to the case cited to us of Mr. Justice WILSON'S, taken together with the English cases, there can be no question that bastardy proceedings are civil proceedings within the meaning of s. 120 of the Indian Evidence Act, and that the defendant thereto may give evidence on his own behalf. Mr. *Phillips* did not deny that this was the law; we are told that, after the witnesses for the defence had been examined, and Mr. Henderson had been heard in reply, Mr. Garth invited the attention of the Magistrate to the point whether Nur Mahomed was a competent witness or not. According to law, he was unquestionably a competent witness, and as he has not been called, we must make the usual presumption arising

order under this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent,

On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason, she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

All evidence under this chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases.]

from the fact of such omission. The fact that counsel by an error of judgment, or for some other reason, omitted to call him, does not, in the smallest degree, interfere with this presumption.

[788] We think, however, that the Magistrate was wrong in making use of his information, which he seems to have obtained otherwise than as a Magistrate. He was also wrong in using the circumstance of the similarity of names. That was not a circumstance which in the least could assist the Magistrate in coming to the conclusion of this kind. If it were so, any woman, by naming her child after a particular individual, might be able to make evidence in favour of herself, and thus give rise to a failure of justice. The Magistrate was therefore wrong in mixing up all these matters. But apart from these circumstances, there is ample evidence upon which the Magistrate could have made the order, and we have no reason to doubt the correctness of such order. The rule is discharged.

H. T. H. *Rule discharged.*

NOTES.

[*See* also the Cr., P.C. 1898, sec. 488, cl. (7); 18 Bom., 468.]

[16 Cal. 788]

APPELLATE CIVIL.

The 26th June, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE RAMPINI.

Aubhoy Churn Mohunt............Plaintiff (Opposite Party in the Rule)

versus

Shamont Lochun Mohunt............Defendant (Petitioner in the Rule)*

Review of judgment—Code of Civil Procedure (Act XIV of 1882), ss. 623, 627, 629—Letters Patent, s. 15—Practice.

A second appeal was decided on the 1st June 1888 in favour of the respondent by Mr. Justice WILSON and Mr. Justice BEVERLEY. On the 24th July 1888 an application for review was filed with the Registrar. Various reasons prevented the learned Judges above named from sitting together until the month of March 1889. On the 6th March, the matter came up before their Lordships, when a rule was issued, calling upon the other side to show cause why a review of judgment should not be granted, being made returnable on the 28th March 1889.

On the 28th March, Mr. Justice WILSON had left India on furlough, and the rule was taken up, heard, and made absolute, by Mr. Justice BEVERLEY sitting alone: *Held*, that Mr. Justice BEVERLEY had jurisdiction to hear the rule, and further that the order of that learned Judge was not a judgment within the meaning of s. 15 of the Letters Patent; and that no appeal

* Appeal under s. 15 of the Letters Patent against the order of Mr. Justice BEVERLEY one of the Judges of this Court, dated the 22nd of May 1889, in Rule No. 312 of 1889, in appeal from Appellate Decree No. 238 of 1888.

[789] would lie therefrom, the order being final under s. 629 of the Code of Civil Procedure.

Bombay-Persia Steam Navigation Company v. *The Zuari* (I. L. R., 12 Bom., 171) and *Achaya* v. *Ratnavelu* (I. L. R., 9 Mad., 253) approved.

ON the 1st June 1888, a certain second appeal was decided by Mr. Justice WILSON and Mr. Justice BEVERLEY in favour of the defendant, respondent. On the 24th July 1888, the plaintiff being dissatisfied with that decision, presented an application for a review of judgment, which, in the ordinary course, was filed in the office of the Deputy Registrar, but in consequence of the absence from Calcutta of one or other of the learned Judges who had decided the appeal, Mr. Justice BEVERLEY having in August 1888 left Calcutta on leave returning in November in that year, and Mr. Justice WILSON being absent on deputation at the time of the return of Mr. Justice BEVERLEY, and not returning to Calcutta till after the expiration of six months from the 24th July 1888, the rule to show cause why the review should not be heard was not issued until the 6th March 1889. The rule so granted was made returnable on the 28th March, but previously to that date, on the 6th March, Mr. Justice WILSON left India on furlough, and did not return to India until a period of more than six months had expired from that day. On the 28th March, the rule came up before Mr. Justice BEVERLEY, sitting alone. At the hearing, an objection was taken that, under s. 627 of the Code, his Lordship Mr. Justice BEVERLEY had no jurisdiction to hear the rule; and that the proper course to be pursued was to direct the matter to stand over until the return from furlough of Mr. Justice WILSON; the contention raised upon that section was that, inasmuch as both Mr. Justice WILSON and Mr. Justice BEVERLEY were "attached to the Court" at the time the application was presented (whether the date be taken to be the 24th July 1888, or the 6th March 1889), and were not precluded by absence or other cause for a period of six months next after the application from considering the matter, those learned Judges were bound to hear the application as a Bench sitting together, and that no other Judge or Judges could hear it.

[790] On this contention, BEVERLEY, J., said: "If the date of the application be taken to be, as I think it must be taken to be, the 24th July 1888, the facts are as follows: At the beginning of August I left Calcutta on leave, and when I resumed my seat in Court after the vacation, WILSON, J., was absent at Poona. He did not return till after the 24th July 1888, and we were, therefore, precluded from sitting together to hear the application.

"If, on the other hand, the 6th March 1889 be taken as the date of the application, Mr. Justice WILSON took leave at the end of that month, and will not return to the Court till after the expiration of six months from that date. . . . . . It seems to me that under the spirit of the section referred to, I, and I alone, am bound to hear this rule. The section is apparently intended to refer to a High Court which is specially excepted from the rule laid down in s. 624 . . . . . Section 627 imposes a very reasonable and proper restriction, and that restriction is this, that when the Judges, or any one of them who made the decree, can hear the application, within six months after its presentation, they or he, and they or he only, shall hear it.

"Now the present rule was granted by Mr. Justice WILSON and myself, but it does not follow that we must both hear it as a Bench sitting together; had Mr. Justice WILSON been absent for six months after the application, I should have had jurisdiction to grant the rule and hear it sitting alone. The case seems to me stronger when the rule was issued by both of us. I may draw attention to the analogous provisions contained in s. 626, proviso (*c*). I come to the conclusion that I have jurisdiction to hear the application sitting alone, and that to prevent further delay, I am bound to do so."

His Lordship then heard the rule and made the same*absolute, directing the papers to be laid before the Chief Justice for the appointment of a Bench to hear the review.

Against that decision an appeal under s. 15 of the Letters Patent was made.

Mr. *Hill* (with him Baboo *Baikant Nath Dass*), for the Appellant, contended that the matter ought to have been allowed [791] to stand over until the return of Mr. Justice WILSON; or that an application should have been made to the Chief Justice to appoint another Judge to sit with Mr. Justice BEVERLEY to hear the review. He also contended that at all events the Court had jurisdiction under the Letters Patent to consider the case on its merits; the rule being made absolute by one learned Judge, it was a judgment within the meaning of s. 15 of the Letters Patent, and that, notwithstanding the provisions of s. 629 of the Code, an appeal would lie to this Court.

Mr *Evans* (with him Baboo *Kishcri Lall Sircar*), for the Respondent, contended that Mr. Justice BEVERLEY had jurisdiction to hear the rule, and that no appeal would lie from his order, citing *Achaya* v *Ratnavelu* (I. L. R., 9 Mad., 253) and *Bombay-Persia Steam Navigation Company* v. *The Zuari* (I. L. R., 12 Bom., 171).

The **Judgment** of the Court (PETHERAM, C.J., and RAMPINI, J.) was delievred by

Petheram, C J. —This is an appeal under s. 15 of the Letters Patent from an order of Mr. Justice BEVERLEY, making a rule absolute to re-hear an appeal.

The case was originally a second appeal to this Court, which was heard by a Bench of this Court consisting of Mr. Justice WILSON and Mr. Justice BEVERLEY. The second appeal was decided on the 1st June 1888, and it was decided in favour of the defendant; and the plaintiff, being dissatisfied with that decision, was desirous of having it reviewed, and, accordingly, on the 24th July 1888, an application for review bearing the proper stamp was filed with the Deputy Registrar of this Court. Section 623* of the Code of Civil Procedure provides that such an application shall come before the Judge or Judges who were parties to the original decree. Those Judges, as I said just now, were Mr. Justice WILSON and Mr. Justice BEVERLEY. Various reasons prevented them from sitting together until the month of March 1889, and, on the 6th of that month, the matter was presented before those learned Judges, and upon its being so presented, they issued a rule calling upon the other side to show

Application for review of judgment. *[Sec. 623 :—Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is hereby allowed, but from which no appeal has been preferred;

(*b*) by a decree or order from which no appeal is hereby allowed; or

(*c*) by a judgment on a reference from a Court of Small Causes,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred.

A party who is not appealing from a decree may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except when the ground of such appeal is common to the applicant and the appellant, or when, being a respondent, he can present to the appellate Court the case on which he applies for the review.]

cause why the application should not be granted. The practice is, that such [792] applications should be presented in this way, and if the Judges, before whom the application is made, think there is anything in it, they grant a rule calling upon the other side to show cause against it; and the whole of these proceedings, the granting a rule and the argument of the rule when it is returned, are treated within the meaning of Chap. XLVII of the Code of Civil Procedure as being an entire application.

That being the state of things and the rule having been granted and made returnable on the 28th March, Mr. Justice WILSON took furlough and left before the 28th March, at any rate he was absent fromCourt on the 7th; so that when the rule was returned, one of the Judges had gone, and inasmuch as he was absent on furlough and another Judge appointed to officiate for him, we think he was not then attached to the Court within the meaning of s. 627 of the Code.

Then the question arises, what is to be done? The rule being returnable on the 28th, was heard by Mr. Justice BEVERLEY alone. The present contention of the appellant is that that procedure was wrong, and either the matter ought to have stood over until Mr. Justice WILSON returned, or else that an application ought to have been made to me as Chief Justice to appoint another Judge to sit with Mr. Justice BEVERLEY to form a Bench to hear it.

I do not think that it could be necessary for the matter to stand over, and I do not think that, if an application had been made to me, I should have had jurisdiction to hear it, and for this reason. The latter part of s. 627 of the Code provides that no other Judge or Judges of the Court, excepting the Judge or Judges who was or were parties to the original judgment, shall hear the application for review if the Judge or Judges or any one of them is still attached to the Court; so that it seems to me that although the Chief Justice of this Court has in general the duty cast upon him of appointing the Judges who are to constitute particular Benches for particular business, in these cases the constitution of the Bench is taken out of his hands, and is provided for by the Code; for the Code says that these applications shall be heard by the Judge or Judges remaining attached to the Court by whom the original decree was given.

As I said just now, at the time this rule was returned Mr. [793] Justice WILSON had gone away on furlough and another gentleman had been appointed to perform his duties, and, consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and, consequently, Mr. Justice BEVERLEY was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice BEVERLEY was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails.

The other point made by the appellant here is that we have jurisdiction under the Letters Patent to consider the question on the merits, whether Mr. Justice WILSON and Mr. Justice BEVERLEY were right in granting a rule, and whether Mr. Justice BEVERLEY was right in making it absolute; and this argument proceeds upon the ground that inasmuch as the rule was made absolute by one Judge, that is a judgment within the meaning of s. 15 of the Letters Patent, and that, notwithstanding the provisions of s. 629 of the Code of Civil Procedure, an appeal lies to this Court.

The first question is, whether that is a decision within the meaning of that section of the Letters Patent? In my opinion it is not, because the Courts have laid down over and over again, I think up to the Privy Council,

that "judgment" there means a judgment that decides the rights of the parties. This order of Mr. Justice BEVERLEY, making this rule absolute, did not decide the rights of the parties in any sense. All it decided was that in his opinion the trial of the appeal had been unsatisfactory, and it would be in the interests of justice that it should be re-heard. It decides nothing more. The rights of the parties are still at large as before. In addition to that, we think that the matter is limited by the terms of s. 629. That section provides that the order rejecting the application shall be final. It then goes on to say, that an order admitting the application may be appealed against on several grounds, and it seems to us that the meaning of that is, that it may be appealed against on those grounds and no other; and that being the case, it, in our **[794]** opinion, takes away an appeal in the matter, because the Code does contemplate this matter being heard under certain possibilities by one Judge and then takes away an appeal from his decision.

Under these circumstances it seems to me that on neither of these grounds can an appeal be entertained on the merits. The two cases in the Madras and Bombay High Courts, viz., *Achaya* v. *Ratnavelu* (I. L. R., 9 Mad., 253) and *Bombay-Persia Steam Navigation Company* v. *The Zuari* (I. L. R., 12 Bom., 171), take the same view of the matter, and as to those decisions it is sufficient for us to say that we entirely agree with them. In the result this appeal will be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[*See* also (1891) 22 Cal., 3 ; (1895) 22 Cal., 984 ; (1895) 1 C.W.N., 338 ; (1895) 18 All., 41 ; (1897) 24 Cal., 878 ; (1905) 9 C.W.N., 502 ; (1907) 31 Mad., 47.]

[16 Cal. 794]

APPELLATE CIVIL.

The 18th July, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE GORDON.

Basharutulla............one of the Defendants

versus

Uma Churn Dutt (Plaintiff) and others............Defendants.*

Sale in execution of decree—Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287 - Sale set aside as being no sale—Execution- - Possession, Recovery of.

A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation : *Held*, that there had been no sale within the meaning of the Code ; proclamation of the time and place of sale and the holding of the sale at such time and place, being conditions precedent to the sale being a sale under the Code.

* Appeal from Appellate Decree No. 1671 of 1888, against the decree of Baboo Krishna Mohun Mookerjee, Subordinate Judge of Khulna, dated the 28th of July 1888, reversing the decree of Baboo Saroda Pershad Chatterjee, Munsif of Baglahat, dated the 30th June 1888.

THIS was a suit for possession of a certain jumma under the following circumstances :—

The defendants, Nos. 2, 3, 4 and 5, who were the landlords of the plaintiff, had obtained a rent-decree against the plaintiff, and in execution of this decree, the jumma belonging to the plaintiff was advertised for sale, the sale being fixed for the 20th June 1885.

[793] Before the day on which the sale was fixed arrived, the plaintiff arranged with his landlord to stay the sale on payment of a portion of the decretal money, and on a *kistibundi* being entered into this arrangement was communicated by the landlord to his Naib with directions to him to stay the sale. On the 20th June the plaintiff and the defendant's Naib proceeded to the Court House to stay the sale, reaching the Court before twelve o'clock. On so arriving, they discovered that the sale had been held by the Munsif at 10-30 instead of at twelve o'clock, as advertised, and that there being no other purchasers at that early hour, the jumma in question was purchased by the defendant No. 1, a pleader of the Court. The plaintiff (after failing to come to terms with the purchaser) then applied under s. 311 of the Civil Procedure Code to have the sale set aside. This application was rejected, and the sale was in due course confirmed. The plaintiff thereupon brought this present suit to recover possession of the jumma.

The defendant No. 1 alone appeared, and contended that as the sale had not been held fraudulently it could not be set aside.

The Munsif found that it had not been established that the sale at an early hour was the effect of a preconcerted plan on the part of the decree-holder with the intention of defrauding the plaintiff; that, if such facts had been shown, they would have formed good reasons for setting aside a sale under an application made under s. 311 of the Code, but that the plaintiff had failed to substantiate such facts in his application under that section, which had been dismissed by an order which had been unappealed against; that under s. 244 of the Civil Procedure Code, the plaintiff could not raise the question again in a civil suit; but that at least, if such a suit as the present would lie, there must be clear evidence (which there was not) to show that the defendant No. 1 was a party to the fraud (if any) alleged. He therefore dismissed the suit.

The plaintiff appealed to the Subordinate Judge, who held that the sale held before the hour fixed was absolutely void, and reversed the decision of the Munsif.

The defendant appealed to the High Court.

Moulvi *Mahomed Yusuf* for the Appellant, contended, that what had taken place was a mere irregularity, and the sale could [796] only be set aside on that ground under s. 311 of the Code; a suit being expressly excluded by that section and cited *Sharoda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376), which followed the case of *Viraraghava* v. *Venkata* (I. L. R., 5 Mad., 217), on the question as to whether the suit would lie.

Baboo *Srinath Banerjee*, for the Respondent, contended, that the sale proclaimed under s. 287 of the Code had not been carried out; and that there had been no sale within the meaning of the Code and therefore no property could pass to the purchaser.

The **Judgment** of the Court (PETHERAM, C. J., and GORDON, J.) was delivered by

Petheram, C. J.—This is a suit which has been brought by the plaintiff against the defendants, claiming various reliefs, and, among other things, the plaintiff claims to set aside the sale of certain property as being fraudulent, and

in addition to that, he claims to recover possession of that property from the defendants, and he claims any other relief to which he may be found entitled. The Judge has decreed the suit, and the appeal has been preferred to this Court, really on the ground that such a suit will not lie at all by reason of the provisions of the Code of Civil Procedure.

The facts of the case are that the present plaintiff had a decree passed against him for a sum of money due to certain persons, some of whom were his landlords, or at all events his judgment-creditors. He did not pay that money, and his property was attached and was proclaimed for sale by reason of the plaintiff's failure to pay the sum decreed, and, according to the proclamation, the sales, amongst which the sale of this particular property was one, were advertised to take place on a certain day. Before that day arrived, the present plaintiff arranged with his creditors to pay them off the amount of their decree by instalments, and that the property should be released from attachment and not sold, and upon the faith of that arrangement both the present plaintiff and his three creditors attended at the place of sale at 12 o'clock on the day stated in the proclamation, and [797] found, when they got there, that the sales were all over; and that the sales, instead of commencing at 12 o'clock, had commenced at about 10 o'clock, and concluded before 12 o'clock, the advertised time. Under these circumstances, an application was made by the plaintiff to get that proceeding set aside for irregularity, and that proceeding was disposed of by an arrangement made between the plaintiff and the present defendants that a certain sum of money should be paid by the present plaintiff, being the amount which the purchasers had paid; and that the purchasors should withdraw all claim to the property. The proceeding to set aside the sale accordingly went off upon that arrangement being come to, but afterwards, as the Judge finds, the purchasers, the present defendants, refused to carry out their part of the agreement in this sense, that they said, we decline to give up all claim to this property upon the payment of the purchase-money into Court. Upon this, the arrangement fell through, and the purchasers got possession of the property under their sale certificate, and upon that the plaintiff brings this suit for the purpose of getting back his property, and of having it declared that this sale did not affect his right to possession at all.

If what took place was a mere irregularity, then the only proceeding for setting the thing aside was a proceeding under s. 311 of the Code of Civil Procedure, the latter portion of that section providing that no suit shall be brought to set aside a sale for mere irregularities; but if the sale took place under such circumstances that it was not a sale under the Code at all, then it is contended that no property passed under it, and that the judgment-debtor has a right to bring this suit to get back his property, and to have it declared that the purchasers have no right to it at all.

The question then is, whether what took place here was an irregularity only, or whether there was no sale within the meaning of the law at all.

By s. 287 of the Code, it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall [798] state the time and place of sale, and shall specify fairly and accurately certain other things.

There is then a provision in the Code that, before a sale takes place, the time and place of sale shall be advertised. It is perfectly true that there is no provision in the Code that the sale shall take place at the time and place advertised, but it is clear that such a provision must be implied, and that

consequently no sale can take place under the Code except at the time and place advertised under the Code.

As a matter of fact, the sale in this case did not take place at the time advertised. When the time advertised arrived, the property had been sold, and the whole thing was over; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late.

Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property.

A case has been cited, which was decided by Mr. Justice PIGOT and Mr. Justice BEVERLEY, of *Sharoda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I.L.R., 11 Cal., 376). That case proceeded upon s. 244 of the Code of Civil Procedure, and not upon the sections now under our consideration. It seems to us that that case has no bearing upon the present one, and that the Judge was right in the conclusion at which he arrived, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

---

[799] APPELLATE CRIMINAL.

The 18th July, 1889.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Schein............Appellant

versus

The Queen-Empress............Respondent.*

Appeal in Criminal Case—Criminal Procedure Code (Act X of 1882) s. 411—Bengal Excise Act (Bengal Act VII of 1878), ss. 60, 74—Appeal from sentence of Presidency Magistrate—"Like offence—" Punishment on second or subsequent conviction of offence under Bengal Excise Act.

No appeal lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200, or a further period of three months' simple imprisonment, passed by a Presidency Magistrate.

* Criminal Appeal No. 463 of 1889, against the order passed by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 11th of June, 1889.

The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term "like offence" as used in s. 74 of the Bengal Excise Act.

* ***Ram Chunder Shaw* v. *The Empress* (I. L. R., 6 Cal., 575) followed.**

THIS was an appeal against a conviction by the Chief Presidency Magistrate of an offence under the Bengal Excise Act (Bengal Act VII of 1878). The accused, who was a licensed wholesale vendor of spirituous and fermented liquor, was charged under s. 60 of the Act, with having, on the 7th day of June 1889, sold on two different occasions imported liquor by retail, and also, on the 8th of May and subsequent dates, sold imported liquor by retail without an excise retail license. It appeared in evidence that an Excise Officer, named Siddons, sent one Ashruff with a marked rupee and two marked four-anna bits to the accused with instructions to purchase three points of claret. Ashruff went and returned almost at once with the wine, on which the Excise Officer and others rushed into the house and forcibly took from the accused the marked money which they found on his person. In the accused's room was found a book containing entries of sales of wine, all or most of which the prosecution contended were of a retail nature. It was found that the accused had been convicted on the 8th May 1886 of an **[800]** offence under the Act, the offence being selling two dozens of claret without a license.

The Magistrate, believing the evidence for the prosecution convicted the accused of the offence charged, and, under the provisions of s. 74 of the Act, sentenced him to pay a fine of Rs. 200 or in default to undergo three months' simple imprisonment, and also to undergo six months' rigorous imprisonment. Against that conviction and sentence the accused appealed to the High Court, upon the grounds that the evidence did not justify the conviction, and that as there was no evidence that he had been convicted of a like offence to the one charged, the sentence of six months' rigorous imprisonment was bad in law.

Baboo *Umbica Churn Bose* for the Appellant.

Mr. *Acworth* for the Crown.

On the appeal being called on, Mr. *Acworth* objected that no appeal lay. He relied on the language of s. 411 of the Criminal Procedure Code, and referred to the case of *In the matter of Jotharam Davay* (I. L. R., 2 Mad., 30), which he pointed out had been decided under the similar provisions contained in s. 167 of the Presidency Magistrates Act (Act IV of 1877) which was then in force.

The Court here stopped Mr. *Acworth* and called on Baboo *Umbica Churn Bose*, who contended that s. 411 did not apply, but upon being referred by the Court to ss. 413 and 415 of the Code, contended that whether an appeal lay or not it was a case in which the Court should exercise its revisional powers under s. 439. He then went into the facts of the case and contended that the conviction was not justified, and that even if it was, the sentence of rigorous imprisonment was illegal as the conviction for selling without a license was not a like offence to selling retail with only a wholesale license, although he admitted that the decision in *Ram Chunder Shaw* v. *The Empress* (I. L. R., 6 Cal., 575) was against him.

Mr. *Acworth* was not called on.

The **Judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

The first question which was raised before us was one raised by the learned Counsel for the prosecution. He contended that **[801]** no appeal lies in this case. This is an appeal from the decision of the Presidency Magistrate inflicting

a sentence of six months' rigorous imprisonment and a fine of Rs. 200, and, in default of payment of the fine, three months' simple imprisonment.

The question depends on the construction of s. 411 of the Criminal Procedure Code, which says: "Any person convicted on a trial held by a Presidency Magistrate, may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees."

In this case the Magistrate has neither sentenced the appellant to imprisonment exceeding six months nor has he sentenced him to a fine exceeding two hundred rupees. But it is contended by the pleader for the appellant that the combination of the sentences of imprisonment and fine, gives an appeal. That is not justified by the words of s. 411, and we think a reference to s. 415 makes the construction of the earlier section clear. Section 415 says: "An appeal may be brought against any sentence referred to in s. 413 or s. 414, by which any two or more of the punishments therein mentioned are combined" . . . . There is no mention of s. 411 in that section; and, according to the ordinary construction, it follows that the Legislature did not intend to apply to s. 411 the provision in s. 415, that is to say, that a combination of punishments does not give a right of appeal under s. 411, though it does so under ss. 413 and 414. Section 404 provides as follows: "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

Section 411 is the only section under which an appeal lies, and therefore it seems to us that no appeal lies in this case. In this view we are supported by the decision in *In the matter of Jotharam Davay* (I. L. R., 2 Mad., 30), in which s. 167 of the Presidency Magistrates Act (IV of 1877) was considered. The terms of that section are exactly similar to those of s. 411 of the Code of Criminal Procedure now in force. It is not necessary for us to go over the facts of that case. It is sufficient to say that there is no distinction whatever to be drawn between **[802]** the circumstances of that case and the circumstances of this case. The terms of the Act they were then applying are the same as the terms of the Act we are now applying, and the reasons given by the Judges in that case seem to us conclusive on this question.

It appears that a Division Bench in another case, viz., *Ram Chunder Shaw* v. *The Empress* (I. L. R., 6 Cal., 575), entertained an appeal in a case of this kind from the order of the Presidency Magistrate, but it is to be remarked that in that case, the question as to whether there was an appeal or not was not raised by Counsel and was not apparently considered by the Court, and so it is no assistance to us as an authority. We consider that no appeal lies in this case, but as a Court of Revision we have the right to look into the facts, and we accordingly heard the learned pleader for the appellant with regard to the facts of the case in order that we might see whether there are circumstances which would justify us in interfering under our powers of revision. Having heard the whole evidence, we think there is nothing in this case which would justify our interference.

There has been no irregularity in procedure, and we think that the Magistrate has arrived at a right conclusion on the facts of the case.

Much has been made of the fact that the witnesses for the prosecution were persons interested in getting a conviction. In cases of this kind it is impossible to put forward witnesses who are not in some degree interested. That circumstance would render it necessary for the Magistrate to examine

the evidence for the prosecution carefully, but it is not a circumstance which would prevent a conviction.

It appears from the evidence in the case that there was found in the room of the accused a book containing memoranda of sales of liquors. This book was given in evidence, and in the affidavit used before us on behalf of the accused and made by a person who was in Court during the time, the deponent speaks of Mr. Siddons having said in his evidence that he found this book in the room of the accused. The book which was produc-
[803] ed contains a number of entries purporting to be entries of the sale of liquor by retail. It was suggested by the learned pleader for the appellant that possibly that was a book recording a series of purchases. We think that the only possible inference is that it is an account of sales by retail. People do not purchase by retail in order to sell wholesale. The circumstance that an account of this kind containing a number of sales of liquor by retail is found in the room of a person who has only got a license to sell wholesale, to some extent supports the evidence for the prosecution. It shows that he was in the habit of doing an act which the prosecution in this case are charging him with doing. Moreover on the question of punishment, it is evidence which the Magistrate is not only entitled to look at, but to consider to the fullest extent. On the facts, therefore, we see no reason to interfere.

There is one more question to consider. It has been argued that the Magistrate has no power to give imprisonment in this case. The Excise Act (Bengal Act VII of 1878), s. 74, under which this prosecution was instituted, provides : "Whenever any person is convicted of an offence against the provisions of this Act punishable with a fine of two hundred rupees or upwards, after having been previously convicted of a like offence, he shall be liable, in addition to the penalty attached to such offence, to imprisonment for a period not exceeding six months." It is in evidence that the appellant was, on the 18th May 1886, convicted of the offence of selling two dozens of claret without a license under the provisions of this same Act.

The question before us is, whether the selling of wine without a license, is an offence like to that of selling wine by retail, when the vendor has got a wholesale license only. That question is concluded by the decision to which we have referred in the case of *Ram Chunder Shaw* v. *The Empress* (I. L. R., 6 Cal., 576). MORRIS and PRINSEP, JJ., there said this: "It appears to us, however that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of Rs. 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term, 'like offence.'"

[804] That decision is an authority for saying that the Magistrate was right in the view that he took of the law. We agree with the decision, and we think that the offence of selling wine by retail, with a wholesale license, is an offence like to the offence of selling wine without a license at all; it is equally the offence of selling wine without having a license so to sell it.

It remains only to consider the question of punishment. We do not think that under the circumstances there is anything excessive in the punishment.

In the result we dismiss the appeal and decline to interfere.

H. T. H. *Appeal dismissed.*

NOTES.

[*See* also (1895) 20 Bom., 145.

A sentence in default of imprisonment does not make it obligatory on the Presidency

Magistrate to formally record the evidence, (1906) 4 C.L.J., 408 : 33 Cal., 1036 ; See also the distinction made in (1908) 30 All., 334 ; (1908) 9 C.L.J., 439.]

ORIGINAL CIVIL.

The 15th August, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE PIGOT.

Bank of Bengal............Plaintiff

versus

Kartick Chunder Roy and others............Defendants.

Decree—Form of decree—Suit on Bill of Exchange—Civil Procedure Code, Act XIV of 1882, ss. 532, 538—Negotiable Instruments Act (XXVI of 1881) s. 35.

A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants ; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal.

THIS was a suit under Chapter XXXIX of the Code of Civil Procedure, brought by the Bank of Bengal against Kartick Chunder Roy, the acceptor, Gocool Chunder Mullick, the drawer, and Paul, J. Valetta, the endorser, of a bill of exchange for Rs. 5,000, payable ninety days after sight. The defendants obtained no leave to defend.

The facts were that, on the 30th June 1888, Gocool Chunder Roy drew a bill of exchange for Rs. 5,000, ninety days after sight, on Kartick Chunder Roy. This bill was, on the 2nd July 1888, accepted by Kartick Chunder Roy, and was endorsed over before [805] maturity and without restriction by Paul J. Valetta to the Bank of Bengal. On the 4th October 1888, the bill was presented to Kartick Chunder Roy, but was dishonoured. The Bank thereupon gave notice of dishonour to the other two defendants, and, on the 10th October 1888, the defendant Gocool Chunder Roy paid to the Bank Rs. 1,000. No further payments being made the Bank brought this suit against the three defendants above-named for Rs. 4,000, with interest, together with costs of noting and presentment.

Mr. *Handley*, for the plaintiff Bank, the defendants not having obtained leave to appear and defend, asked for a decree for the amount due as against all the defendants citing s. 35 of the Negotiable Instruments Act of 1881.

NORRIS, J., gave a decree for the sum of Rs. 1,000 with interest at 6 per cent. from the date of dishonour to the date of decree, and Rs. 19 for notarial charges, costs on Scale 1 ; but he directed that execution should not issue against the endorser until the plaintiff Bank had exhausted their remedy against the drawer and acceptor.

---

* Original Civil Appeal No. 9 of 1889, against the decree of Mr. Justice NORRIS, dated the 18th of February 1889.

The plaintiff Bank appealed against so much of the decree of Mr. Justice NORRIS as restricted their remedy against the endorser.

Mr. *Phillips* for the Appellant.

The **Judgment** of the Court (PETHERAM, C.J., and PIGOT, J.) was delivered by—

Petheram, C.J.—This is a suit by the plaintiffs, the holders of a bill of exchange, against three persons (the drawer, the acceptor, and endorser) under the Negotiable Instruments Act (Act XXVI of 1881). Section 35 of that Act provides that, in the absence of a contract to the contrary, whoever endorses and delivers a negotiable instrument before maturity without in such endorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, and the Code of Civil Procedure provides that the holder of a bill of exchange may sue all the parties to it in one action. This has been done, and there is no question that the parties are all equally liable to the plaintiffs. The learned Judge has given judgment against all **[806]** three, but he has made it a condition of the judgment that no execution is to issue against the endorser until the holder has exhausted his remedies against the drawer and acceptor. We are unable to agree with the learned Judge that he had power to place such a condition upon the holder in this case. The law entitles the holder of a bill of exchange to sue all the parties in one action or in separate actions; and, having brought his suit, the judgments are practically separate, and may be enforced against each or all of the parties. We think then that the Judge was wrong in imposing this condition, and this appeal to amend the decree by striking out that condition must be decreed, but without costs.

Appeal allowed.

Attorneys for the Appellants: Messrs. *Morgan & Co.*

T. A. P.

[16 Cal. 806]

APPELLATE CIVIL.

The 25th June, 1889.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Jonardon Mundul Dakna and another............Plaintiffs

versus

Sambhu Nath Mundul and others............Defendants.*

Arbitration—Award on one point only—Remission to arbitrator—Refusal by arbitrator to act—Limitation—Adverse possession.

A case was referred for decision to an arbitrator. The arbitrator made his return, deciding by the award only one of the issues raised in the case, viz., that the defendants had been in possession of the land in suit for more than twelve years. The plaintiffs and the defendants claimed under the same landlord.

The Munsif remitted the award to the arbitrator for determination of the other matters arising in the case; the arbitrator, however, refused to act further in the matter, and the Munsif himself took up the case and decided it in favour of the plaintiffs. On appeal, the Subordinate Judge held that the award made by the arbitrator was sufficient for the determination of the case, and reversed the decision of the Munsif, and gave the defendants a decree in terms of the award.

Held, that as the plaintiffs and the defendants claimed under one and the same landlord, and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that [807] the Munsif had acted rightly, on the arbitrator declining to complete the award, in deciding the case himself.

THIS was a suit to recover possession of certain lands held by the plaintiffs under a lease granted in the year 1289. The plaintiffs alleged that they had been dispossessed therefrom by the defendants on the 23rd Bysack 1292. The defendants claimed the land as being within their *jamma*, alleging that they held it under the same landlord through whom the plaintiffs claimed, and denied that the plaintiffs had ever been in possession thereof, and pleaded limitation. The issues framed were:--

(1) Is the suit barred by limitation?

(2) Has the plaintiffs a *jammai* right to the disputed lands, and were they in possession and dispossessed thereof?

(3) Have the defendants a *jammai* right to the said lands?

(4) What are the correct south and west boundaries of the land.

The case was then referred to arbitration.

The arbitrator submitted his award, finding that the defendants had been in possession for more than twelve years, and made no return of any finding on the other issues. The matter then came up before the Munsif for final disposal, and he referred the matter back to the arbitrator for determination of the other questions. The arbitrator, however, refused to move further in

* Appeal from Appellate Decree No. 1761 of 1888, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Jessore, dated the 7th of August 1888, reversing the decree of Baboo Gopal Kristo Ghose, Munsif of Narrail, dated the 13th of February 1888.

the matter; and the Munsif, therefore, tried the case himself, and decided the case in favour of the plaintiffs.

The defendants appealed to the Subordinate Judge who held that the award was perfectly legal, and that it could not be set aside by the Munsif on the ground that the arbitrator had not decided all the points referred to him; the point decided by him being sufficient for the dismissal of the plaintiffs' claim; and he therefore directed that the plaintiffs' suit should be dismissed in terms of the award filed by the arbitrator.

The plaintiffs appealed to the High Court.

Baboo *Chunder Kant Sen*, for the Appellants, contended that it was open to the Munsif to remit the award under s. 520 of the Code of Civil Procedure; and that, on the arbitrator refusing to re-consider the matter, the only course open to the Munsif was to try the case himself; he further submitted that **[808]** the Subordinate Judge should, at all events, have tried the case on its merits.

Baboo *Latoo Behari Bose* for the Respondents.

The **Judgment** of the Court (GHOSE and GORDON, JJ.,) was delivered by

Ghose, J.—This appeal arises out of a suit brought by the plaintiffs to recover possession of certain lands which they alleged had been demised to them by a certain landlord in the year 1289. The defence was, that the defendants held the land in question from a period prior to the execution of the lease in 1289 as a part of his *jammai*, and therefore the plaintiffs had no right to recover. They also pleaded that they were in possession of the land for more than twelve years, and, therefore, the plaintiffs' claim was barred by limitation.

Upon this state of the pleadings, certain issues were raised between the parties in the Court of First Instance: one was as to limitation, and another as to the title of the plaintiffs and the defendants respectively. Upon the application of both parties, the case was referred to arbitration; but the arbitrator to whom the case was referred confined his award only to the question of limitation, he being of opinion that the defendants had held possession of the land in suit for more than twelve years, and that the plaintiffs' allegation, that they had been in possession of it for some time and had been subsequently dispossessed, was not made out.

The matter then came before the Munsif for final disposal. That officer was of opinion,—and we think rightly of opinion,—that the award given by the arbitrator had left undetermined some of the matters which had been referred to him for decision; and we may here observe that the second and third issues laid down by the Munsif were issues which were essentially necessary for the determination of the case. Being of that opinion, the Munsif remitted the case to the arbitrator with the view that the other issues in the case might be determined.

The arbitrator, however, declined to act further in the matter, and sent the case back to the Munsif. In this state of things, the Munsif had no alternative but to try the case out himself, **[809]** and being of opinion that the plaintiffs' case was a valid one, and that the defendants had no *jammai* right in the land in question, he gave a decree to the plaintiffs.

The Subordinate Judge, on appeal, expressed himself as follows: "The arbitrator found, as a fact, that the defendant had been in possession for more than twelve years, and submitted his award against the plaintiffs. The award was perfectly legal, and was supported by the fact found, and it could not be set aside merely on the ground that the arbitrator had not decided all the

points referred to him. The point decided by him was sufficient for the dismissal of the claim, and there was no necessity for any decision on the other points. The lower Court ought to have disposed of the case according to the award which was perfectly legal." He therefore set aside the order of the lower Court, and directed that the case should be disposed of in terms of the award filed by the arbitrator.

It seems to us that the view which the Subordinate Judge took is not the correct one; and that, in the circumstances of this case, the Munsif was right in remitting the case to the arbitrator for determining the points which he had left undetermined. It will be observed that the lease under which the plaintiffs claimed the property was one granted in 1289, *i.e.*, within twelve years of the institution of the suit. The defendants no doubt plead the law of limitation, but they admit that the person who granted this lease to the plaintiffs is the person under whom they have been holding the land as tenants. It follows therefore that, if the defendants had been holding the land adversely to anybody for more than twelve years, it must have been their own landlord. But there could be no adverse possession against the landlord, and the defendants could not acquire a title against him. And if the landlord had brought a suit to eject them, they could not have successfully set up the plea of limitation. It has been found that the landlord gave the lease to the plaintiffs in 1289, and they bring this suit, upon the basis of that lease, to recover possession, and upon the ground that the defendants have no title to the land ; and the whole question between the parties seems to be, whether the title of the plaintiffs or of the defendants is to prevail.

[810] We are therefore of opinion that the case could not be concluded by the finding that was come to by the arbitrator upon the question of possession, and that the Munsif was right, when the arbitrator declined to complete the award, in deciding the case himself.

Accordingly, we direct that the case be sent back to the Subordinate Judge, with the view that he should re-try the appeal on its merits. The costs will abide the result.

T. A. P. *Case remanded.*

NOTES.

[In (1903) 7 C. W. N., 294 it was held distinguishing this case that it was open to a party to plead tenancy and limitation in the alternative.

See also (1907) 5 C.L.J., 47 *n.* where this decision was held to have no application to cases in which the title originated more than 12 years before the suit.]

THE LAW REPORTS OF BRITISH INDIA

BY

M. SUBRAMANIAM, B.A., B.L.,
AND
M. V. KRISHNASWAMY, B.A., B.L.,
VAKILS, HIGH COURT, MADRAS.

CALCUTTA Vol. 8.

PUBLISHED BY
THE LAW REPORTS OFFICE
MADRAS, SOUTH INDIA
1915

THE INDIAN LAW REPORTS, CALCUTTA SERIES CONTAINING CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA NOT SUBJECT TO ANY HIGH COURT.

CALCUTTA—Vol. XVII—1890.

PRIVY COUNCIL.

The 3rd April, 1889.

PRESENT:

LORD WATSON, LORD MACNAGHTEN, AND SIR R. COUCH.

Rajab Ali............Plaintiff

versus

Amir Hossein and others............Defendants.

[On appeal from the High Court at Calcutta.]

Security for costs—Discretion of Court to refuse security—Civil Procedure Code (Act XIV of 1882), s. 549.

An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under s. 549, Civil Procedure code; and refused to receive other security offered, in lieu, after the time fixed by the order had expired. This was affirmed by the High Court: *Held*, that as the High Court had a discretion to enlarge the time allowed for finding security, and to accept other security in lieu of that rejected, or to refuse to do either, it had, under the circumstances, judicially exercised that discretion in refusing.

APPEAL from a decree (29th June 1885) of the High Court affirming a decree (30th August 1884) of the Subordinate Judge of the Patna District.

The suit, out of which this appeal arose, was brought by the present appellant for land left by Sayed Enayat Hossein, deceased, valued at Rs. 4,000; and having been dismissed with costs by the Subordinate Judge on 30th August 1884, an appeal was preferred. The High Court ordered, on 11th March 1885, that Rajab Ali the plaintiff should within one month furnish security, under s. 549, of the Code of Civil Procedure, to the satisfaction of the Judge "for costs of the appeal and in the original suit."

Rajab Ali accordingly, on 2nd April 1885, filed a security-bond executed by one Bande Ali for Rs. 4,000, hypothecating [2] mouza Abdulpore Pipla, perganna Balia, zila Patna, alleged to be worth Rs. 15,000. The respondents, Syed Amir Hossein and others, objected to the security, alleging that the mouza was not the property of Bande Ali.

On the 17th June 1885, the Subordinate Judge found that the security, in reference to title, was insufficient, and rejected it. The Court also refused to allow other security to be given in lieu, as the time fixed by the Appellate Court for filing security had then expired.

On an appeal from this order, urging that the grounds of the rejection were not made out, and that the security tendered in lieu immediately on the passing of the order of rejection, should have been accepted, the High Court said: "As regards the first point, we have no means of ascertaining or forming any opinion regarding the grounds of the Subordinate Judge's order. No objection was taken until the actual hearing of this matter; and consequently the requisite record has not been forwarded to us. As regards the second objection, we think that the terms of the judgment in the case of *Haidri Bai* v. *East Indian Railway Company* (I. L. R.. 1 All., 687), which has been followed by a Division Bench of this Court, *Budri Narain* v. *Sheo Koer* (I. L. R., 11 Cal., 716), is conclusive. The appellant took the risk of furnishing security which was found to be insufficient, and he therefore cannot be allowed the opportunity, after the expiry of the prescribed period, of furnishing a fresh security." The appeal in the suit was rejected. On the 13th January 1886, the appellant obtained leave to appeal to Her Majesty.

Mr. *James Tatlock*, for the Appellant, argued that there was no default within the meaning and intent of s. 549 of the Code of Civil Procedure, such as would call for the extreme measure of rejecting the appeal; and the High Court was in error in supposing that it had no discretion in the matter to allow the appeal to proceed. That discretion it had. And the High Court was wrong in not sending for the record of the enquiry as to the security made by the Subordinate Judge. He referred to *Balwant Singh* v. *Dow*-**[3]***lut Singh* (I. L. R., 8 All., 315; L. R., 13 I. A., 57), where the High Court having apparently treated an appeal as though, after rejection of it under s. 549, a petition tendering security and asking restoration could not be entertained, it was held by this Committee that to restore it was within the Court's discretion. *Haidri Bai* v. *East Indian Railway Company* (I. L. R., 1 All., 687) was also cited.

The Respondents did not appear.

Their Lordships' **Judgment** was delivered by

Lord Watson.—Their Lordships have come to the conclusion that this appeal ought not to be allowed. They are not disposed to agree with the view taken by the learned Judges of the High Court, to the effect that the Court had no discretion to enlarge the time allowed for finding security, or to accept another security in lieu of the bond which had been filed by the appellant upon the 2nd April 1885. At the same time they are very clearly of opinion, in the circumstances of the case, that if the Court had assumed the discretionary power, which their Lordships think they possess, they would not have exercised it rightly if they had acceded to the motion which is said to have been made on behalf of the appellant.

Their Lordships will humbly report to Her Majesty that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for the Appellant: Mr. *Geo Thatcher.*

C. B.

NOTES.

[This was followed in (1889) 17 Cal., 512; (1911) 18 C.L.J., 432; (1912) 16 C.W.N., 1090. In (1910) 12 C.L.J., 62 the same principle was applied to plaints. Sec. 148 C.P.C., 1908 is a statutory recognition of the rule.]

[17 Cal. 3]

PRIVY COUNCIL.

The 13th, 14th, 15th, 16th and 19th February and 3rd April, 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR R. COUCH.

Gossami Sri Gridhariji............Plaintiff

versus

Romanlalji Gossami, son and representative of Purushottam Gossami and others............Defendants.

And a cross-appeal of Romanlalji Gossami.

[On appeal from the High Court at Calcutta.]

Hindu Law – Endowment –Hereditary right to be shebait and to have possession of property dedicated to religious purposes.

According to Hindu law, when the worship of a Thakur has been founded, the office of a shebait is held to be vested in the heir or heirs of the founder. in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing, or circumstance, [4] showing a different mode of devolution. *Peet Koonwur* v. *Chutter Dharee Singh** referred to. It having been established that a particular worship had been founded by the plaintiff's grandfather, it followed that the plaintiff was by inheritance the shebait of that worship, there being no proof of any usage at variance with this presumption, but the custom appearing to be in accordance with it.

Held, that the plaintiff, as such representative of the founder, was entitled, in preference to a collaterally descended member of the founder's family, to claim the shebaitship. Also, that the plaintiff was entitled, in that character, to the possession of a portrait which had been by the same founder dedicated to this worship. But that he had no right to a temple in which the portrait was kept, this temple having been given by one of the worshippers ("for the location of the Sri Sri Ishwar Jios") with the condition annexed that the defendant should be shebait. The plaintiff, accordingly, could not claim possession of this temple, as it could only have been accepted as a gift upon the donor's terms; and this condition prevailed notwithstanding that the temple had been in part paid for by subscription among the worshippers; there being no evidence that the latter did not know of it, or had paid their money with any reference to the question who was to be shebait.

APPEAL and cross-appeal from a decree (9th January 1885) of the High Court varying a decree (28th June 1882) of the High Court in its original civil jurisdiction, the latter decree having been confirmed by a decree (9th March 1883) of a Division Bench of the same Court.

* 13 W. R., 296—In that case a mutwali, or trustee, of dedicated property, was constituted by a donor whose deed gave property for maintaining the worship of a Thakur and keeping up the Thakurbari. On the death of this mutwali, the property was claimed by a relation of the deceased: It was held by H. V. BAYLEY and DWARKANATH MITTER, JJ., that "the property is always the property of the Thakur, under the management of the mutwali; and, on that view, the managership must revert to the heirs of the person who endowed the property."

The suit, out of which this appeal arose, was brought by the appellant against Purushottam Gossami (now represented by the first respondent) and others, for the possession of a portrait, property connected with worship, and the temple in which the portrait was kept, in Hanspokar Lane in Calcutta; an injunction, a receiver, and an account, were also asked for. The portrait was that of a deceased Gossami named Daoji, the plaintiff's grandfather, who, as head of a sect named the Bullav Acharji, presented [5] it to his followers in Calcutta in the year 1825, founding a worship in connection with it.

The questions now raised were, whether the plaintiff's title to the office of shebait, he being admitted to be the grandson of the founder of the worship, the donor of the portrait, was better than that of the principal defendant, a collateral relation of the founder; and whether the plaintiff's rights as such shebait, besides including the possession of the portrait, also of valuables and contributions, extended to the possession of the temple in which the portrait was worshipped, or kept as a symbol of the object of worship.

The plaint alleged that he was entitled, by reason of his being the hereditary head of the Bullav sect of Vishnuvites, to the possession of all property dedicated by members of the sect for the worship. But at the trial the claim was limited to property dedicated by the sub-division of the sect to which he belonged. The custom having been negatived in the original Court and in the Division Court, still the latter Court held that the plaintiff had a claim to possession and management of the particular property in dispute, as being the heir of the founder of the institution, such a claim being according to Hindu law.

In that Court (GARTH, C.J., and WILSON, J.), by both Judges, it was agreed that the claim based on custom was not made out; but they held that the founder's title to possession was good. The latter Judge, however, was of opinion that the suit was barred by limitation, a point on which the Chief Justice did not concur with him.

The plaint stated several appointments by the plaintiff of persons to act as *mukhia*, and conduct the worship, including that of the defendant Sewlol; and it was alleged that when the plaintiff, who had till then been at the earlier and principal seat of the worship in Rajputana, came in person to Calcutta in February 1881, and visited the temple in Hanspokar lane, his servants in charge of it were forcibly expelled by the defendants, at the instigation of Purushottam. The plaintiff then, as he alleged for the first time, learned that the latter and Sewlol, claimed title to the temple, on the ground that one Munni Bibi had executed, on the 13th August 1866, a deed of gift, making [6] *debutter* or religiously dedicating the land on which the temple was erected, not only for the purposes of the worship previously established by Daoji, but for that of another deity, Behariji, a household deity of her own family worship.

The exclusion of the plaintiff and his servants led to a charge being made before a Bench of Magistrates, who on 12th July 1881, imposed fines on the defendants in this suit other than the first; and the defendant Sewlol filed, on 21st July 1881, a suit against the plaintiff in the present one for a declaration of his right under Munni Bibi's deed of gift.

The first defendant, Purushottam, admitted the plaintiff's descent from Daoji, and his high place as a member of the sect; but denied that the sacred character claimed by the plaintiff gave him any exclusive right of possession, that quality extending to all the members of the Bullav family to which they in common belonged.

He alleged that each member of that family was qualified and entitled to be the custodian and trustee of any property dedicated to the worship

of their deity. He also, without claiming for himself any exclusive title, alleged that Munni Bibi in 1866, by her deed of that year, dedicated the land on which the temple was afterwards erected, and that this had been under his control, containing the portrait which was placed there.

Sewlol's defence supported that of the first defendant, by whom he said that he had been appointed *mukhia*, not by the plaintiff to whom he denied ever having rendered any accounts. Other defendants, Newal Kishen Choobe and Monilal Khandelwal, jointly, in their answer, alleged themselves to be agents and managers on behalf of the first defendant.

The first Court (CUNNINGHAM, J.) found that Daoji in his life-time founded the worship, and presented his portrait to his disciples. He held, however, that the first defendant was entitled to have charge of the temple, which had been built on land given by the deed of 30th August 1866. His judgment dismissing the suit concluded thus:—

" On the whole, I consider the balance of evidence to be on the side of first defendant, and that the more probable story is that which he sets up, viz., that he being a moharaj with temples and disciples at various places obtained the grant from Munni Bibi appointing him shebait; that the terms [7] of that grant must be held to regulate the right of those who hold under it; that the portrait of Daoji was removed thither by Purushottam in 1866; that Govindram and Sewlol and the committee of management acted under his orders; and that the attempt on the plaintiff's part to assert his ownership of the temple was unlawful."

On the plaintiff's appeal, the two Judges of a Division Bench were unable to agree. WILSON, J., was of opinion that the plaintiff, as the grandson and heir of Daoji, the founder of the worship, had, according to Hindu law, shown a good title to the custody of the portrait with its jewels and valuables, and to the control of the worship. He was also of opinion that about the temple a further question might arise from the terms of its dedication. But he was further of opinion that the plaintiff was barred by limitation from asserting his title to the temple against the first defendant, who had been in adverse possession since August 1866. The Chief Justice agreed in the above, as to the question of title, but differed as to limitation.

The Chief Justice stated in his judgment that, with the exception of the point of limitation in this case, he and Mr. Justice WILSON were substantially agreed. He continued thus:—

The plaintiff has certainly failed to prove a case strictly in accordance with the custom or customs which he has alleged in his plaint; but if he has proved facts which are in accordance with his claim and which would entitle him in law to the relief which he seeks, I think we are bound to grant him that relief.

Now, it seems to me either admitted or proved by the evidence of both sides, that by the law of this country, as well as by the usage of this particular sect, where the worship of a divinity has been founded by a moharaj or shebait, the founder and his heirs, in the absence of evidence to the contrary, is considered to be the proprietor and high priest of the establishment; and so long as the worship is properly conducted by him or those in authority under him, no other person is legally justified in depriving him or his heir of their status or proprietorship.

In this case it seems to be admitted that Daoji, in the year 1825, when he came to Calcutta, presented his own portrait to his disciples for purposes of worship, and that he then by that means founded, in the first instance, the shrine which is the subject of this suit. It is not suggested that the worship of Daoji was established by, or belonged to, any one else than Daoji himself; and it is clear that the picture has been the object of adoration ever since, and that from time to time, a *mukhia*, or officiating priest, has always been appointed to perform the services.

We must assume, therefore, I think, in the absence of evidence to the contrary, that as Daoji was the founder of the worship, it was he who, in [8] the first instance at any rate, appointed *mukhias* ; and we find that for some time before and up to the year 1860 one Tickumji was the officiating *mukhia*, and that he was succeeded in that year by his brother Govindram ; and that Govindram continued to officiate till the year 1877.

Meanwhile, Daoji himself had died, and it is admitted that Govindraiji was Daoji's heir, and that the plaintiff is the heir of Govindraiji.

In the year 1865 certain facts occurred, which give rise to the only substantial difference between my brother WILSON and myself. In that year Purushottam, the principal defendant in the suit, appeared upon the scene for the first time. He is a moharaj of the same sect as the plaintiff, but not, as it would appear, so high in rank or position.

It seems to me more than probable, although it is not actually proved, that Purushottam, whose principal place of worship was at Patna, was induced or invited to come here by Govindram, who was formerly his chela or pupil. As Daoji and his heirs had not come to Calcutta for a good many years, and apparently evinced no particular interest in the shrine, it was, perhaps, only natural that Govindram should have asked Purushottam to come to Calcutta, with a view to his becoming eventually the malik of the establishment. Whether that was so or not, we find that Purushottam, in the year 1866 , had the picture removed from Shama Bhye's Lane, where it had been previously worshipped, to a house in Hanspokar Lane, which is the site of the present temple. This latter house was the property of an old lady, called Munni Bibi, who was a devotee of Purushottam ; and it appears that a proposition had been made to her to sell Purushottam this house for the purpose of the worship. She however refused to sell the house ; but she made a dedication of it by deed, not to Purushottam himself, but to her own family idol Behariji and to Daoji in the way in which property in this country is usually dedicated to idols. By this deed Purushottam and his heirs were constituted the shebaits of the worship, and Purushottam was directed by the deed to employ Govindram as the *mukhia* or officiating priest for his life.

I agree with my brother WILSON that there is no reason to suppose that any particular secrecy was observed about this transaction On the contrary, the deed was publicly registered, and Purushottam afterwards appointed a comittee of four persons, to see that the worship was properly conducted during his absence. From this time Purushottam did not remain in Calcutta, but merely visited the shrine when he came here from time to time, in the same way as he visited other establishments of the same kind which he had founded in other parts of India.

The plaintiff's case is, that Govindram all this while continued to act, and to communicate with him from time to time, as his *mukhia* ; and although he was informed by Govindram that the worship had been removed from the one place to the other, he was not made aware of the terms of the deed of dedication, and never knew that Purushottam had, under that deed or otherwise, been appointed the shebait, or had appropriated to himself the [9] worship of Daoji ; or that Govindram had been appointed *mukhia* under Purushottam. There is no evidence whatever that the plaintiff was aware of these facts ; and I fully believe, for reasons which I shall more fully explain presently, that he was not made acquainted with them.

It is contended, on the part of the defendant that although the plaintiff himself might not have been aware of these facts, yet his agent Sukloll; who collected the rents of the plaintiff's house property in Calcutta, and looked generally after his interests there, must have known all that was going on. But Sukloll says he did not know it ; and whether he did or not, I believe, for reasons which I shall also explain, that he did not communicate to the plaintiff the true state of the case.

On the other hand, there is evidence, though it certainly is not of a very satisfactory character, that Govindram continued, after this dedication as before, to communicate with the plaintiff, and to send him sums of money from time to time out of offerings to the shrine. In 1875 the new temple was built. The subscriptions for it were raised in the name of Daoji,

and were principally contributed by the worshippers of Daoji. Govindram died in the year 1877, and after an interval, was succeeded as *mukhia* by his brother Sewlol. Sukloll says that, during that interval, he kept the keys of the temple, and otherwise exercised acts of ownership over it."

The judgment then related to the particulars of the evidence; and afterwards to the question of limitation. As to this, the Chief Justice said :—

"It would be observed that, according to my view, the plaintiff and his ancestors have, from first to last, believed, and had reason to believe, that they were the maliks of this shrine, and that the *mukhias* who were officiating from time to time were their servants. Purushottam, as I conceive, had no right whatever, by virtue of the so-called deed of dedication, to take the right of worship out of the hands of the plaintiff, and to appropriate it to himself. He had no more right to do this than the plaintiff would have had to go to Dacca in Purushottam's absence, and remove Purushottam's establishment into a temple dedicated to himself, and so appropriate a worship which belonged to Purushottam. I consider further that as Govindram and Sewlol were both from the year 1866 playing this double game, still acting or professing, as between themselves and the plaintiff, to act as *mukhias* for the plaintiff, whilst they ostensibly performed the services under the supervision of Purushottam's committee, and as the plaintiff from time to time not only believed in the allegiance of these two persons, but communicated with and received money from them from time to time, however small the remittances may have been, I consider that the plaintiff was never in fact ousted from his proprietorship of the shrine in such sort as to deprive him by limitation of his right to bring this suit. I consider that the cause of action in this suit arose when the plaintiff was forcibly ejected from the temple in 1881; and that what he [10] really sues for in this suit is to have his rights declared, and to be restored to the proprietorship as malik of this shrine, and the property appertaining to it, to which he has all along been entitled.

I would illustrate what appears to me to be the legal position of the parties in this simple way: If I leave my servant in charge of my house or other property, and he, in my absence and without my knowledge, colludes with some other person, and allows that person to live in my house and to use my property, whilst he all along continues to act towards me ostensibly as my servant, and to communicate with me as such, and to send me what he represents to be the usufruct of my property, I take it to be clear that, in point of law, and for purposes of limitation, he never ceases to be my servant, and his possession of my house and property continues to be my possession. It is upon this point, as I understand, that the only substantial difference exists between my brother Wilson and myself.

There undoubtedly is some difficulty with regard to the land on which the temple stands, and which I presume belongs, in point of law, to the heirs of Munni Bibi, subject to any rights over it, which may have been conferred on Purushottam by reason of the deed of dedication.

It seems to me that as regards the picture of Daoji, or the worship of that picture, or the worship of Daoji as connected with it, Purushottam never had, and has not now, any rights at all; and yet it is very difficult, having regard to what occurred in 1875, to disconnect for the purposes of the suit the picture and worship of Daoji from the temple in which it has been so long carried on. It seems to me that as to this point we ought to consider whether, in point of fact, the temple was substantially built by offerings from the worshippers of Daoji, and for the purpose of the worship of Daoji, or whether it was built partly for that purpose, and partly for the worship of the other minor deities, which appear to have been also more or less objects of worship.

Having regard to the evidence upon this point, it seems to me that the temple was built mainly and substantially for the worship of Daoji; and that looking at the matter in that light, neither the heirs of Munni Bibi nor Purushottam had any right to require the plaintiff or his worshippers to pull down the temple and remove the picture to any other place. Pursushottam must take the consequences of that, which I think he must have known in 1865 to have been a wrongful and improper act on his part. If he could show that any of

the minor deities in the temple belonged to himself, and that any jewels or other valuables belonged to those deities, he should be at liberty to remove them. But with regard to the temple itself, the picture of Daoji, and the bulk of the valuables, which are proved to have been offered to Daoji, I consider that the plaintiff's proprietorship should be declared, and that he should be restored to the possession of the temple and valuables as malik. As the difference, however, between my learned brother and myself depends (in my view of the case) upon a question of fact, I think that according to the rule which now governs this Court (see [11] s. 575 of the Code), his judgment, being in accordance with that of the Court below, will prevail."

The result of this difference of opinion was, under s. 575, Civil Procedure Code, that the appeal was dismissed and the decree of the first Court affirmed. The plaintiff then appealed under the 15th section of the Letters Patent of the High Court, from the judgment of WILSON, J. A question as to the admissibility of such an appeal having been heard and decided in the affirmative by a Full Bench *Gridhariji Moharaj Tickait* v. *Purushottam Gossami* (I. L. R., 10 Cal., 815), which decided that, when the judgment of the lower Court had been confirmed under s. 575 of the Code of Civil Procedure, by reason of one of the Judges of the Appellate Court agreeing upon the facts with the Court below, an appeal will lie, the appeal came on to be heard before a Bench consisting of MITTER, PIGOT, and NORRIS, JJ.

One of the Judges of this latter Bench, PIGOT, J., expressed himself unable to see any satisfactory ground for holding that Daoji was founder of this worship, in such a sense as the word bears when it is said that the heirs of a founder are shebaits. He pointed out that nothing was proved to have been done by Daoji, when he presented his portrait to his disciples in Calcutta. It was admitted that he did present it: but to whom, at what place, under what circumstances, there was nothing to show. And even if a consecration by Daoji's heirs could be presumed, it could not be understood that he was rendered a founder. Custom having failed, not having been proved, upon the point of title, the evidence in favour of the plaintiff was reduced to little, if anything, more than that he was the grandson of Daoji. This was not in the learned Judge's opinion enough. Again, on the point of limitation, he agreed with WILSON, J., that the plaintiff's claim (if he ever had any) was barred.

The **Judgment** of the majority of the Appellate Court, viz., that of MITTER, J., and NORRIS, J., was delivered by the former, who expressed the opinion that the defendants were bound by the judgment of the Division Court on the facts, in which the Judges of that Bench had concurred; but stated that he came to the same conclusion on the facts, and gave the reasons.

[12] As to the title to the portrait, and the valuables attached to it, and the control of the worship, it was clear to him that "Daoji presented the portrait to his disciples after consecrating it. A present of his portrait, without such consecration, would be wholly useless. It was, however, not shown that at the time of the consecration, Daoji laid down any rule regarding any rights of control and succession to the shebaitship of the portrait."

Then, "there was ample evidence in the case itself that the consecrator became the shebait, and that his heirs succeeded to the office of shebait on his death." He was also of opinion that upon the facts, the plaintiff's claim to the custody of the portrait, and the valuables belonging to it, was not barred by limitation. As to this, he was of opinion that "the plaintiff was in undoubted possession in 1866, through his *mukhia* Govindram, and the mere fact of the latter having removed the portrait, and its accessories, to the house dedicated by Munni Bibi, and then acknowledging the defendant Purushottam as the shebait, under the deed of dedication, would not constitute the plaintiff's

possession, unless these facts were brought to his knowledge, of which last there was no evidence. On the other hand, there was a strong probability that he was not informed about the appointment of a new shebait. In the year 1866, the plaintiff was in possession through his agent, Govindram, who continued to have the actual custody of the portrait, and its belongings, till his death, which occurred in November 1877. Supposing that Sewlol was not the plaintiff's servant, still the suit relating to the custody of the portrait was not barred, as it was brought in September 1881, within four years and a few months from the date of dispossession.

"But the question of limitation regarding the claim for the recovery of the possession of the ground upon which the temple was built, stands upon a different footing. The site of the temple came into the possession of the *mukhia*, Govindram, not as a servant of the plaintiff, but under the terms of the deed of dedication. He took possession of it on behalf of the shebait appointed under the deed. Supposing that the plaintiff under the deed of dedication was entitled to take possession of the land in dispute, his cause of action for the recovery of possession [13] accrued in August 1866. The claim for the possession of the site of the building was, therefore, barred by limitation.

"That being so, the claim for the recovery of the possession of the temple also cannot succeed. It is true that a large proportion of the money spent in building the temple was raised by subscription opened in the name of Daoji; but that would not entitle the plaintiff to claim the temple built on another's land, and he must take the consequences of the act of his agent, in allowing the subscribed funds to be thus spent."

The judgment concluded thus—

"The result in my opinion, is that the plaintiff is entitled to recover possession of the portrait and the moveables belonging to it, claimed in this suit; but that the suit so far it relates to the possession of the temple and its site, and for other relief, must be dismissed. Under the circumstances of the case I think that both parties should be decreed to pay their own costs on scale No. 2."

This then being the judgment of the Court, the plaintiff appealed from it to Her Majesty in Council, because he had not obtained the temple and its site. The first defendant (alone of the six defendants in the original suit) cross-appealed; because nothing, in his view, should have been decreed, but the claim should have been dismissed. The first defendant having died pending the proceedings, his son, Romanlalji Gossami, succeeded him on the record.

On this appeal, Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne* (Mr. *J.H.A. Branson* with them), for the appellant, argued that the evidence and the admissions established that the worship of the portrait was instituted by Daoji, the plaintiff's grandfather, and that the plaintiff became thereby entitled as heir to be custodian of any property dedicated to that worship, in Daoji's time and afterwards. This accorded with Hindu law. Insufficient weight had been attached, in the judgment of the first Court, to the plaintiff's right, as shown to exist before August 1866, when the gift of the land was made by Munni Bibi. The latter had no authority to interfere in respect of the appointment of shebait, nor could her declaration in the deed of gift, whatever her desire in the matter might be, cause the possession, then held by [14] *mukhias* appointed by the plaintiff and on his behalf, as heir of Daoji, to be held as if the *mukhias* had represented Purushottam. In answer to a question by their Lordships, whether the acceptance of Munni Bibi's gift did not involve, to some extent, compliance with this, as a condition made by her, it was argued that the temple was built out of the contributions of the worshippers, the account of which was

shown to have been in Daoji's name, so that there was notice to all concerned that the title to the institution was unchanged. It was further argued that there could not be, under colour of a dedication to Behariji, one of the household deities of the donor's family, and in consequence of this gift, an appropriation of a previously-established institution, with the effect of depriving the plaintiff of the advantages connected with the latter, which he had inherited. It was beyond the power of any donor to introduce an alteration into the management of the temple over which the control, by inheritance, had vested in the plaintiff.

Mr. *J. D. Mayne*, for the respondent, the cross-appellant, contended that the plaintiff had failed to establish his title. In regard to a certain class of temples, of which this temple in question was said to be one, being subordinate to the central Bullav establishment at Nath Dwar, a restricted custom was set up; and it was claimed by the plaintiff that by this custom he was entitled to possess and control any subordinate temples, in virtue of his being the hereditary head, and all the property connected with the worship; thus being entitled to make the present claim. But that custom had not been made out. It has not been established by the evidence. The Appellate Court, finding like the first that the custom had not been proved, applied the rule of Hindu law as to the office of shebait. That rule might be said to be that the right to be shebait was in the heirs of the founder, unless a contrary rule should be shown by evidence of custom or other matters. That rule, however, did not apply here; because a distinction must be taken between the rights of a founder of a worship, and those of a founder of an institution, or owner of a property, in which that worship was carried on. The whole rule of Hindu law might be summed up by saying that the devolution of the management of a religious institution [16] was *primâ facie* to be judged of by custom. Reference was made to *Greedharee Doss* v. *Nundokissore Doss* (11 Moore's I. A., 405), *Muttu Ramalinga Setupati* v. *Perianayagam Pillai* (L. R., 11 A., 209), *Janoki Debi* v. *Srigopal Acharjea* (I. L. R., 9 Cal, 766; L. R., 10 I. A., 32), *Genda Puri* v. *Chatar Puri* (I. L. R., 9 All. 1; L. R., 11 I. A, 105).

Putting usage aside, where property was given as an endowment for carrying on worship, the holders took the property, not as managers with an interest or property in it of their own, but as trustees—Macnaghten's Principles and Precedents of Hindu Law, p. 102; *Chutter Sein's Elder Widow* v. *The Younger Widow* [Sel. Rep., 1880 (2nd Edn.), 239]. It was incorrect to say that, if a man started a worship, the property dedicated for its maintenance was vested in him. It might, or might not, be so vested. Thus it was incorrect to assume that, if Daoji gave the portrait as an object or symbol of worship, and subscriptions were made for that worship, he remained proprietor of what he had established. It was more correct to say that by Hindu law the property must be vested in some person as trustee for the worship.

Consequently, there was no authority for the conclusion that any heritable right of management over the property given for the purpose of worship remained to be inherited by any heir of Daoji. The authorities showed that a gift by a worshipper vested in the religious community to which the gift was made, and they might vest it in whom they chose.

[LORD HOBHOUSE inquired if the donor, and his heirs, might not retain founder's rights.]

By custom they might; and if, from want of fixed arrangements, disputes arose, it might be that the donor or his heirs would be the proper persons to be declared. But this suit was not based on any such state of things. Not only was there no suggestion of misapplication of funds, but this was purely a

suit for the private benefit of the plaintiff. It was a private suit claiming the personal custody of property devoted to religious objects. All that the plaintiff could assert was that the property had [16] vested in him; but he had laid no foundation for the proposition. The case that the custom of the Bullav Acharjis vested the property in their head was not established. Thus the claim failed upon title without the defence having to resort to that view of the facts, which would, according to the judgment of the Court below, cause limitation to be applicable. The learned Counsel referred to the Limitation Act (XV of 1877), sch. ii, art. 48*, and *Gurudas Pyne* v. *Ramnarain Sahu* (I.L.R. 10 Cal., 860; L. R., 11 I. A. 59).

Mr. *T. H. Cowie*, Q. C., replied, referring to the representation of the plaintiff by *mukhias* in the management; and arguing that Munni's dedication of 1866 had not interfered with what had been established in 1825.

On a subsequent day (April 3rd) their Lordships' **Judgment** was delivered by

Lord Hobhouse.—In this suit the plaintiff, who is appellant in the first appeal, claims to be the rightful shebait of a consecrated picture or idol, to which peculiar sanctity is attached by the Bullav Acharji sect or community of Vishnuvites; and, as incident thereto, he claims the things which have been offered to the idol, and the possession of a temple in Calcutta in which the idol has for some years been located. His claim is disputed by Purushottam, the principal defendant, whose son and represntative is the appellant in the cross-appeal. The controversy, as usual in such cases, has ranged over a wide field, and has given occasion to a great amount of difference in judicial opinion. But their Lordships think that the matters of fact on which the decision should be rested are either undisputed or proved beyond reasonable doubt; and that when they have been ascertained the legal conclusions are plain enough.

The plaintiff is the representative by primogeniture of the founder of the Bullav Acharji community. Purushottam is a cadet of the same family. All the male members of the family are in their life-time esteemed by their community as partaking of the Divine essence, and as entitled to veneration and worship; but the head of the family has the precedence, and is styled the *tekait*. The plaintiff is the present *tekait*. His principal seat, [17] apparently the principal seat of the community, was Sri Nath Dwar in Oodeypore, but in the year 1876 he was expelled from thence, for some cause not now appearing in evidence.

The plaintiff's grandfather was named Daoji, who was *tekait* in his day. In the year 1825 he paid a visit to Calcutta and presented to his disciples there a consecrated portrait of himself, which has ever since been worshipped, and which is now the subject of contention. It is known as the Thakur Daoji, is one of the very numerous presentments of Krishna, and is shown by the evidence to attract many worshippers. Daoji the mortal died in the year 1826, and he is worshipped in many places through other consecrated portraits, or images of some kind. But thenceforward for many years the connection of

* [Art. 48:—

Description of suit.	Period of limitation.	Time from which period begins to run.
For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same.	Three years ...	When the person having the right to the possession of the property first learns in whose possession it is.]

the *tekait*, or of any of the chiefs of his family, with the worship of the Thakur in Calcutta, is very obscure.

We learn from the evidence that for some time prior to 1860 one Tickumji was *mukhia* or ordinary officiating priest. On his death, apparently in 1860 or 1861, his brother Govindram entered on the duties of that post, which he held till his death in 1877. Then, after a short interregnum, Sewlol the son of Govindram was appointed, and he apparently holds the post still. By whom these two persons were appointed, and whose servants they were, are matters of controversy.

In the year 1865 Purushottam, who is described as an inhabitant of Mothoora, and whose principal place of worship was at Patna, came to Calcutta, with which place he had no previous connection. He appears to have been invited there by Govindram, who in Patna had been his disciple. He then took a prominent part in the worship of the Thakur Daoji, as indeed by his family and spiritual position he was entitled to do.

In the next year arrangements were made for the worship of the Thakur, either on a grander scale or in a more decorous fashion. Before that time he was placed in a house in Shama Bhye's Lane, which had then fallen into disrepair. An old and devout lady, named Munni Bibi, was then moved to provide a better habitation for him. She was a disciple of Purushottam, and to him she addressed a deed of gift conveying a new house to Daoji and to her family Thakur Behariji, who is another presentment of Krishna.

[18] The deed bears date the 30th August 1866, and the material passages are as follows :—

" To the auspicious lotus feet of the most worshipful Sriloo Srijut Purushottamji Moharaj, inhabitant of Mothoora."

She then described a house in Hanspokar Lane, and continued : -

" I by this *orpunnamah* make *debutter* and give to Sri Sri Ishwar Behariji and Sri Sri Ishwar Daoji, Thakurs; the aforesaid Sri Sri Ishwar Behariji and Sri Sri Ishwar Daoji, Thakurs, shall be located in the said house ; you and your heirs, whoever shall be here, shall absolutely have charge of the property, the subject of this gift, and perform all necessary *sheva* or worship, etc., of the Sri Sri Ishwar Jios, without having any concern with me or my heirs ; you shall engage Srijut Govind *mukhia*, as long as he shall live, *pujari* to carry on the *sheva* of the Sri Sri Ishwar Jios ; upon the death of the said Govind, *mukhia*, you shall have absolute power to appoint any one *pujari* during the existence of this *orpunnamah* granted by me.

" Should I or my heirs, or any other Gossami of the Bullav family, set up any claim to the said house or land or to the said *sheva* or worship of the Sri Sri Ishwar Jios, the same shall be void and inadmissible. By this *orpunnamah*, I merely give the said house and land and *sheva* (interview) to you and your heirs ; you or any of your heirs shall have no power at any future time to sell this house and land. It simply remains for the location of the Sri Sri Ishwar Jios."

The Thakurs Daoji and Behariji were removed to the house so granted and in the course of a few years Daoji's worshippers desired still further to exalt his worship by building a new temple on the site of the house. A large sum of money, about Rs. 16,000, was collected for that purpose ; the temple was built, other accommodation being got for the Thakurs in the meantime ; and in the year 1878 they were brought back and installed in the temple. There they remained up to the final decree of the High Court in this suit. There are also some other Thakurs, all presentments of Krishna, in the temple, but it is clear from the evidence that the principle object of worship is Daoji.

[19] In the month of February 1881 the plaintiff for the first time visited Calcutta He was received with great ceremony by a large number of Vishnuvite worshippers, and was taken to the temple on the following day, when he performed the solemn, apparently the most solemn, ceremony of arutty Sewlol, who was *mukhia*, paid him great veneration, and for the next three months regularly brought to him part of the *proshad* or offerings made to Daoji On the 24th April the plaintiff went to the temple and inspected the valuables belonging to Daoji, which were produced to him by Sewlol The plaintiff ordered that a list of the articles should be made, and he caused some of them, and also the money in hand, to be locked up, and the keys to be given to Sukloll who describes himself as having been the plaintiff's jemadar for eight years in Udaipur, and for 16 years in Calcutta

The plaintiff then demanded of Sewlol an account of the money received by him while in charge It is not very clear what was said or done upon this demand, except that no accounts were rendered, and that soon afterwards quarrels broke out, which culminated on the 19th May in a riot The plaintiff's people were then forcibly turned out of the temple On the 16th September the plaintiff brought this suit

The case was heard in the first instance before Mr Justice CUNNINGHAM, then on appeal by a Division Court consisting of Mr Justice WILSON and Chief Justice GARTH, and on further appeal by a Full Bench consisting of Mr Justice PIGOT, Mr Justice MITTER, and Mr Justice NORRIS The two last named learned Judges agreed in the opinion that the plaintiff is entitled to succeed in his claim to the portrait and the valuables, but must fail in his claim to the temple To that effect therefore, is the decree of the High Court, from which both parties appeal

Their Lordships will first address themselves to the plaintiff's claim to the portrait The principal points taken in the elaborate argument of Mr *Mayne* who is counsel for Purushottam and his heir, may be briefly summarized as follows Neither by general law nor by special custom is it shown that the shebaitship descends to the heirs of the founder there is no document or trustworthy evidence to show that, between the mortal Daoji's visit [20] in 1825 and the plaintiff's in 1881, such heirs, ever intervened in the affairs of the Thakur Daoji The reception given to the plaintiff in 1881 was no more than was due to his great position and sacred character which all admit It is true that Purushottam did not appoint Govindram or Sewlol but the Thakur Daoji was given by the mortal Daoji to the community of worshippers it was their business to tend the Thakur and to appoint *mukhias*, and the evidence shows that a committee of them did appoint Sewlol Finally the suit is not a suit on behalf of Daoji, the Thakur, but a personal claim by the plaintiff to moveable chattels and is barred under art 49 of the Limitation Act of 1877

According to Hindu law, when the worship of a Thakur has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of

[Art 49

Description of suit	Period of limitation	Time from which period begins to run
For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same	Three years	When the property is wrongfully taken or injured or when the detainer's possession becomes unlawful]

evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution. This principle is illustrated by the decision in the case of *Peet Koonwur* v. *Chutter Dharee Singh* (13 W. R., 396), and in the present case some of the learned Judges of the High Court have affirmed it, while none has expressed dissent from it. One learned Judge thought that the principle does not apply to this case, because Daoji was not the founder of the Calcutta worship. But their Lordships adopt the view of the other Judges, and the holding that the mortal Daoji was the founder, they must also hold that the plaintiff is, by eneral law, the shebait of that worship.

There is no proof of any usage or course of procedure at variance with this presumption in favour of the plaintiff. The only circumstance bearing against him on this point is the non-appearance of intervention on the part of his family. So far as the oral evidence goes, it is to the effect that the custom of the Bullav Acharji community is in accordance with the general rule, and is quite sufficient to satisfy the requirements of the case.

With respect to intervention by the plaintiff, there is no evidence that the plaintiff appointed Govindram as he alleges, **[21]** and though it is clear that Purushottam did not appoint that *mukhia*, it cannot be assumed that the plaintiff did so. But, to begin with the later part of the history, their Lordships consider the reception given to the plaintiff by the congregation of worshippers in February 1881, and the obedience which Sewlol at first paid to his directions, show that, in their opinion, he occupied a position of the highest authority perfectly well known to them; that those events are inconsistent with the theory that his family had never intervened since the year 1825; and that they are not sufficiently accounted for by the family or spiritual character of the plaintiff.

Going a little further back, we have evidence that Sewlol accepted appointment from the plaintiff in the year 1878, through the agency of his jemadar Sukloll. (Exhibit B is express to that effect.) Some of the learned Judges have rejected that document, because it is not mentioned in this plaint, and because its custody is not clearly accounted for. But its execution in the presence of several people is positively deposed to by four witnesses, all rigorously cross-examined, and so entirely unshaken that Mr. *Mayne* did not think it worth while to refer to those cross-examinations. The person who could contradict them with effect is Sewlol, who is a defendant, is a partisan of the principal defendant Purushottam, and was in Court when the evidence against him was given. He did not come forward to say a word about it. Their Lordships think it is carrying mere suspicion too far when it is allowed to get rid of a document so proved, and so allowed to pass by the person most nearly concerned in it. It may be that Sewlol consulted his security by taking appointments from Purushottam and from the committee. But his taking one from the plaintiff shows that the plaintiff was then intervening, and that his position was recognized.

Again, travelling back to an earlier time, evidence is offered of the conduct of Govindram. Whether his mere declarations should be received as something against his interest is a question of some difficulty, which their Lordships would have investigated further if it had been necessary to decide it. But it was shown by Hirji Meghji that, when Govindram made the monthly **[22]** collections, he pressed for them on the plaintiff's account; and by Suddasuk that he urged that offerings should be made at his *mundir* because it was the *tekait's*. Such conduct is clearly admissible, and is good evidence, to show that in Govindram's time the plaintiff's position was acknowledged.

With respect to the bar by lapse of time, their Lordships do not consider this suit to be one in which the plaintiff is seeking merely personal relief. Even apart from the sixth and seventh paragraphs of the plaint, which expressly put forth his spiritual character as the foundation of his claim, the nature of the suit is for the proper conduct of the Thakur's worship. It rests quite as much on the right of the Thakur to have the conduct of his worship and his own custody placed in the right hands, as upon the personal right of the plaintiff to property. The suit would rather fall under Art. 124 or Art. 144 than Art. 49. But under whichever of the three articles it falls, the starting point of time is unlawful possession or adverse possession. And the evidence leads their Lordships to the conclusion that until the affray of May 1881 there has been no possession of the Thakur or of his possessions either unlawful or adverse to the plaintiff.

The result is that on this part of the case their Lordships agree with the High Court, and on very nearly the same grounds as taken by the majority whose opinion has prevailed there.

As regards the temple, the High Court thought the suit is barred by time. In that their Lordships cannot agree. The ground is dedicated to the Thakurs Beharili and Daoji; and, except during the building time, it has been occupied by them ever since. If the fact was that the Thakur Daoji had been in the custody of, and his worship been regulated by, another shebait than the plaintiff for a sufficient time, the plaintiff might be barred: but the reasoning on the former part of the case disposes of that suggestion. There has been no possession of the temple adverse to the Thakur Daoji, and no possession of the Thakur adverse to the plaintiff till May 1881.

Their Lordships are of opinion that this part of the case must be governed entirely by the terms of Munni Bibi's dedication. She gave the house and land to the two Thakurs, but with the [23] condition attached that Purushottam should be shebait. The Thakur Daoji, or those who speak for him on earth, need not take advantage of this gift. Munni Bibi could not, of her own authority, alter the shebaitship of the Thakur. But if the gift is taken and the condition insisted on, it must be observed. It has now been insisted on, and Daoji must elect whether to change his habitation or to change his shebait.

It is true that money was raised to build the temple, and was raised mainly from the worshippers and in the name of the Thakur Daoji. But the facts of this case are not such as to raise an equity of the kind suggested at the Bar, and favoured by one of the judgments delivered in the Division Court. There is no reason to suppose that the Subscribers did not know of Munni Bibi's deed; and there is no evidence that the subscriptions, though given to the Thakur Daoji, were given with any reference to the question who should be his shebait.

The decree of the High Court must be affirmed and both appeals dismissed, but there will be no order as to costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers.*

Solicitors for the Respondents: Messrs. *Wintmore and Swinhoe.*

C. B.

NOTES.

[The right of the founder and his heirs to nominate the trustees, in the absence of the founder's directions was recognised also in (1913) 18 I.C., 232; (1911) 11 I.C., 859; (1911) 13 Bom.L.R., 989; (1907) 29 All.. 663; (1896) 18 All., 227; even if the endowment assumed a public character, (1909) 11 C. L. J., 3; even in religious dedications of the strictest character the possession and management of dedicated property still belongs to the sebait, (1904) 32 Cal., 129.

The right to the properties of the trust goes with the right to the office of trustees, and as to limitation see 23 Mad., 271, (1911) 13 I C., 599; (1897) 25 Cal, 854. On this subject, generally, see Mr Ganapati Ayyar's *Religious Endowments*]

[17 Cal. 23]

PRIVY COUNCIL.

The 20th, 21st and 22nd February and 6th April, 1889

PRESENT

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR R. COUCH.

Lutf Ali Khan . . . . Plaintiff

versus

Futteh Bahadur and others ... . Defendants.

[On appeal from the High Court at Calcutta]

Mortgage – Sale of mortgaged property – Purchase by a mortgagor at a judicial sale of interest under a second mortgage Rights against the mortgagor of purchaser at a sale in execution of a consent decree upon the first mortgage

The same property with other was mortgaged, first to one mortgagee, and secondly to another Decree were obtained upon both mortgages the terms of the first decree giving effect to a compromise between the mortgagor and the first mortgagee Sales in execution followed but before the sale under the decree upon the first mortgage was effected, the sale under the decree upon the second took place the possession remaining with the purchaser at the first sale who was acting *benami* for the mortgagor At the [24] subsequent sale under the decree upon the first mortgage, the plaintiff purchased, and now sued for possession.

The High Court decided that the plaintiff was entitled to the first mortgage lien, in consequence of his purchase at the second sale and, all persons interested in the matter being before the Court that the proper course was to direct an inquiry as to how much of the mortgage debt was chargeable upon that portion of the property which formed the subject of the appeal, and to direct that so much of the mortgage debt should be realized by the sale of that property

Held that this judgment incorrectly treated the plaintiff as mortgagee, refusing him a charge for the full amount of his purchase money The case depending upon its own circumstances "it would be contrary to equity to allow the mortgagor to set up any right to possession as acquired by his purchase and that the plaintiff as against him, was entitled to a decree for possession as purchaser

APPEAL from a decree (12th June 1885) of the High Court modifying a decree (2nd November 1883) of the Subordinate Judge of Patna.

The question now raised related to the rights of the plaintiff, appellant, as purchaser at a sale in execution of a decree upon a mortgage. The property, possession of which was claimed by the plaintiff, was a five annas four pies share of mouza Jugdispore Tirn, mortgaged first (with an equal share of mouza Ranipore) to Nawab Syed Velait Ali Khan, C I E., on 14th July 1875 to secure Rs. 36,000, and mortgaged secondly to Jagarnath Singh and another, on 18th December 1877 to secure Rs. 12,000.

These shares were sold on the 22nd November 1880 in execution of a decree upon the latter mortgage obtained by Jagarnath Singh, with notice of the prior lien of the Nawab, and purchased by Ram Padurath Upadhia. The same were sold again on the 15th January 1881 in execution of a decree obtained by the Nawab on his first mortgage, and the plaintiff became purchaser.

Of the six defendants, now respondents (who did not appear on this appeal) the first, Futteh Bahadur, was the mortgagor. The second, Haji Syed Velait Ali Khan, C I.E., was the first mortgagee The third, Jagarnath Singh, was

the second mortgagee, together with the fourth, Jugalkishwar. The fifth and sixth defendants, Gunga Persad and Ram Padurath Upadhia, were in the same interest, having transferred the one to the other after the second sale.

[25] In their Lordships' judgment are set forth the principal terms of the mortgages, and all the facts.

On the 9th April 1880, attachment at the suit of the first mortgagee was issued, and executed on the 18th May following. On the 13th July 1880, attachment at the suit of the second mortgagees was issued, and executed on the 6th August.

The 22nd November 1880 was fixed for the sale of the attached property; but the first mortgagee's sale was postponed. That of the second mortgagee's took place.

On the 15th January 1881 was held the adjourned sale, at which the plaintiff purchased, and on the 28th March following, that sale was confirmed, and a certificate granted to the plaintiff, notwithstanding the objections of the mortgagor, by the Subordinate Judge executing the decree. Disputes arose as to the entry of the name of the rightful purchaser of the one-third share of Jugdispore, which were decided against the plaintiff, and in favour of the defendant, Ram Padurath Upadhia, on the 16th March and 25th August 1882, by the revenue authorities, who referred this appellant to a civil suit on the question of title.

On the 8th October 1882 the present suit was instituted, alleging collusion between the defendants Futteh Bahadur, Jagarnath Singh, and Jugalkishwar, and claiming that the plaintiff's right to possession as purchaser should be declared as existing under "the prior lien," and that possession should be decreed to him; or, if the Court should be of opinion that he was not entitled to possession without giving to the third, fourth, fifth and sixth defendants interested in the second mortgage, an opportunity of redeeming the prior mortgage, a decree for Rs. 36,000, his purchase-money, with interest, to be repaid to him, either by them, or by the second defendant, the Nawab, the first mortgagee.

Futteh Bahadur, the mortgagor, filed no written statement. The Nawab admitted the facts alleged, but contended that he was under no obligation to refund what moneys he had received in respect of the purchase by the plaintiff. The defendants Jagarnath Singh and Jugalkishwar denied collusion, and contended that they were not affected by the prior mortgage. Gunga Pershad disclaimed all interest, on the ground that he **[26]** had sold to Futteh Bahadur, in the name of Ram Padurath Upadhia, what he had purchased, and the latter denied that he was acting *benami* for Futteh Bahadur, asserting that he bought the share from Gunga Pershad *bona fide* for himself.

The decree of the Subordinate Judge was in favour of the plaintiff, that he should recover Rs 36,000, as principal, and Rs. 3,705, as interest, together with costs and future interest, by the sale of the property purchased by him, as he alleged, unless the defendant Ram Padurath Upadhia should pay off the above amounts to him by the 3rd of April 1884. Ram Padurath appealed to the High Court as to the liability thrown on him to pay the plaintiff's purchase-money of the share of Jugdispore, as a condition of redemption. There was another appeal by the third and fourth defendants as to a share of other property which the decree affected, but to which the present appeal did not relate Futteh Bahadur appealed as to certain costs which he had been directed to pay. The plaintiff Syed Lutf Ali Khan did not appeal to the High Court, which disposed of the three appeals by one judgment, set aside

the decree of the Subordinate Judge, so far as he directed the payment of the Rs. 36,000, with interest and costs to the plaintiff, and directed an inquiry as to how much of the money was chargeable upon the property ordering that he might recover the same by sale of it.

The judgment of the High Court (WILSON and BEVERLEY, JJ.), was as follows :

"This share was sold on the 22nd November 1880, in execution of a decree of Jagarnath Singh, on the proclamation of Syed Velait Ali Khan, and purchased by Ram Padurath Upadhia. Subsequently, on the 15th January 1881, this same share was sold again in execution of the decree of Syed Velait Ali Khan, and purchased by the plaintiff. The first purchaser is in possession.

It appears, then, that this property was mortgaged first to Syed Velait Ali Khan. It was mortgaged, secondly, to Jagarnath Singh. Suits were brought upon both mortgages. A decree was obtained and sale effected in the first place under the second mortgage, and the property sold became vested ultimately in, or in the name of, Ram Padurath Upadhia. The property was then sold under the decree obtained upon the first mortgage and purchased by the plaintiff. Now, the Court below has held that the plaintiff is not entitled to recover possession from that defendant Ram Padurath, but that he is entitled to recover from that defendant the amount of [27] the purchase-money which he, the plaintiff, paid upon the purchase of this property. Against that decision this appeal has been brought. The contention in support of the appeal, shortly stated, is this :—It is said that the effect of the plaintiff's purchase under the decree in the suit upon the first mortgage, was to give him certain rights in the property, and in particular the right of enforcing the mortgage lien which the decree-holder, the mortgagee, had upon the property, and no other lien. We think that this contention is well founded, and that after his purchase his right was to enforce the mortgage lien. On the other hand, the right of the purchaser under the decree in the suit on the second mortgage was a right to redeem.

It is argued, therefore, that the decree that has been given cannot be supported ; and we think this is so as the decree stands. But on the other hand, it is pointed out that in the Court below there was a contention that the property sold under the decree on the second mortgage vested in Ram Padurath as a mere *benamdar* for the first defendant Futteh Bahadur the original mortgagor. The Subordinate Judge in the Court below has found against that. In that we are unable to agree. We accept what he says with regard to the unsatisfactory character of the witnesses who spoke about the matter. But that evidence stands unrebutted, and we think it ought not to be rejected. If it was not true Ram Padurath was the man most interested in denying it, and he is a party. But Ram Padurath did not venture to come into the witness-box to say that this was really a purchase by him on his own account and not on account of his master Futteh Bahadur. We are, therefore, unable to agree with the Court below in that finding. We hold that Ram Padurath was a *benamdar* for Futteh Bahadur.

Then it is said that, that being so, a decree against this property in the hand of this man, a mere *benamdar* for the original mortgagor, may properly be made. We think it is not open to the respondent to come forward and ask for a decree other than the decree made by the Court below. But we think he is entitled to dispute the finding on the question of *benami* in order to sustain the decision of the Court below that a decree might properly be made against the property ; and we think also that, when the appellant complains that a wrong decree has been given, the respondent is entitled to be heard as to how that decree is to be modified.

Then the question is, what should be the decree ? We think that a decree should be given, giving the plaintiff in this case the benefit of that to which he is entitled, namely, his mortgage lien. The first mortgage covers ten parcels of property ; and the second mortgage covers two out of those ten parcels The original mortgagees seem to have no interest left in either property, and the person who has acquired title under the first mortgage is the plainti

He is before the Court. The persons entitled under the second mortgage are also before the Court. And so is the [28] mortgagor. Therefore all the persons interested in the matter are before the Court. There is authority [see *Ramdhone Dur* v. *Mohesh Chunder Chowdury* (11 C. L. R., 565) and *Yakoob Ali Chowdhury* v. *Ram Doolal* (13 C. L. R., 272)] for saying that in a suit like the present, where all parties are before the Court, an enquiry may be made as to how the benefit and the burden of the mortgage debt should be distributed among various persons interested in the various properties originally affected by the mortgages. The claim for relief in the plaint is not very clear. But we think it is sufficient to cover the relief which we propose to give. We think, therefore, that we may direct an enquiry as to how much of the mortgage is properly chargeable upon that portion of the property which forms the subject-matter of this second appeal before us, and direct that so much of the mortgage debt may be realized by the sale of that property. The decree may be modified accordingly.

In this appeal, having regard to the nature of the modification made in the decree, we think that all parties should bear their respective costs.

On this appeal, Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon* appeared for the Appellant.

The respondents did not appear.

For the appellant it was argued that he ought not to be called on to redeem at all, because he had an absolute right as purchaser. He had shown that at an execution-sale at the instance of the mortgagee, he had acquired by his purchase all the mortgagor's right, title and interest therein existing at the date of the mortgage. Consequently, he was entitled to possession as against a purchaser with notice at a sale in execution of a decree obtained upon a subsequent mortgage; and the purchaser upon the latter had not obtained, by his purchase at the sale effected by the second mortgagee, any right as against the present plaintiff, to retain possession or require redemption. It had been rightly found by the High Court that the defendant Ram Padurath Upadhia acted only *benami* for Futteh Bahadur, the original mortgagor, who had not by such a transaction acquired any right as against the present plaintiff to retain possession or to insist upon redemption. If it should be considered that Futteh Bahadur had a right to redeem, redemption should have been made conditional on his repayment to the present plaintiff of the whole sum of which he the mortgagor had had the benefit in the part payment of his debt to the first mortgagee, the Nawab Syed [29] Velait Ali. There was no ground for such an apportionment of the mortgage debt as had been directed by the High Court.

Reference was made to *Abdulla Saiba* v. *Haji Abbulla* (I. L. R., 5 Bom., 8, at p. 12); *Shringarpure* v. *Pethe* (I.L R., 2 Bom., 662), *Kasandas* v. *Pranjiwan* (7 Bom., A. C., 146), *Rajnarain Singh* v. *Sheera Mean* (7 W. R., 67); *Brojokishoree Dossia* v. *Mahomed Suleem* (10 W. R., 151); *Muthoora Nath Pal* v. *Chundermoni Dabia* (I L R., 1 Cal., 817). *Enam Momtazoodeen Mahomed* v. *Rajcoomar Dass* (14 B.L.R. 408), *Venkata Somayazulu* v. *Kannam Dhora* (I. L. R., 5 Mad., 184); *Ganesh Lal Tewari* v. *Shamnarain* (I. L. R., 6 Cal., 213, at p. 217).

Afterwards, on 6th April, their Lordships' **Judgment** was delivered by

Sir R. Couch. - The respondent, Futteh Bahadur, was the proprietor of two-thirds of a revenue-free estate, consisting of mouza Jugdispore and other mouzas and dependencies, of which he had inherited one-half and had purchased the other half. He was also the proprietor of the whole of a revenue-paying estate called Ranipore. On the 14th July 1875 he executed a mortgage bond in the usual form, by which, after stating that he had borrowed Rs. 35,000 on interest from Haji Nawab Syed Velait Ali Khan (the second respondent) stipulating to pay interest at 1 rupee per cent. per mensem, and

mortgaging, pledging, and hypothecating the shares of the mouzas specified below, owned and possessed by him, he declared that, in case of non-payment of the principal on the completion of two years, or within that period, Velait Ali Khan should be at liberty to realize the principal with interest by instituting a suit and obtaining a decree, and executing the same till the realization of the whole of the decretal amount from the property mortgaged in the bond, and in case of its not being sufficient, from other immoveable properties and from his person. The mouzas specified below were Ranipore one-third share, Jugdispore one-third share, and one-third of seven other mouzas. On the 18th December 1877, Futteh Bahadur executed a similar mortgage of another one-third share of Ranipore and of the same one-[30] third of Jugdispore to Jagarnath Singh (the third respondent), and another person named Baijnath Singh, to secure repayment in one year of Rs. 7,000, with interest at 3 per cent. per mensem.

In 1878, Velait Ali Khan sued Futteh Bahadur for Rs. 47,964-7-1-12, principal and interest due on his mortgage. On the 20th December 1878, Fatteh Bahadur filed a petition stating that Rs. 4,645-3-2-8 had been remitted by the plaintiff out of the money claimed, on condition that the petitioner should pay the whole of the principal amount, with costs, and interest at the rate of 1 rupee per cent., on the 20th December 1879, and praying that, according to this admission of claim, the case might be decreed in favour of the plaintiff, allowing the mortgage of the property to stand. And on the same day the Court made a decree in accordance with this agreement. Default having been made in payment of the money, Velait Ali Khan, in 1880, took proceedings for execution of the decree, and, on the 9th April 1880, the Court issued an order for attachment of the right and interest of the judgment-debtor, "comprising" the one-third of Ranipore and one-third of Jugdispore "mortgaged in bond and decree." The other mouzas are not mentioned, and it does not appear that anything has been done in respect of them. The attachment was made on the 20th May 1880. In the meantime Jugalkishwar, who seems to have taken the place of Baijnath Singh and Jagarnath Singh, had, on the 2nd April 1879, obtained a decree against Futteh Bahadur on the second mortgage bond, in execution of which, on the 13th July 1880, an order was issued to attach one-third "the right and interest of the debtor" out of the entire of mouza Jugdispore, etc., and one third "the right and interest of the debtor" in mouza Ranipore. The attachment of Jugdispore was made on the 6th, and of Ranipore on the 10th August 1880.

The 22nd November 1880 was appointed for the sale in both executions. On that day Futteh Bahadur petitioned that both sales should be postponed. In the case of Velait Ali Khan the sale was postponed until the 15th January 1881. In the case of Jagarnath Singh no order was made, and the sale was held on the 22nd November. The notification of sale stated that the property to be sold was mortgaged in 1875 to Velait Ali Khan. One [31] Gunga Pershad, who was at that time in the service of Jagarnath Singh, bid Rs. 9 one or two other persons having offered less, and there being no higher bid he was declared the purchaser. On the 19th February 1881 Gunga Pershad executed a deed of sale of what he had purchased to Ram Padurath for Rs. 100 and on the 21st February he presented a petition to the Court praying that, in lieu of his own name, the name of Ram Padurath might be entered, and the sale certificate granted and possession delivered to him. Accordingly, on the 24th February, it was ordered that possession should be delivered to Ram Padurath, the certificated auction-purchaser. This was done in the usual form on the 3rd March; but there never was any actual change of possession, Futteh Bahadur remaining in possession all the time.

According to the evidence of Gunga Pershad, Futteh Bahadur was the real purchaser, Ram Padurath's name being used by him. The first Court considered that Ram Padurath must be held to be the real purchaser, but the High Court, on the appeal, did not agree in this, and held that Ram Padurath was a *benamidar* for Futteh Bahadur. Their Lordships agree in this with the High Court, which properly remarked that Ram Padurath had not ventured to come into the witness-box to say that it was really a purchase by him on his own account.

The sale in execution of Velait Ali Khan's decree, which decree it has been stated was made by consent upon his agreeing to relinquish part of his claim and give time for payment of the remainder, took place on the 15th January 1881. At that sale the appellant became the purchaser of the share of Ranipore for Rs. 12,000, and of the share of Jugdispore, etc., for Rs. 36,000 ; the sum to be realized by the execution being Rs. 61,265-6 pies, and there was consequently not sufficient to satisfy the sum due on mortgage by upwards of Rs. 13,000. The sale was confirmed by an order dated the 28th March 1881, and on the 12th September 1881 the bailiff of the Court was ordered to put the appellant, being the certificated auction-purchaser, in possession of the properties. On the 25th October 1881 the nazir reported that he had given formal possession, but the appellant was unable to obtain actual possession, and on the 9th October 1882 he instituted the present suit, and claimed a decree for possession of [32] the share of Jugdispore, etc., or, if that was not granted, a decree for Rs 36,000, and interest thereon, to be recovered from the disputed property. He also claimed a similar decree in respect of the share of Ranipore, but there is no question in this appeal about that property, he having obtained a decree for possession of it.

The Subordinate Judge, acting on his finding that Ram Padurath was the purchaser, ordered that if he did not pay Rs. 36,000, with interest up to the 3rd of April 1884, the plaintiff should have power to put up to sale the third share of Jugdispore, etc., for the realization of that amount, and also that it might be recovered from his personal property. Ram Padurath appealed to the High Court, which held that the decree could not be made against him, a mere *benamidar* for the original mortgagor, and that a decree should be made, giving the plaintiff " the benefit of that to which he is entitled, namely, his mortgage lien," and they directed an inquiry as to how much of the mortgage was properly chargeable upon that portion of the property which formed the subject of that appeal, and directed that so much of the mortgage debt might be realized by the sale of that property

This direction and the enquiry upon which it is consequent seem to be founded on some misapprehension. The High Court treat the appellant as mortgagee in respect of his purchase, and at the same time refuse to give him a charge for the full amount of his purchase-money. As between the appellant and the other parties to the suit there can be no ground for apportioning the original mortgage debt in the manner proposed.

A question of general importance on the law relating to Indian mortgages, and one on which the Courts in India are not altogether agreed, was raised by the learned counsel for the appellant in the course of his argument. Their Lordships, however, do not think it necessary to go into any general question. In their view the decision of the present case must depend on its own special and peculiar circumstances.

Upon the facts which have been stated, they are of opinion that it would be contrary to equity to allow Futteh Bahadur to set up against the title of the appellant any right to possession [33] as acquired by his purchase from

Gunga Pershad. The sale to the appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage.

The High Court, instead of varying the decree of the lower Court in the manner it has done, should, in their Lordships' opinion, have varied it by decreeing possession of the share of Jugdispore, etc., as there described, in the same manner as possession of the share of Ranipore is decreed, with the like order as to mesne profits and costs.

Their Lordships will humbly advise Her Majesty to order the decree of the High Court to be varied accordingly. The respondent, Futteh Bahadur, will pay the costs of this appeal.

Decree varied.

Solicitors for the Appellant. Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[The estoppel of the mortgagor purchaser is recognised also in (1895) 23 Cal., 397; (1903) 25 All, 371, (1905) 29 Mad, 113, (1906) 5 C. L. J., 95

As regards the rights of the transferee of a part to redeem purchaser at sale by the mortgagee under a decree made in his absence see Dr. *Rash Behari Ghosh* on Mortgages Vol. II, (1914) IV Edn. pp 626, 627.]

[17 Cal 33]

APPELLATE CIVIL.

The 21st February, 1889.

PRESENT

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Jasoda Koer............Plaintiff

versus

Sheo Pershad Singh and others ....Defendants.*

Hindu Law—Survivorship—Mitakshara Law - Limitation Act (XV of 1877), Sched. II, Arts. 127, 144.

The principle of survivorship under Mitakshara Law is limited to two descriptions of property, viz. :—

(1) That which is taken as unobstructed heritage, and property acquired by means of it; and

(2) That which forms the joint property of reunited coparceners.

Property inherited by brothers from their maternal grandfather is not of those descriptions.

SUIT for a declaration of title to certain properties.

[34] The plaintiff claimed the property in dispute, as having belonged originally to one Bakhori Singh, and as having passed, by inheritance, to his

* Appeal from Original Decree No. 226 of 1887, against the decree of Baboo Nilmoni Das, Subordinate Judge of Patna, dated the 11th of May 1887.

daughter's sons, Kasi Prasad and Sheo Das Narain, her father and uncle respectively. She alleged that her father died in 1861, leaving him surviving a widow and herself, his only daughter; and that, after her father's death and her mother's, which latter happened in 1864, she was brought up by Inderjoti Koer, the wife of her uncle Sheo Das Narain, who had no children; that Sheo Das Narain, who died in 1869, made a will leaving his property to his wife, and, after her death, to the plaintiff; that her marriage expenses were defrayed by Inderjoti out of the profits of the property left by her father and uncle: and that, since the death of Inderjoti, which happened in 1885, she had held possession of the properties in dispute; but that a cloud had been thrown upon her title by the grant of a certificate under Act XXVII of 1860 to the defendant to collect the debts due to Inderjoti, and she, therefore, brought this suit to have it declared that she was entitled to one-half of the properties in dispute as heiress of her father, and to the other half as legatee under the will of her uncle.

The defendants contended that the suit was barred by limitation; that Kasi Nath and Sheo Das having formed a joint Mitakshara family, Kasi Prasad's interest in these properties passed to Sheo Das to the exclusion of his widow and his daughter; and he also denied the genuineness of the will.

The Subordinate Judge found that the will was a forgery; that Kasi Nath and Sheo Prasad were members of a joint Hindu family; that the incidents of a joint ancestral property attached to the property in dispute; that, therefore, on the death of Kasi Nath, the property passed by survivorship to Sheo Das Narain, and that there being no evidence of the plaintiff having been in possession of the property in dispute for upwards of twelve years, the suit was barred.

The plaintiff appealed to the High Court on the following grounds: (1) that the will was genuine; (2) that the suit was not barred; and (3) that the properties in dispute having been inhe-[36]rited by Kasi Prasad and Sheo Das from their maternal grandfather, Kasi Prasad's share passed, by the ordinary law of inheritance, to his widow, and, after her death, to the plaintiff, the principle of survivorship not applying to such property.

The third ground of appeal was the only one material to this report.

Mr. *Tyndale* and Baboo *Mohesh Chunder Chowdhry* for the Appellant.

Baboo *Hem Chunder Banerjee*, Babu *Rash Behari Ghose*, and Babu *Mohan Chand Mitter* for the Respondents.

The material portion of the **Judgment** of the Court (PETHERAM, C.J., and BANERJEE, J.), after their Lordships had found on the evidence that the will was genuine and that the suit was not-barred by limitation, was as follows:—

We come now to the third question, viz., whether Kasi Prasad's interest in the property in dispute passed by inheritance to his widow and his daughter, or lapsed by survivorship to his brother Sheo Das. Upon this question also, we think the decision of the Court below is wrong We are bound to say that the question is not altogether free from doubt or difficulty. But we think from an examination of the authorities the following propositions may be deduced as correct, namely (1) that the principle of survivorship applies only to those descriptions of joint-property in which the right of co-owners arises by birth, or which form the property of re-united co-parceners under special texts of the Mitakshara Law, or which are accretions to either of these two; and (2) that the property inherited by brothers from their maternal grandfather is not of any of these descriptions. According to the rule laid down by the

Privy Council in *Katama Nachiar* v. *The Raja of Shivagunga* (9 Moore's, I. A., 539) and *Chowdhury Chintamun* v. *Nowluckho Konwari* (L. R., 2 I. A., 263), the rule of succession applicable to any case depends upon the nature of the property and not upon the *status* of the family. And though some of the observations made in those cases and specially the proposition therein laid down that joint-property follows the principle of survivorship might apparently be construed in favour of [36] the respondent's contention, it should be borne in mind that their Lordships in those cases had only to distinguish between joint-property and separate property, and were not called upon to distinguish between different descriptions of joint-property. One thing, however, is clear from the *Shivagunga case* (9 Moore's I. A., 539), namely, that the text of the Mitakshara, limiting the widows'-succession, is to be regarded "as a qualification of the larger and more general proposition in favour of widows; and consequently in construing it, we have to consider what are the limits of the qualification rather than what are the limits of the right." Construing the Mitakshara in the light of these remarks, we find the first of the above two propositions clearly established. After noticing the conflicting texts relating to the widow's succession and the various reconciliations proposed by different writers, the author of the Mitakshara sums up his own opinion thus: "Therefore the right interpretation is this: when a man who was separate from his co-heirs and not re-united with them, dies leaving no male issue, his widow (if chaste) takes the estate in the first instance, for partition had been premised, and re-union will be subsequently considered" (Mitakshara, II, i, 30). What the author means in other words is this, that the widow succeeds to all descriptions of property except those which form the subject of partition in Chap I, and also those which form the subject of re-union in Chap. II, sec. ix. Leaving this last description out of consideration, as no question of re-union arises in this case, let us see of what descriptions of property partition is provided for in Chap. I of the Mitakshara. From an examination of Chap. I it will be seen that they are evidently the grandfather's and father's property in which the right of sons and grandsons arise by birth. And it accords with reason and common sense that succession to such property should be by survivorship. As the Privy Council point out in *Appovier* v. *Rama Sabba Aiyan* (11 Moore's I. A., 75), and Sir BARNES PEACOCK observes, in *Sadaburt Pershad Sahoo* v. *Foolbash Koer* (3 B. L. R. F. B., 31; 12 W. R., F. B., 1), no co-owner of such property can, at any time before partition, say what the extent of his share is, his share being subject to variation by successive births of other co-[37]owners. And if the right is undefined at its inception and unascertained until partition, it is most natural, as it is most convenient, that it should lapse by death to the surviving co-owners instead of passing to the heirs of the deceased. The same considerations do not apply to property taken by several persons jointly under the ordinary law of inheritance. Here their shares are defined from the beginning and are not subject to any variation by the subsequent birth of any co-heir. In illustration of this, we may contrast the rule given in the Mitakshara, Chap, II, sec. iv, paras 8, 9, as to succession to property *inherited* jointly by several brothers, with the rule laid down in *Debi Parshad* v. *Thakur Dial* (I. L. R. 1 All., 105, *see* in particular pp. 111-113), and followed in *Bhimul Doss* v. *Choonee Lall* (I. L. R., 2 Cal., 379), regarding unobstructed heritage, or estate in which the rights of the co-owners arose by birth.

The same view, namely, that the exclusion of the widow from joint-property is based upon the ground of her husband having no specific share, is supported by the Viramitrodaya. Upon the question of the widow's exclusion the author of that treatise remarks: "There is not, however, conflict with any reason, for there is no reason against it; but rather there is a reason in support

of it. Since when the husband dies unseparated he had no (specific) share at all, then what will the wife take?" ("G. C. Sarkar's Translation," p. 164). Now can the same thing be said in the present case? Can it be said that Kasi Prasad took no definite share in his maternal grandfather's estate, when the law is that the daughter's sons inherit *per capita* (*see* "Mayne's Hindu Law," 4th Ed., s. 519), and when the fact of Kasi Prasad and Sheo Das taking a joint estate was a mere accident, seeing that a man's estate may pass to his grandsons by different daughters who belong to different families.

The second of the two propositions enumerated above, follows, we think, clearly from the Mitakshara, Chap. I, sec. i, para. 3 (where unobstructed heritage is defined) and para. 27 (where the author states his conclusion), and also from Chapter I, sec. iv. As to Chapter I, sec. i, para. 27, we would only observe that there is an inaccuracy in "Colebrooke's Translation," which **[38]** may raise doubts upon the present question. What is translated, *ancestral* is in the original *paitamaha* that is, *grandfather's* or *belonging to the grandfather*. The view that right by birth arises only with regard to what is called unobstructed heritage, that is, the property of the father, the grandfather, and (perhaps also) the great-grandfather, is in accord with the opinions of West and Buhler (Digest, 2nd Ed., p 323) and "Mayne's Hindu Law," (4th Ed., s. 251), and has been accepted as correct by Sir RICHARD COUCH in *Nund Coomar Lall* v. *Razeeooddeen Hossein* (10 B.L.R., 183: 18 W. R 477). This case, it was contended, has been overruled by the Privy Council in *Muttayan* v. *Zamindar of Sivagiri* (I.L.R., 6 Mad., 1). But this contention is not right The Judicial Committee have reserved their opinion upon the question and have simply held that property inherited from the maternal grandfather was not self-acquired property. But though not self-acquired property, it does not become ancestral property of that description in which the sons acquire a right by birth.

The only case in which the question now before us was raised is the case of *Gopal Sami* v. *Chinna Sami* (I. L. R., 7 Mad., 458). In that case the learned Judges were of opinion that there was great force in the contention that the principle of survivorship did not apply to property inherited jointly by daughters' sons and they gave effect to that principle only upon the ground that the property had been so dealt with as to subject it to that incident, a ground which is wholly inapplicable to this case, as Kasi Prasad and Sheo Das had no opportunity of dealing with the property in dispute, the same not having been actually recovered until after their death.

Upon the whole, we think, it is in accordance with the letter as well as with the spirit of the Mitakshara law to hold that the principle of survivorship is limited to two descriptions of property, namely (1) what is taken as unobstructed heritage and property acquired by means of it; and (2) what forms the joint-property of re-united co-parceners; and that property obtained in the ordinary course of inheritance is not subject to that incident. We therefore hold that the interest of Kasi Prasad in **[39]** the estate, which he and his brother inherited from their maternal grandfather, passed, on Kasi Prasad's death, to his widow, and, after her death, it has passed to the plaintiff; and we accordingly direct that the decree of the Court below be varied, and the plaintiff's suit decreed as regards an undivided moiety of the property in dispute with costs in proportion in both Courts.

T. A. P. *Appeal allowed in part.*

NOTES.

[This case together with the case of 20 Mad., 207 (*see* also 19 Mad., 70) which followed it was **overruled** by the Privy Council in **(1912) 2 Mad., 678** in which the principle of survivorship was extended to daughter's sons. In 27 Mad., 300 Sir V. BHASHYAM AYYANGAR explained that decision as having basis in the historical origin of their rights; and it was not extended to *stridhan*.

The principle of survivorship was also held to govern *re-united* families in (1909) 33 Mad. 165 : 19 M.L.J. 719.]

[17 Cal. 39]

APPELLATE CIVIL.

The 14th June, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE GORDON.

India General Steam Navigation Company............Defendants

versus

Joykristo Shaha and others............Plaintiffs.*

Carriers Act (III of 1865) ss. 6, 8—Negligence—Accident, Loss by—Special contract—Divisibility of contract.

A flat belonging to the defendants carrying goods belonging to the plaintiff, was lost by coming into contact with a snag in the bed of a certain river, the existence of which snag could not have been ascertained by any precautions on the part of the defendants.

The goods were received for carriage by the defendants under conditions printed on the back of "forwarding note" signed by the plaintiff, by one of such conditions the defendants protected themselves from liability against accident of certain particular kinds, and "from any accident, loss, or damage resulting from negligence, &c."

Held, that the loss was not occasioned by the negligence of the defendants; that the forwarding note "was a special contract" within the meaning of the Carriers Act; that the clause purporting to protect the defendants from negligence was bad as being in contravention of the Carriers Act: but that, nevertheless, the contract was not thereby rendered wholly bad, but was divisible, being good so far as it provided that the defendants were not to be liable for loss by accident, but bad so far as it provided that they should not be liable for negligence.

THIS was a suit brought by the plaintiffs, who were merchants carrying on business at Calcutta and Dacca, against the defendant Company to recover the value of goods made over to the defendants for carriage from Calcutta to Dacca on their flat the *Bhyrub*.

The goods in question were shipped in May 1886 and were made deliverable to the plaintiff's son at Dacca. On the journey up, the *Bhyrub* struck on a snag in going round a bend in the river [40] Chili Chang Pijang, and was wrecked, all the goods on her board being lost or so damaged as to be valueless. The defence to the suit was that the flat was lost without negligence on the part of the Company and that the defendant Company was protected from liability by special contract in a forwarding note on the back of which was printed the conditions under which goods were received and carried by the defendant Company. This note was signed by the shipper. Paragraph 6 of these conditions was as follows: "The Company will not be liable for any loss or damage, non-delivery or short delivery occasioned by the Act of God, dacoity, piracy, destruction, or damage by fire, or vermin, leakage, and breakage or rust or deteriorations of perishable goods, accidents of and from machinery or ship tackle, boilers, steam, risks of separation of the cargo vessels from the steamer, stress of weather, want of water in the rivers or the difficulties or casualties of navigation, or any danger or accident of the rivers, or navigation of whatever nature or kind soever, or any accident, loss or damage resulting from any act, negligence or default of the master mariners or other servants of the Company in navigating the vessel, &c., &c."

---

* Appeal from Original Decree No. 146 of 1888, against the decree of Baboo Anund Kumar Surbadhikari, Subordinate Judge of Dacca, dated the 23rd of January 1888.

The Subordinate Judge found that the goods were lost by the negligence of the defendant Company, and that the conditions set out in para. 6 of the forwarding note were unreasonable and contrary to public policy; that the document was not a special contract within the meaning of the Carriers Act; and that there being no special contract between the parties, the duties and liabilities of the defendant Company were to be regulated by the English Common Law, and the Company considered as insurers of goods against all risks, except the Act of God and the Queen's enemies; that the accident not falling within either of these exceptions, the defendants were liable, and he therefore gave the plaintiffs a decree for Rs. 3,505.

The defendants appealed to High Court.

Mr. *Evans* and Mr. *Henderson*, (instructed by Mr. *McNair*) for the Appellants.

Baboo *Srinath Dass*, Baboo *Rash Behari Ghose*, and Baboo *Kuluda Kinker Roy* for the Respondents.

[41] The case turned upon the questions whether the forwarding note constituted a special contract within the meaning of the Carriers Act, and whether the defendant's Company were, according to law, entitled to protect themselves by special contract against accidental loss or injury; the Court finding that the loss of the goods had not been caused by negligence on the part of the defendant Company.

Mr. *Evans* contended on these points, that, under s. 6 of the Carriers Act, the Company might limit their liability by special contract, citing *Peek* v. *Directors of the North Staffordshire Railway Company* (10 H. L. C., 473) as to the meaning of a special contract; and *Zunz* v. *South Eastern Railway Company* (L. R., 4 Q. B., 539), *Moothora Kant Shaw* v *India General Steam Navigation Company* (I. L. R., 10 Cal., 166) and referring to *Ashendon* v. *London-Brighton Railway Company* (L. R., 5 Exch D., 190), *Rooth* v. *North Eastern Railway Company* (L. R., 2 Exch. D., 173), *Henderson* v. *Stevenson* (L. R., 2 H. L. Sch., 470), *Manchester-Sheffield and Lincolnshire Railway Company* v. *Brown* (L. R., 8 App. Cas., 703), *Poonoo Bibee* v. *Fyez Buksh* (15 B. L. R., App., 5), *Price* v. *Green* (16 M. & W., 346), as to the divisibility of the liability clause.

Baboo *Srinath Dass* for the Respondents.

The **Judgment** of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

Petheram, C.J.—This was a suit which was brought by the plaintiffs against the India General Steam Navigation Company to recover the value of goods which were entrusted by the plaintiffs to them for carriage. The defendants are carriers of goods between Calcutta and various parts of the country by means of flats towed by steamers, which proceed up the rivers in the country. The plaintiffs are merchants carrying on business at Calcutta and at Dacca, and the business to a great extent consists in the purchase of goods in the Calcutta market and sending them up from Calcutta to Dacca by means of these flats for sale in their shop there.

[42] The owner of the plaintiffs' business is a person of the name of Joy Kristo Shaha, and he has two sons who assist him in his business, one of them being at Dacca and the other at Calcutta, and it is the business of the man at Calcutta to purchase goods and forward them to his brother at Dacca, whose business is to sell them there.

The defendants are common carriers within the meaning of the Indian Carriers Act (Act III of 1865), and the defence which they set up to the action

is, that these goods were lost by the loss of the flats without any negligence on their part, and that they are protected from liability by the special contract which they make with their customers, and which they made with the plaintiffs in this case.

The first question that was tried in this case was whether the goods were, in fact, lost by the negligence of the defendants, and the learned Subordinate Judge who tried the case has found that the defendants were negligent in the performance of their duty as carriers and that the goods were lost by such negligence. In that finding we are unable to concur, and the learned Pleader who argued the case for the plaintiffs did not attempt to support it, because upon the evidence which was adduced in this case there is nothing whatever to show any negligence on the part of the defendants, or to show that in this case every care was not taken by them.

The flat, in which the goods in question were being carried, was lost by coming in contact with a snag in the bed of the river, the existence of which could not be ascertained by any precautions on the part of the defendant; and that being the case, the case comes within the class of cases in which accidents have been caused by hidden defects in machinery and in which consequently the loss has been held to be due to accident and not to negligence in any sense. We find therefore, as a fact, that the loss here was not caused by any negligence on the part of the defendants.

That being the case, the question then arises, whether the defendants were, according to the law, entitled to protect themselves by special contract against accidental loss or injury.

The Carriers Act, s. 6*, provides that, under certain circumstances, [43] carriers may limit their liability by special contracts. The way in which the defendants carry on their business is this: when goods are received by them they obtain from their customer a forwarding note which is signed by the customer, and by the terms of the note the customer delivers over to them the goods subject to the condition that they are not to be held liable for accidents, and next, that they are not to be held liable for negligence: and the first question is whether this is a special contract within the meaning of the Indian Carriers Act.

It has been contended here with great force, that the special contract under that Act must mean a contract for some different consideration than the mere agreement by the carriers to carry the goods, it must mean that the customer has the option of different rates, or some new arrangement making a different contract.

The case of *Peek v. North Staffordshire Railway Company* (10 H.L.C., 473) shows that it has been established for many years in England that a special contract under such circumstances means a special arrangement by the carrier with his customer for the carriage of his goods; and that such arrangement will be binding on the customer notwithstanding the fact that he does not get any advantage beyond getting his goods carried, provided the terms of the special

---

In respect of what property liability of carrier not limited or affected by public notice.

Carriers, with certain exceptions, may limit liability by special contract.

* [Sec. 6.—The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 *(to provide for taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken)* may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.]

arrangement or contract are reasonable; and the reason for that seems to be this, that although the carriers are common carriers and as such bound to take and carry the goods with the liability of common carriers, they do not carry them as common carriers, when they are delivered to them without tender of their reasonable charges for their carriage, but under a new arrangement or contract which they make with their customers.

Under these circumstances, we think that this was a special contract within the meaning of the Act, and that therefore the defendants were not liable for loss not caused by the negligence of their servants, and the only question which is left is, whether this contract is so divisible that it is a good contract to protect the defendants from liability from accident notwithstanding that one of the terms of it is that they, the carriers, will not be **[44]** liable for negligence, it being provided by s. 8 of the Indian Carriers Act that such a contract as that shall not be binding upon the customer.

Various cases have been cited and especially the case of *Ashendon London and Brighton South Coast Railway Company* (L. R., 5 Exch. D., 190), in which the Court of Exchequer held that where carriers made a contract with their customers that they would not be liable for any loss, however occasioned, such a contract was unwise, and was unreasonable and bad, and could not be enforced as to any part of it; and that no doubt would be so, because the contract by a carrier not to be liable for the negligence of his servants has been held to be bad in England, and such a contract would clearly be bad in this country, because it is prohibited by the terms of the Statute.

But in this particular case the terms are distinct, because the customer says, in effect, to the carrier, I hand you my goods to be carried on the terms that I will not hold you liable for accidents, and then in another clause he goes on to say, and further I will not hold you liable for negligence. The two things are totally distinct, and, drawn in that way, we do not think it can be taken to be so indivisible as to render the whole of it bad by reason of one of its terms being so.

Under these circumstances, we think that the contract in this case was a special contract within the meaning of the Indian Carriers Act: that it was a divisible contract, so that one portion of it might be good and another portion bad; and that, so far as it provided that the defendants were not to be liable for loss by accidents, it was a good contract: and we think that the Subordinate Judge was wrong in decreeing the plaintiffs' suit, and this appeal must be decreed and the suit dismissed with costs in all the Courts

T. A. P. *Appeal allowed.*

NOTES.

[*See* also 18 Cal., 620; 26 Cal., 398; 41 Cal., 80.]

[45] *The 30th April, 1889.*

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE TREVELYAN.

Mohima Chunder Shaha and others..........Plaintiffs

versus

Hazari Pramanik and others............Defendants.*

Bengal Tenancy Act (VIII of 1885), s. 3, cls. (3) and (5), s. 4 and s. 5, cls. (2) and (3).—Liability to ejectment—Non-occupancy ryots—"Rent"—Payment for "use and occupation."

The defendants were cultivating ryots who had held certain land under Government, but not for a period sufficient to give them a right of occupancy. The plaintiffs in a suit against the Government succeeded in proving their title to the land. In a suit to eject the defendants as trespassers, inasmuch as they could have derived no title from Government who themselves had no title, and no relationship of landlord and tenant existed between them and the plaintiffs who had not recognized their right to cultivate the lands: *Held*, that, under s. 3, cls. (3) and (5), s. 4 and s. 5, cls. (2) and (3), of the Bengal Tenancy Act, the defendants were "non-occupancy ryots," and therefore not liable to ejectment except for the reasons and on the conditions specified in that Act; and no such reasons or conditions existed in this case.

Liability to pay for the "use and occupation" of land by a person between whom and the proprietor of such land there exists no relationship of landlord and tenant, is a "liability to pay rent" within the meaning of s. 3, cl. (5), of the Bengal Tenancy Act.

Clause (3), s. 5 of that Act is intended merely to define the position of a ryot in respect to a proprietor or tenure-holder, and to distinguish him from what is afterwards described as an under-ryot.

THE plaintiffs sued to eject the defendants from and recover possession of eleven *pakhis* of land appertaining to the estate of Char Bantai, of which they stated they and their predecessors had been for many years in possession as proprietors. The plaintiffs alleged that the land sued for was diluviated by the river in 1284, and subsequently re-formed on the old site, when they re-took possession of it; that in 1286 the Government and other zemindars of a neighbouring mouza Haul Bhanga dispossessed them, and in a suit brought against those zemindars for a declaration of right and for possession the plaintiffs obtained a decree and got possession of the land; and that they had repeatedly asked the defendants to quit the land, but they had refused to do so.

[46] The defendants alleged that the land in suit appertained not to Char Bantai, but to mouza Haul Bhanga, and that they had acquired a right of occupancy in the land, and were not liable to ejectment.

The Munsif found that the defendants had not acquired a right of occupancy, and were liable to be ejected. He therefore gave the plaintiffs a decree.

The Judge also found that the defendants had not proved their acquisition of a right of occupancy: that they were non-occupancy ryots and not mere trespassers; but he held that as non-occupancy ryots they were not liable to be ejected except under s. 44 of the Bengal Tenancy Act, on grounds which did not exist in the present case. He therefore reversed the decision of the Munsif and dismissed the suit.

---

* Appeal from Appellate Decree No. 525 of 1888, against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 14th of December 1887, reversing the decree of Baboo Koylash Chunder Mozumdar, Munsif of Serajgunge, dated the 25th of May 1887.

The plaintiffs appealed to the High Court.

The grounds of appeal were mainly that the Judge had erred in law in holding the defendants to be "non-occupancy ryots," and liable only to ejectment on the grounds set forth in s. 44 of the Bengal Tenancy Act; that the plaintiffs not having admitted the defendants as their tenants by receipt of rent or otherwise, the mere fact that they were non-occupancy ryots who had been holding under persons who were themselves trespassers, did not give them any right to hold as against the plaintiffs; and that it ought to have been held that the defendants were trespassers and as such were liable to be ejected.

Baboo *Umakali Mukerjee* for the Appellants.

Baboo *Upendra Nath Mitter* for the Respondents.

The **Judgment** of the Court (PRINSEP and TREVELYAN, J) was as follows:—

The defendants are cultivating ryots who were placed on this property by the Collector and have held possession for many years, but not for a sufficient period to create a right of occupancy, they are therefore of the class termed in the Bengal Tenancy Act "non-occupancy ryots." The plaintiffs in a suit against Government have succeeded in proving their title to the land.

The matter for our decision is whether the plaintiffs are entitled to eject the defendants, non-occupancy ryots, as having no right to hold the lands because the Government from whom they de-[47]rived their title had no right and title itself, and no relationship of landlord and tenant has ever existed between the plaintiffs and defendants by recognition of their right to cultivate by receipt of rent.

In order to establish the right of defendants as non-occupancy ryots under the Bengal Tenancy Act and as such not liable to ejectment except under its special provisions (none of which admittedly apply to this case), it becomes necessary to determine whether they are non-occupancy ryots as therein defined.

Section 5 (2) declares that "a ryot means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right." And s. 4 specifies non-occupancy ryots as one of the classes of tenants under that Act.

A "tenant means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person."—Section 3 (3).

It cannot be said that defendants, though not under actual contract with the plaintiffs, do not hold land under them, because from the nature of their occupancy, they cannot be regarded as holding independently or adversely, but are they "liable to pay rent for that land" to the plaintiffs? They would clearly be liable to pay for use and occupation of the land, but would that fall within the definition of rent as set out in the Act? "Rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant."—Section 3 (5).

It seems to us that under these definitions, the defendants are ryots, and therefore, non-occupancy ryots within the terms of the Bengal Tenancy Act.

It is next contended that s. 5 (3), which declares that "a person shall not be deemed to be a ryot, unless he holds land either immediately under a proprietor or immediately under a tenure-holder," shows that there must be some title acquired from the landlord or his predecessors in interest, and not from a person who held adversely to him and without any title himself. But

[48] we think that this clause is intended merely to define the position of a ryot in respect to a proprietor or tenure-holder, and to distinguish him from what is afterwards described as an under-ryot; for under the general definition of the term "ryot," unless the further definition were given, there would be no distinction between the class dealt with by the Act as under-ryots, and ryots the landlords of under-ryots and not themselves proprietors or tenure-holders.

It may seem anomalous that the defendants who have no title from the plaintiffs directly, or through their predecessors in estate, should thus be protected as non-occupancy ryots from ejectment as trespassers at the plaintiffs' free will; but it seems to us that this is in accordance with the general spirit of the Bengal Tenancy Act, which regards a landlord as a rent-receiver and as able to eject a tenant or cultivator of the soil, not an under-tenant, only for certain specified reasons and conditions none of which here exist. If the defendants had acquired a right of occupancy by occupation for twelve years, they would have been protected from ejectment, and as non-occupancy ryots they are also protected, except as specially provided.

The appeal is, therefore, dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[This was approved by the Full Bench in (1893) 20 Cal. 708; see also (1902) 29 Cal., 871.]

[17 Cal. 48]

APPELLATE CIVIL.

The 19th June, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE GHOSE.

Abhiram Dass, Minor, by his Mohafiz and Executor Jairam Parida............Petitioner

versus

Gopal Dass............Opposite Party.*

Appeal—Probate and Administration Act (V of 1881), ss. 69, 86—Order of District Judge admitting person as caveator—Civil Procedure Code, s. 588, cl. (2).

Section 86 of the Probate and Administration Act (V of 1881) makes the Code of Civil Procedure applicable to orders passed under that Act. An appeal therefore lies to the High Court from the order of a District Judge admitting a person as a caveator under s. 69 of the Act; such an order is appealable under s. 588, cl. (2) of the Code.

A person not claiming any of the property of the testator, but disputing the right of the testator to deal with certain property as his own, has not [49] such an interest in the estate of the testator as entitles him to come in and oppose the grant of probate.

---

* Appeal from Order No. 85 of 1889, against the order of A. E. Staley, Esq., Judge of Cuttack, dated the 22nd of February 1889.

Kamona Soondury Dassee v. *Hurro Lall Shaha* (I. L. R., 8 Cal., 570) dissented from; *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (I. L. R., 4 Cal., 1; 2 C. L. R., 422) and *Nanhu Koer* v. *Somirun Thakur* (8 C. L. R., 287) followed in principle.

THE judgment of the District Judge, which states the circumstances under which the order appealed from was made, was as follows :—"The petitioner, as executor of the will of Hari Dass Babaji, deceased, on the 13th April 1888, claims probate of that will. The will is dated 27th of Falgoon 1295 (corresponding with the 8th March 1888). The will contains a detailed list of the property purporting to be that of the deceased, and the value is stated in the petition to be about Rs. 4,000.

"The caveator objects that the will filed is spurious; that the testator never owned the property with which the will deals, and neither made nor had power to make the will. The caveator claims, that the property with which the will deals is the property of the *muth*, or residence of ascetics; that the petitioner was only a servant at the *muth*; and that the property was in the joint possession of the caveator and his spiritual brother, till the decease of the latter, and has since been in the possession of the caveator.

"On the case coming on for argument before me the petitioner objects that, as the caveator does not claim any interest in the estate of the deceased under s. 69, Act V of 1881, and denies that the property to which the will refers is the property of the deceased, he cannot be admitted to object, and that probate of the will should be granted to the petitioner.

"As I understand the section referred to, the words 'interest in the estate of the deceased' mean, interest in the estate purporting to be that of the deceased for the purpose of the Act, namely, the estate appearing to be that of the deceased under the will. As the caveator claims that the whole of this property is his own, it is obvious that he has sufficient interest under the provision quoted. Several reported cases justify this interpretation. In the case of *Kamona Soondury Dassee* v. *Hurro* [80] *Lall Shaha* (I. L. R., 8 Cal., 570), it was held that, inasmuch as the plaintiff was the next presumptive reversioner, and he had sufficient interest in the property with which the will dealt to entitle him to maintain a suit in respect thereof, he had therefore sufficient interest to maintain a case for revocation of probate. In the case of *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (I. L. R., 4 Cal., 1; 2 C. L. R., 422), one similar to the present, the caveator denied both the genuineness of the will and the right to dispose of the property to which it referred, and claimed the property as his own. His objection to probate was admitted. It was also decided in that case that, when an application for probate is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose. According to the principle *exceptio probat regulam*, then, if it be held that the present application is made *mala fide*, it will be within the authority of the Court to go into the question of title. The objection to probate is admitted: the case will proceed under s. 55 of the Act."

The petitioner appealed from this order to the High Court on the following grounds:—

That the Judge was wrong in admitting the caveator's objection to probate, inasmuch as he did not claim any "interest in the estate of the deceased;" that the Court had put an erroneous interpretation on the words "interest in the estate of the deceased" in s. 69 of Act V of 1881; that the rulings referred to in the judgment of the Court below did not apply to the facts of this particular case; and that under the circumstances the Court below should have granted probate to the petitioner.

Baboo *Juggut Chunder Banerjee* for the Appellant.

Baboo *Mon Mohun Dutt* for the Respondent.

The **Judgment** of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

The matter under appeal before us is an order by the District Judge admitting the respondent as a caveator under s. 69 of the Probate and Administration Act (V of 1881).

[51] A preliminary objection is taken that no appeal lies against such an order. We have been referred to s. 86 of that Act, which declares, that every order made by a District Judge, by virtue of the powers conferred upon him by the Act, "shall be subject to appeal to the High Court, under the rules contained in the Code of Civil Procedure applicable to appeals." It is contended on one hand that, inasmuch as this is not a decree, there is no appeal. We have been referred to the case of *Brojonath Pal* v. *Dasmony Dassee* (2 C. L. R., 589), in which the law in this respect has been clearly laid down by Sir RICHARD GARTH, the late Chief Justice. The order in that case was found to be an order admitting a review of judgment, and it was there held that that order was not appealable under the Code of Civil Procedure, and therefore could not be brought before the Court. In our opinion s. 86 of the Probate and Administration Act makes the Code of Civil Procedure applicable to orders passed under that Act. The order admitting the respondent as a caveator was exactly the same in effect as if it had made him a defendant in the suit. We may refer, first of all, to s. 55 of the Probate and Administration Act, which declares that, except as specially provided, the proceedings under that Act shall be regulated, as far as the circumstances of the case will admit, by the Code of Civil Procedure. Section 83 provides that "in any case before the District Judge in which there is contention," that is to say, an objection is raised to the grant of probate or letters of administration, "the petitioner shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant." Consequently the position occupied by the respondent is clearly that of a defendant under the Code of Civil Procedure. Under such circumstances, it appears to us that the order passed admitting him as caveator is appealable under s. 588, cl. (2). We accordingly over-rule the objection.

On the merits of this appeal, we think that the order of the District Judge must be set aside. Admittedly the caveator has no interest in the estate of the deceased testator, but it is contended on his behalf that, inasmuch as he lays claim to the properties dealt with by the will, he is entitled to come in and [52] oppose the grant of probate or letters of administration. The District Judge relies on the case of *Kamona Soondury Dassee* v. *Hurro Lall Shah* (I. L. R., 8 Cal., 570) as authority for holding that the caveator has an interest in the estate of the deceased, because he disputes the title of the deceased to dispose of the particular property which he says is his. He lays no claim to succeed to any part of the estate of the testator, but claims some of the property said to form portion of that estate. We cannot agree in the rule laid down in that case, which is that expressed by Mr. Justice FIELD in the case of *Nobeen Chunder Sil* v. *Bhobosoondari Dabee* (I. L. R., 6 Cal., 460), but not adopted by Mr. Justice WHITE. A person disputing the right of a deceased testator to deal with certain property as his own cannot be properly regarded as having an interest in the estate of the deceased. His action is rather that of one claiming to have an adverse interest. The cases of *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (I. L. R., 4 Cal., 1 ; 2 C. L. R , 422) and *Nanhu Koer* v. *Somirun Thakur* (8 C. L. R., 287) proceed on the principle which we think should be adopted If any further argument be necessary, we would refer to the terms of s. 69 which require the District Judge "to issue citations calling upon all persons claiming to have any interest in the estate of the deceased." The term

used does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular property, but in the estate itself whatever that may consist of. The form of the caveat too, would seem to show that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator but objects either to the execution of the will or to the proposed manner of dealing with any portion of the estate. We therefore set aside the order of the District Judge admitting the respondent as caveator in these proceedings. The appellant will be entitled to his costs.

J. V. W. *Appeal allowed.*

NOTES.

[Probate is merely evidence of the genuineness of the will; it is no evidence of the disposing power.—(1902) 26 All., 792; (1897) 19 All., 458; (1893) 18 Bom., 749, (1910) 34 Bom., 589; (1912) 17 C. W. N., 613.

Persons who dispute the disposing power of the testator over the property dealt with by him have no *interest* to apply for revocation of probate:—(1910) 34 Bom., 459: 12 Bom.L.R., 366; (1909) 14 C. W. N., 119; (1909) 14 C. W. N, 119; nor is the right of maintenance sufficient, (1900) 4 C.W.N., 602; (1913) 17 C.W.N., 1141. See also (1909) 10 C.L.J., 263.

As regards appeal, see also (1900) 28 Cal., 149; (1894) 21 Cal., 539; (1904) 8 C.W.N., 748; (1913) 35 All., 448; (1891) 20 Cal, 245; (1912) 16 C.W.N., 1099; (1912) 39 Cal., 563.]

[53] APPELLATE CIVIL.

The 19th July, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Chowdhry Paroosh Ram Das and another............Claimants

versus

Kali Puddo Banerjee and another............Decree-holder and Judgment-debtor.*

Limitation Act, 1877, Sch. ii, Art. 179—Application to execute decree—Step in aid of execution—Application for sale of property under attachment.

The application contemplated by Art. 179 of sch. ii of the Limitation Act, and described as "an application for the execution of a decree or order of any Civil Court, etc., etc.," is an application within the terms of s. 235 of the Civil Procedure Code, that is to say, an application setting the Court in motion to execute a decree in any manner set out in the last column of the form prescribed, but, having so set the Court in motion, any further application, during the continuance of the same proceeding, is an application to take some step in aid of execution within the terms of cl. 4 in the last column of Art 179 of the Limitation Act.

An application, therefore, for the sale of property under attachment, is an application merely in aid of an execution then proceeding.

THE judgment appealed from, in which the facts are sufficiently stated, was as follows.

"On the 20th December 1851, one Jemiruddin Mahomed obtained a decree against one Mahiuddin Bibeo. That decree was sold by Mahomed to Baboo Ishan Chunder Banerjee, father of the present applicant for execution. On the 14th August 1857, there was a compromise between Mahiuddin Bibee and Ishan Chunder, in which it was stipulated that, until the decretal debt was satisfied, a two-annas share of the judgment-debtor's property should remain hypothecated for the debt, and that the property then under attachment should continue to be so. Mahiuddin Bibee conveyed a portion of her properties, *i.e.*, the aforesaid two-annas, to one Rowsun Mahomed, by a *kobala*.

* Appeal from Order No. 84 of 1889, against the order of Baboo Jogesh Chunder Mitter Subordinate Judge of Cuttack, dated the 11th of December 1888.

On the 5th September 1859, Rowsun Mahomed conveyed a fractional share of the property he purchased from Mahiuddin Bibee to Chowdhry Roghoonath Das (the property is in the hands of a Receiver appointed by the Court, and includes the share purchased by chowdhry Roghoonath Das). The decree-holder, on 30th of [54] November 1887, applied for execution, making both the heirs of Rowsun Mahomed and Roghoonath Das legal representatives of his deceased judgment-debtor Rowsun Mahomed. The heirs of Roghoonath contend that the decree is barred by limitation, and that they cannot be made legal representatives of the deceased judgment-debtor.

"I think this objection of limitation cannot be heard. When the present decree-holder applied to take certain proceeds realized from the attached properties, these persons, the heirs of Roghoonath, objected to payment of a share of the same proportionate to the share of the property purchased by their father from Rowsun Mahomed, on the ground that the decree was barred by limitation. That objection, after hearing, was disallowed, my predecessor finding the decree was not barred by limitation. It was contended that then the heirs of Roghoonath Das intervened, and were no parties to the execution-proceedings, but here execution has been applied for against them. But it seems to me that the mere fact of their having appeared of themselves then, and not as now under an order of Court, makes no difference. The question at issue now is the same as that raised in Miscellaneous Case No. 19 of 1886, and the parties are the same.

"Assuming however that the question is still open for adjudication, I do not think that the decree was barred by limitation. The property is still under attachment, and under the management of the Court through a Receiver. Proceeds of that property have, from time to time, been given to the decree-holder on his application. There are petitions showing that Rowsun Mahomed consented to the attachment continuing and the profits of the attached property going to the satisfaction of the decree. I am not satisfied that this attachment was given up. The application for distribution of proceeds made by the decree-holder may be, as pointed out by my predecessor, looked upon as a continuation of the former execution-proceedings. If the decree has been kept alive by proceedings taken from time to time, if realisations are being made and applied to the satisfaction of that decree from property already attached, the mere fact that Roghoonath or his heirs were not made parties [55] to the execution, while Rowsun Mahomed the assignee from Mahiuddin was made a party, cannot make the execution thereof as barred by limitation.

"It is not denied that Chowdhry Roghoonath Das did purchase a portion of the property which Rowsun purchased from Mahiuddin Bibee. That property was hypothecated for this decretal debt, and therefore the objectors are the legal representatives of the deceased judgment-debtor.

"The objections raised by the heirs of Chowdhry Roghoonath Das are disallowed. They should be made legal representatives of the deceased judgment-debtor Rowsun Mahomed."

Chowdhry Paroosh Ram Das and Chowdhry Joy Kristo Das, the heirs of Roghoonath Das, appealed to the High Court, on the grounds, among others, that s. 230 of the Civil Procedure Code applied to the present execution-proceedings; that the attachment of the property had been given up and was not in existence; that the appellants not having been made parties to the suit in which the decree was obtained, though the decree-holders were aware of their purchase, the execution ought not to be allowed to proceed against them, nor ought they to have been made legal representatives; that the application for distribution of the proceeds had been wrongly treated as a continuation of

the former execution-proceedings; and that no steps having been taken to keep the decree alive for a period of three years prior to the present application, execution of it was barred by limitation.

Mr. *R. E. Twidale*, Baboo *Abinash Chunder Banerjee*, and Baboo *Mon Mohun Dutt* for the Appellants.

Baboo *Taruk Nath Sen* for the Respondents.

The **Judgment** of the Court (PRINSEP and HILL, JJ.) was as follows :—

The decree which is now under execution is a very old decree, having been passed in December 1851. It is unnecessary to detail all the proceedings taken in execution except those of somewhat recent date It is sufficient to say that a share of the property belonging to the appellant, against which execution is sought, was, on the 7th September 1859, sold to his ancestor. Whether the property was then under attachment is not clear; [56] but we learn that, in the year 1860, the property was, under s. 243, Act VIII of 1859, placed in the hands of a Receiver, who was directed to pay the malikana allowance to the several sharers in that property except that the malikana due to the debtors was to be paid into Court for the decree-holder. We must take it that the share of those debtors was under attachment in execution of this decree, and that the intervention of the Receiver was for the benefit of the debtors and to avert the sale which would ordinarily have followed that attachment. The transfer of a share of the debtors' property by sale to the appellants' ancestor was apparently not known to the Court or to the decree-holder, for the name of the vendee does not appear on the proceedings. Nevertheless it is not denied that, at least up to 1882, payments from time to time of the malikana share of the debtors, including that sold to the appellants, were paid away to the decree-holder towards satisfaction of the decree We must therefore take it that the attachment continued, and that, at least for a very long series of years, all the parties concerned considered that the share which originally belonged to the debtors was liable in satisfaction of the decree against them.

The decree-holder, on 30th November 1887, applied for sale of this share of the property under attachment and the only objection raised before us is that execution is barred by limitation. We may first of all state that s. 230 of the Code of Civil Procedure now in force is not applicable so as to bar execution, because, prior to the application now before us, no application for execution of this very old decree has been made and granted under that Code. The question for our consideration is whether further execution is barred by Art. 179 of sch. II of the Limitation Act of 1877, and that depends upon whether we should hold that the application for sale of property under attachment should be regarded as an application merely in aid of an execution then proceeding.

We have not been shown that the attachment has been taken off this property, or that it is no longer in the hands of the Receiver, and therefore we must take it that there is before the Court an application for execution of this decree made before or during 1860 and therefore still in operation.

[57] In our opinion the application contemplated by Art. 179, sched. II, and described as " an application for the execution of a decree or order of any Civil Court, etc., etc." is an application within the terms of s. 235 of the Code of Civil Procedure, that is to say, an application setting the Court in motion to execute a decree in any manner set out in the last column of the form prescribed; but having so set the Court in motion, any further application during the continuance of the same proceeding is an application to take some step in aid

of execution within the terms of cl 4 in the last column of Art. 179, sched. II of the Limitation Act. This we may add seems to have been the view taken by the Full Bench in the case of *Umbica Pershad Singh* v. *Surdhari Lall* (I. L. R., 10 Cal., 851). It is unnecessary to consider the ground upon which the lower Court has held that execution is not barred, because we arrived at the same conclusion by holding that, under the existing law of limitation, execution is not barred.

The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[This was approved of in (1890) 15 Bom., 242, (1900) 24 Mad., 188, see also (1894) 19 Bom., 261, (1908) P.L.R., 125, (1912) 14 I.C., 264.]

[17 Cal. 57]

APPELLATE CIVIL.

The 21st May, 1889

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Gourmoni Dabee. ..... .Defendant

versus

Jugut Chandra Audhikari ... ... .Plaintiff.

Res-judicata -*Party as representative— Execution of decree—Order disallowing objection—Civil Procedure Code (Act XIV of 1882,) ss. 13 and 244*

G brought a suit against *I* for the establishment of her rights as purchaser of certain immoveable properties sold in execution of a decree obtained against *I*, and for possession of the same After the settlement of issues, but before the suit was finally disposed of, *I* died, and his brother *J* was made defendant as his legal representative *J* consented to the suit being tried on the defence raised by *I*, and upon the issues already settled The suit was decreed, it being held that *G* was the purchaser In execution of this decree in which *G* sought to obtain possession, *J* objected that he was entitled to a half share of some and to the entire sixteen-annas of the other properties and that his brother *I* had no right whatever in the same This objection was disallowed by the Court executing the decree, on the **[58]** ground that it had not been raised in the original suit and that, as the decree had been passed in the presence of the party then objecting, he was not entitled to urge it Thereupon *J* brought a suit against *G* to establish his rights The defence was that the order passed in the execution proceedings, disallowing the plaintiff's objection, was a bar to the suit under ss. 13† and 244 of the Civil Procedure Code

---

* Appeal from Appellate Decree No 1382 of 1888 against the decree of Baboo Karuna Das Bose, Subordinate Judge of Mymensingh, dated the 3rd of May 1888, reversing the decree of Baboo Ram Jadub Tolapatro, Munsif of Sherepore, dated the 16th of May 1887.

†[Sec. 13 —No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Res judicata

Explanation I.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of

Held, that the order disallowing the plaintiff's objection did not operate as *res judicata* under s. 13 of the Civil Procedure Code.

The *Delhi and London Bank* v. *Orchard* (I.L.R., 3 Cal., 47; L.R., 4 I.A.,127) relied on.

Held, also, that this order was no bar to the suit under s. 244 of the Civil Procedure Code.

Kanai Lall Khan v. *Shashi Bhosun Biswas* (I. L. R., 6 Cal., 777; 8 C. L. R., 117), followed.

SUIT for declaration of title.

Gourmoni Dabee, the defendant, obtained a decree against Iswar Chandra Audhikari, the brother of the plaintiff Jugut Chandra Audhikari; and, in execution of that decree, sold certain immoveable properties, alleging that they were the properties of the judgment-debtor Iswar Chandra. The purchase was made in the name of one Kandarpa Narain Singh. The defendant, Gourmoni, attempted to take possession of the properties, on the ground that she had paid the purchase-money, and that Kandarpa Narain was her *benamidar*. She was resisted by Iswar Chandra, who denied her title, alleging that Kandarpa Narain was his *benamidar*. Thereupon, Gourmoni instituted a suit against Iswar Chandra for a declaration that she was the real purchaser of the properties. Iswar Chandra filed a written statement, in which he alleged that he had purchased the properties with his own money in the name of Kandarpa Narain Singh. Issues were settled: but before the suit was finally disposed of, he died, and his brother, the plaintiff Jugut Chandra, was made a defendant as her legal representative. The plaintiff Jugut Chandra filed a petition, in which he prayed that the suit might proceed upon the defence raised by his brother and upon the issues already settled. The only material issue in that case was who paid the purchase-money: Gourmoni or Iswar Chandra? The Court held that Gourmoni, having paid the purchase-money, was the real purchaser, and accordingly decreed the suit

[59] In execution of this decree, Gourmoni was resisted by the plaintiff Jugut Chandra, who took the objection that he was the owner in his own right of an eight-annas share of some and of the entire sixteen-annas share of the rest of the properties; and that his brother Iswar Chandra had no right whatever in the same This objection was disallowed by the Court executing the decree, on the ground that it had not been raised in the original suit, and that, as the decree had been passed in the presence of the party then objecting, he was not entitled to urge it. Thereupon the plaintiff brought this suit for a declaration that he was entitled to one half share of some and the entire sixteen-annas of the other properties, of which possession had been sought by the defendant Gourmoni. The defence was that the suit was barred as *res judicata*, and that the plaintiff was estopped from advancing his present claim under

defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or re-consider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the Judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.]

s. 115* of the Evidence Act. The Munsif found that the plaintiff was entitled to a half share by right of inheritance: but held that his claim was barred under s. 13 of the Civil Procedure Code and also s. 115 of the Evidence Act, and accordingly dismissed the suit.

On appeal, the Subordinate Judge upheld the decision of the Munsif on the merits, but reversed it on the question whether the suit was barred under s. 13 of the Civil Procedure Code and s. 115 of the Evidence Act. He also decided in favour of the plaintiff the question, which was raised for the first time, whether the suit was barred under s. 244 of the Code of Civil Procedure. The Subordinate Judge accordingly gave the plaintiff a decree for a half share in the properties mentioned in the plaint.

The defendant Gourmoni appealed to the High Court.

The grounds of appeal were as follows:—

(1) For that the Court below ought to have held that the plaintiff's suit was barred under s. 13 of the Code of Civil Procedure.

(2) For that the Court below was wrong in holding that the plaintiff was not bound in the previous suit to raise the objections raised by him in this suit.

(3) For that the Court below ought to have held that the plaintiff was estopped under s. 115 of the Evidence Act from instituting this suit.

[60] (4) For that the Court below ought to have held that the plaintiff was bound by his application in the previous suit by which he agreed to have the trial of the case only on the issues already settled.

Baboo *Kaluda Kinkar Roy* for the Appellant.

Baboo *Mukunda Nath Roy* for the Respondent.

Baboo *Kaluda Kinkar Roy* contended that, although the decision in the original suit brought by Gourmoni against the plaintiff's brother might not operate as *res judicata*, by reason of the plaintiff having litigated under a different title from that which he was setting up in the present suit, yet the objections taken by him in execution of the decree obtained by Gourmoni in that suit, were taken in the same character in which he had brought his present suit, and that consequently the decision in the execution-proceedings operated as *res judicata*. He also contended (but this contention was not raised in the written grounds of appeal), that the order passed in the execution proceedings, disallowing the plaintiff's objection, was a bar to the suit under s. 244 of the Code of Civil Procedure; and in support of this contention he cited *Chowdhry Wahed Ali* v. *Mussamut Jumaee* (11 B. L. R, 149; 18 W. R., 185), *Oseemunnissa Khatoon* v. *Ameeroonissa Khatoon* (20 W. R., 162), *Raj Rup Singh* v. *Ram Golam Roy* (I. L. R., 16 Cal., 1).

Baboo *Mukunda Nath Roy* contended that s. 13 of the Procedure Code did not apply in the present case. He also contended that the appellant should not be allowed to argue that the suit was barred under s. 244 of the Civil Procedure Code, as no such ground had been taken in his grounds of appeal: and further that, even if the Court allowed the appellant to take that ground, the suit was not barred under s. 244. In support of his argument he cited *Delhi and London Bank* v. *Orchard* (I. L R., 3 Cal., 47; L. R., 4 I. A., 127) [see the observations of their Lordships of the Privy Council at p. 58]; *Rup Kuari* v. *Ram Kirpal Shukul* (I. L. R., 3 All., 141); *Beni*

*[Sec. 115:—When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.]

Estoppel.

[61] *Prasad* v. *Lachman Prasad* (I.L.R., 4 All., 131); *Kanai Lall Khon* v. *Sashi Bhuson Biswas* (I. L. R., 6 Cal. 777; 8 C. L. R., 117); *Shankar Dial* v. *Amir Haidar* (I. L. R., 2 All., 752); *Abdul Rahman* v. *Mahammud Yar* (I. L. R., 4 All., 190) *Nath Mal Das* v. *Tajammul Husain* (I. L. R., 7 All., 36); *Bahori Lall* v. *Gauri Sahai* (I. L. R., 8 All., 626); *Roop Lall Dass* v. *Bekani Meah* (I. L. R., 15 Cal., 437). He also referred to *Raj Rup Singh* v. *Ramgolam Roy* (I. L. R., 16 Cal., 1); *Chowdhry Wahed Ali* v. *Jumaee* (11 B L. R., 149; 18 W. R., 185); *Ram Ghulam* v. *Hazaru Kuar* (I. L R., 7 All., 547); *Sita Ram* v. *Bhagawan Das* (I. L. R., 7 All., 733), *Mulmati* v. *Ashfak Ahmad* (I. L. R. 9 All., 605).

The **Judgment** of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

The main question raised in this case is whether the plaintiff's suit is barred under s. 13 of the Code of Civil Procedure.

The facts of the case are shortly these: The defendant, the appellant before us, obtained a decree against the plaintiff's brother, and, in execution of that decree, sold certain immoveable properties, alleging that they were the properties of the judgment debtor. The purchase was made in the name of one Kandarpa Narain Singh, and the question was raised as to whether Kandarpa Narain Singh was the *benamidar* for the defendant or for the plaintiff's brother.

This dispute led to a suit by the defendant against the plaintiff's brother, Iswar Chandra Audhikari, to have it declared that the defendant was the real purchaser of the property. Iswar Chandra Audhikari filed an answer to the effect that he was the real purchaser: but before the suit was finally disposed of, he died, and his brother, the present plaintiff, was made a defendant as his legal representative, and he consented to the suit being tried upon the defence made by his brother and upon the issues laid down. The suit was decreed, it being held that the defendant was the real purchaser.

[62] In execution of the decree obtained by the defendant, the plaintiff took an objection that one-half share of some and the entire sixteen-annas of the other properties, of which possession was sought in execution, belonged to him in his own right, and that his deceased brother had no right in the same. This objection was disallowed by the Court executing the decree, upon the ground that in the original suit no such objection had been raised, and the decree having been obtained in the presence of the party then objecting, he was not entitled to urge it The plaintiff, thereupon, brought the present suit for recovery of one-half share of some and the entire sixteen-annas of the other properties, of which possession had been sought by the defendant.

The first Court found that the plaintiff was entitled to an eight annas share of the properties mentioned in the plaint, but it dismissed the suit on the ground that it was barred as *res judicata*, and also because the plaintiff was estopped from advancing the present claim under s. 115 of the Evidence Act.

On appeal, the Lower Appellate Court has affirmed the decision of the first Court on the merits, but reversed it on the question as to whether the suit was barred under s. 13 of the Code of Civil Procedure and s. 115 of the Evidence Act. It also considered the question, which was for the first time raised before it, as to whether the present suit was barred under s. 244 of the Code of Civil Procedure, and it decided that question also in favour of the plaintiff. The Lower Appellate Court, accordingly, gave a decree to the plaintiff to the extent of eight annas of the properties mentioned in the plaint.

Against that decree of the Lower Appellate Court the defendant has preferred this second appeal; and the grounds taken in the memorandum of appeal are that the suit is barred under s. 13 of the Code of Civil Procedure, and that the plaintiff is estopped under s. 115 of the Evidence Act.

This last ground was not seriously pressed by the learned Vakil for the appellant, and we do not see any reason for holding that s. 115 of the Evidence Act can at all apply to this case.

As to the plea of *res judicata*, it was contended that, though in the original suit brought by the defendant for the determination of the question as to whether Kandarpa Narain Singh purchased [63] the properties really for her or for Iswar Chander Audhikari, the present plaintiff might have been litigating under a title different from that which he is now setting up; and although for that reason the decision in that suit may not operate as *res judicata*, yet the objection taken by the plaintiff in execution of the decree passed in that suit to the effect that certain shares in the properties, of which possession was sought to be recovered, belonged to him in his own right, was certainly taken in the same character in which he has brought his present suit, and that consequently the decision passed by the Court in the execution-proceedings should operate as *res judicata* upon the present question. It was also contended, though this contention is not raised in the written grounds of appeal, that s. 244 of the Code of Civil Procedure would bar the present suit, as the question now sought to be raised ought to have been, if it has not actually been, disposed of in execution of the decree obtained in the former suit.

We shall consider these two grounds separately.

The former of these two contentions we consider untenable for two reasons: In the first place, it is only certain descriptions of orders passed in the course of the execution of a decree that have operation by way of *res judicata*, and not every order passed in execution. In the present case, the objection that was raised, was raised by the plaintiff not in his character as judgment-debtor under the decree, but in a different and quite an independent character, and if it could have been adjudicated at all, it should have been under s. 331 of the Code of Civil Procedure, and if it had been so adjudicated, it must have been numbered and registered as a suit as that section requires. In that case the decision arrived at might have had the effect of a decree. But no such thing appears to have been done in this case.

In the second place, though the objection was disallowed, it does not appear to have been disallowed after any adjudication of the question raised. It was disallowed, as has been said at the outset of this judgment, merely upon the ground that the point had not been raised in the original suit.

We are not, therefore, prepared to hold that this was a matter heard and determined within the meaning of s. 13 of the Code of Civil Procedure, and we think we are supported in this view [64] by the observations of the Judicial Committee in the case of the *Delhi and London Bank* v. *Orchard* (I.L.R., 3 Cal., 47; L. R., 4 I. A., 127) with reference to a somewhat similar order.

With reference to the plea of *res judicata*, there is one other observation that we wish to make, which is this, that the learned Vakil for the appellant, while arguing the case, gave to his first ground in the memorandum of appeal this somewhat strained meaning, namely, that it was urged with reference to the order in the execution case; yet reading his memorandum of appeal, especially the first, second, and fourth grounds together, it does seem that the objection was originally evidently meant to be taken with reference to the decision in the previous suit, and not with reference to the order passed in the execution-proceedings. But be that as it may, as we have shown above, that order cannot, in our opinion, have the effect of *res judicata*.

We come now to the second contention noticed above, namely, that the present suit is barred under the provisions of s. 244 of the Code of Civil Procedure.

As this ground is not taken in the memorandum of appeal, we do not feel disposed to allow it to be successfully taken. To allow it to be taken would be far from furthering the ends of justice It has been found concurrently by both the Courts below in this case that the plaintiff has a good case on the merits; and though the plaintiff was unsuccessful in the execution-proceedings, his objection was thrown out without any adjudication upon it.

Then as to the validity of this contention, it is, we think, more than doubtful. It is true it has been held in several cases, and must now be taken to be settled law, that a person who is made a party to a suit in his representative capacity is a party to the suit within the meaning of s. 244 for several purposes, but it has never yet been held, as far as we are aware, that he is in every capacity a party to the suit for all purposes. The cases referred to are all without exception cases where the judgment-debtor in his representative capacity sought to question his liability to satisfy a decree for money or for costs out of property which he claimed as his own as distinguished from [65] that of the person whose representative he was. The questions thus raised are questions which are to be decided with reference to the provisions of ss. 244 and 252 of the Code of Civil Procedure, and these provisions of law throw upon the Court executing the decree the duty of coming to a decision as to whether the liability questioned does or does not really attach. The question now raised is of a very different kind, that question being whether the share that the plaintiff now claims was sold in execution of the decree in the previous suit, irrespective of any question as to whether the purchase was for the plaintiff or for the defendant. If Iswar Chandra Audhikari had not died during the pendency of that suit, and if the decree in that suit had been passed in the presence of Iswar Chandra Audhikari, there can be no question that it would have been open to the present plaintiff to raise the point that he now raises in this regular suit; and we see no reason for thinking that the mere fact of the present plaintiff having been made a party defendant in that suit as the legal representative of his brother Iswar Chandra Audhikari, had the effect of enlarging the scope of that suit so as to make the present question come under the description of questions arising between the parties to that suit and relating to the execution of the decree. Indeed, s. 368 of the Code of Civil Procedure would not have admitted of the scope of that suit being so enlarged; for that section provides that the person so made defendant may make any defence appropriate to his character as legal representative, and it would certainly never have been appropriate to the character of the present plaintiff as the legal representative of his deceased brother, Iswar Chandra Audhikari, to raise the question in that suit that he now seeks to raise.

We think that this case comes well within the scope of the observations made by this Court in the case of *Kanai Lal Khan* v. *Shashi Bhosun Biswas* (I. L. R., 6 C. 777; 8 C. L. R., 117), and, following that case, we think the present suit is not barred under s. 244 of the Code of Civil Procedure, even if the objection raised by the learned vakil for the appellant had been allowed to be taken.

In the result we dismiss this appeal with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[*See* (1890) 17 Cal., 711 *infra.*]

[66] ADMIRALTY JURISDICTION.

The 11th April, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE TREVELYAN.

In the matter of the Ship "Champion."

Appeal—Letters Patent, 1865, cl. 15—Appeal from decision of a Judge exercising Admiralty or Vice-Admiralty jurisdiction—Practice—Vice-Admiralty Regulations of 1832, Rule 35, Application of—Mentioning of the apportionment of award for salvage services—Peremption of appeal.

Under cl. 15 of the Letters Patent, 1865, an appeal lies to the High Court from the decision of one of its Judges exercising Admiralty or Vice-Admiralty jurisdiction.

Such appeals are governed by the practice under the Civil Procedure Code, and not by Rule 35 of the Vice-Admiralty Regulations published under the authority of 2 Will. IV., cap. 51.

Rule 35 applies to appeals from the High Court to the Privy Council.

The *Brenhilda* (I. L. R., 7 Cal., 547 ; S. C., L. R., 8 I. A., 159) relied on.

The mere fact of the salvors having appeared and mentioned in Court the matter of the apportionment of an award for salvage services reserved by the decree making the award, did not perempt an appeal from that decree.

APPLICATION for the admission of an appeal.

In an action of salvage, brought by the owners, master, and crew of the Steam Tug *Rescue* against the British Sailing Ship *Champion*, her cargo and freight, NORRIS, J., by an interlocutory decree, awarded the promovents the sum of £ 1,500 sterling for salvage services rendered by the *Rescue* to the *Champion* and Rs. 887 and 2 annas for damage substained by the *Rescue* in rendering such services, together with the costs of the action ; and reserved the consideration of the apportionment of the £ 1,500 sterling among the promovents. The decree was pronounced in Court on the 22nd February 1889, but was not signed until the 4th April 1889.

On the 25th February, Messrs. Watkins & Co., the attorneys for the promovents, served upon the Marshall of the Vice-Admiralty Court and the Registrar of the High Court, Original Jurisdiction, and Messrs. Morgan & Co., attorneys for the impugnants, the following notice:—

"Take notice that we are instructed by the promovents to appeal, and shall appeal in due time in this case against the [67] decision and decree pronounced in this cause on the 22nd February 1889, and we further beg to give you notice not in any way to release the bail found and provided by the impugnants, which bail, consisting of Company's Paper for Rs. 1,25,000, now remains deposited in Court. *Dated the 25th day of February 1889.*"

On the 6th March 1889, a memorandum of appeal on behalf of the promovents was presented to the Registrar, who returned it on the ground that it had been presented without a copy of the decree in the action. On the 11th March 1889, the matter of the apportionment of the £1,500 sterling, reserved by the decree of the 22nd February, was mentioned in Court by counsel on behalf of the promovents; and on 19th March, NORRIS, J., pronounced the apportionment.

On the 29th March, the promovents gave the impugnants notice that they would renew their application of the 25th March 1889 before Mr. Justice NORRIS "for an order that the said learned Judge do proceed to make a formal decree in the above action, and that the said learned Judge do have such decree recorded in the Assignation Book under and in the manner provided for by the 38th clause of the Vice-Admiralty Rules, subject always to the procedure provided for by and under rules made by this Honorable Court and applicable to this matter": and also that they would repeat the assertion of their appeal made on the 25th March: and further that should the Court be of opinion that the said motion and assertion could not be made as of right, then that they would ask for an order in effect that the presentation of their memorandum of appeal, tendered to and endorsed by the Registrar on the 6th March, should be taken and held as an assertion of appeal by them; or, in the alternative that the time for the assertion of such appeal should be extended. The application was supported by the following affidavit, dated 25th March:—

I Nowell Shaw Watkins an Attorney-at-law and a member of the firm of Watkins and Company make oath and say as follows:—

(1) That the said firm have acted for the promovents in this matter since and prior to the institution of the proceedings herein.

[68] (2) That the hearing of this matter came on before His Lordship Mr. Justice NORRIS on the 20th of February 1889, and came to a termination on the 22nd February 1889, on which day the said learned Judge said that on the evidence adduced he was of opinion that the said promovents were entitled to receive from the impugnants herein the sum of £1,500; but that His Lordship reserved the matter of the apportionment of the said sum amongst the said promovents and requested the said promovents' counsel to submit a scheme for such apportionment.

(3) That on the 25th day of February 1889 the said promovents through the said firm instructed counsel to prepare a memorandum of appeal in anticipation of a decree being pronounced and made in this matter on the basis appearing in the earlier portion of the last preceding paragraph and on the same day a draft memorandum of appeal was drawn up and settled by counsel and handed over to the said firm.

(4) That on the 27th of February 1889, the said firm delivered to counsel for settlement a draft decree on the said basis which the said firm had on that or the previous day received from the Registrar of this Honourable Court; and such draft decree was as I am informed and believe on the following day returned as settled by counsel to the said firm and was then handed over as I am informed and believe to the said Registrar who settled it on 1st March 1889.

(5) That the said decree after being duly engrossed was submitted by the said Registrar to the said learned Judge as I am informed and believe on the 5th day of March 1889 for signature.

(6) That his Lordship intimated as I am informed and believe that he would not sign the said decree until he had made the said apportionment.

(7) That on the 6th of March 1889 the said memorandum of appeal was presented to the said Registrar who returned it on the ground that it had been presented without a copy of the decree herein with a note thereon to that effect in his own handwriting. . . . . .

(8) That on the 6th of March 1889 the said firm instructed counsel to mention the matter of the said apportionment to the [69] said learned Judge, and this matter having, thereafter, on the 11th of March 1889, been mentioned to the said learned Judge, his Lordship, on the 19th of March 1889, pronounced the said apportionment.

(9) That on the 22nd day of March 1889 the said promovents took the advice of counsel as to whether any of the grounds mentioned in the said memorandum of appeal required amendment in consequence of the said apportionment, and that on the following day they were advised in the negative.

(10) That a draft decree has been prepared in the office of the said Registrar, * * * to which the said impugnants object on the ground that there ought to be two decrees in this matter, one in respect of the amount to be paid on account of salvage by the said impugnants to the said promovents, and another in respect of the apportionment of the said amount.

(11) That no decree herein has yet been moved by counsel under the 38th Rule governing the procedure of this Honourable Court in its Vice-Admiralty jurisdiction; that I am informed and believe that at no stage of the proceeding herein has the said Registrar been present; and that at no stage of the proceedings in this matter as I am informed and believe has the said learned Judge permitted any actuary or practitioner of this Honourable Court to do any act for the Registrar by reason of his unavoidable absence or for any other cause.

(12) That I am advised and believe that under the circumstances aforesaid no decree has yet been pronounced or made in this matter.

(13) That I have this day instructed counsel to move the said learned Judge for an interlocutory decree in this suit and to pray that on such decree being pronounced and made the same be recorded and attested in the Assignation Book of this Honourable Court by the said Registrar.

This application was refused on the 4th April 1889 by NORRIS, J., who held that the rules of the Vice-Admiralty Regulations, published under 2 Will. IV., Cap. 51, governed the admission of appeals here, assuming an appeal did lie under cl. 15 of the Letters Patent, 1865. He also held that his pronouncing [79] judgment in Court on the 22nd February was an interlocutory decree and that the presence of the Registrar in the building of the High Court was a sufficient presence to comply with the Vice-Admiralty Rules; and that the presence of the Court Official taking minutes was also a sufficient attendance of the Registrar. He also held that separate decrees must be drawn up: one in respect of salvage, and another in respect of the apportionment. On the 6th April 1889, Mr. Watkins presented the promovents' memorandum of appeal, with a copy of the decree annexed, to the Registrar, who refused to receive it but retained it as being filed on the record. The promovents, thereupon, gave the impugnants notice of motion before a Division Bench of the High Court for an order directing the Registrar to register the promovents' appeal and to take the ordinary steps to bring the same to a hearing. They also gave notice to the impugnants not to release the bail deposited by them until this matter was disposed of.

In this application, which was heard by PIGOT and TREVELYAN, JJ., on the 11th April 1889, the questions raised and argued were: -

(1) Did an appeal lie under cl. 15 of the Letters Patent, 1865, to the High Court in its appellate jurisdiction from the decision of a single Judge exercising Admiralty or Vice-Admiralty jurisdiction, or was the appeal direct to the Privy Council from such decision?

(2) If an appeal did lie under cl. 15 of the Letters Patent, 1865, was the procedure in respect of such appeal governed by the Civil Procedure Code or the Vice-Admiralty Regulation published under the authority of 2 Will. IV., cap. 51, and especially by Rule 35 of such regulations? And

(3) Was the appeal perempted by the Acts of the promovents?

The impugnants appeared on the motion under protest.

Mr. *Evans* and Mr. *Gasper* for the Promovents.

Mr. *Woodroffe* and Mr. *Roberts* for the Impugnants.

Mr. *Evans*.—I move for an order directing the Registrar to register an appeal which has been presented to him, and to take the ordinary steps to bring the same to a hearing.

[71] By s. 540, Civil Procedure Code, appeals lie from all original decrees except when expressly prohibited. Section 541 states the form in which an appeal must be presented; and under s. 548, when an appeal has been admitted, it must be registered. In the Mofussil, presentation of appeal has to be made to the Court; but here it is made to the Registrar. This Rule applies to all appeals. The Court has power to delegate to the Registrar all ministerial functions; and the practice here is to present appeals to the Registrar who is the proper officer for registering appeals. If the Registrar finds any difficulty with regard to them, he either takes the opinion of the Court, or refuses to register; and, in the latter case, there is a right to move the Court.

[PIGOT, J. -Which rule do you refer to?]

Mr. *Evans*.—It is the practice, and, I believe, it is in accordance with the rules.

[PIGOT, J. - (after consulting the Registrar who was present in Court)—I understand that is the practice. but, if not, you can apply to us now to register the appeal.]

Mr. *Evans* The real point here is, whether the appeal should be registered under cl. 15 of the Letters Patent, 1865, having regard to the fact that the appeal is from an order of a Judge exercising Vice-Admiralty jurisdiction. The rules with regard to appeals are the rules of the High Court under the Civil Procedure Code: and the High Court has power to make rules for its own procedure not inconsistent therewith. *See* s. 652*. Apart from rules so made, the Civil Procedure Code, chap 48, s. 631 *seq.*, deals with the powers of the High Court: s. 638† excepts certain sections from applying to the High Court. Before the Act of 1877, Act VIII of 1859 constituted the rules. Section 37, Letters Patent, 1865, gives power to make rules in Admiralty and Vice-Admiralty matters. Rules 61, 62 and 63 (Belchambers' Rules and Orders, p. 81) must be read with Rule 50. Does Rule 63 mean that every step in an action *in rem* must be in accordance with the Vice-Admiralty Rules, or does it mean that only such portions shall be under those rules as are not provided for by the rules under the Civil Procedure Code?

* [SEC. 652.—The High Court may from time to time make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence.

Power to make subsidiary rules of procedure.

All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.]

† [SEC. 638:--The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, sections 16, 17 and 19, sections 54, cl. (*a*) and (*b*), 57, 119, 160, 182 to 185 (both inclusive) 187, 189, 190, 191, 192, so far as relates to the manner of taking evidence, 198 to 206 (both inclusive), and so much of section 409 as relates to the making of a memorandum;

Sections not applying to High Court in original civil jurisdiction.

and section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Code not to affect High Court in exercise of insolvent jurisdiction.

Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court.]

[72] The Vice-Admiralty Rules are, many of them, obsolete, and have never been followed here in practice. Then there is another question as to Rule 35 of the Vice-Admiralty Rules, namely, whether that rule applies in cases of appeals from one Judge of this Court to a Division Bench, or whether it applies only to appeals to a Superior Court. If it be held that Rule 35 does not apply, then I am in order. If Rule 35 applies, then the rules contained in the Vice-Admiralty Regulations, as to the examinations of witnesses, presence of the Registrar, etc., have not been complied with. These rules are really obsolete.

Mr. *Woodroffe* (interposing).—We are appearing in this matter under protest, having had notice of the application. I understand your Lordships are not sitting here to take any appeal from Mr. Justice NORRIS' order or decree. This matter Mr *Evans* is moving has been moved and argued before Mr. Justice NORRIS and decided by him. Mr Justice NORRIS decided that the rules of Vice-Admiralty Court, published under 2 Will. IV, cap. 51, governed admissions of appeals here, assuming an appeal did lie under cl. 15 of the Letters Patent Act.

[PIGOT, J.- We are sitting here to hear motions, or, if an appeal is filed and is ripe for hearing to hear such appeal.]

Mr. *Woodroffe*. I submit a Division Bench, not sitting on appeal, has no power to deal with the order or decree of another Judge.

PIGOT, J. -We think it will be better not to deal with this point now.]

Mr. *Woodroffe*.– I desire to state it so that it might not be supposed there was any waiver

[PIGOT. J. At present, one incident of our sitting here as an Appeal Court is that we may entertain any application to admit an appeal.]

Mr. *Evans* -I will show this is a fresh application based on a former application. When we moved before Mr. Justice NORRIS, we could not ask him to admit the appeal, because the decree had not then been signed. It was signed on 4th April [Mr. *Evans* then referred to the affidavit of Mr. Watkins dated the 9th **[73]** April.] This matter has not been adjudicated upon by Mr. Justice NORRIS. The Court cannot hold that Vice-Admiralty suits are to be governed by the old rules. These rules were made under 2 Will. IV, cap 51.

[PIGOT, J.—Additional rules were made on 6th July 1859 for the purpose of regulating the practice in the Vice-Admiralty Court.]

Mr. *Evans*. —Those rules do not touch this particular matter.

[TREVELYAN, J. -I have been in several cases here, and the procedure was under the Civil Procedure Code, except in one undefended case.]

Mr. *Evans*. --Under the rules of the 6th July no witness can be called without forty-eight hours' notice given to the other side. Those rules refer almost entirely to the examination of witnesses.

[TREVELYAN, J.– Have you enquired what has been the procedure on appeal from a Judge sitting in Vice-Admiralty jurisdiction in this Court ?]

Mr. *Evans*.– In *The Moorhill* v. *The Natmoo'* and in other cases † the procedure in the Civil Procedure Code was followed. --See Forms 108 and 109, Vice-Admiralty Rules and Regulations, Appendix, p. 81.

[TREVELYAN, J. Was not there an appeal in *The Ava* v. *Brenhilda* † ?]

* Appeal No. 36 of 1875 (unreported).

† *The Michelino* v. *The Dacca* (Appeal No. 50 of 1875, unreported) ; *The Brenhilda* v. *The B. I. S. N. Company, Limited* (Appeal No. 7 of 1880).—This case went before the Privy Council, and is reported in I. L. R., 7 Cal., 547, and L. R., 8 I. A., 159 ; *The Mary Stuart* v. *The Nevada* (Appeal No. 21 of 1883, unreported).

Mr. *Evans*.—Yes, but I do not know how it was filed. The Privy Council held there that the appeal to the Privy Council was governed by the Vice-Admiralty Regulations. Rule 35 refers to appeals to a Superior Court. The chapter in the Civil Procedure Code on Privy Council appeals was introduced into Act of 1877 from Act VI of 1874; and from the Act of 1877 into the present Act: Act VI of 1874 governed the procedure in appeals to the Privy Council. There is a provision in the Act of 1874 [74] that nothing in it shall affect appeals from Vice-Admiralty jurisdiction. It is embodied in the Civil Procedure Code with slight variations. Section 1 of Act VI of 1874 is the last part of s. 616 of the present Code. Under s. 616 a copy of decree is not necessary to the filing of an appeal. I submit Rule 35 does not apply to appeals to a Division Bench of this Court. No monition or inhibition has ever been issued from one Bench of this Court to another.

[PIGOT, J. - Was there an appeal in its Vice-Admiralty jurisdiction in the time of the old Supreme Courts ?]

Mr. *Evans*.- No: an appeal lay only to the High Court of Admiralty in England.

Mr. *Evans*. - The appeal was by the Admiralty Courts Act, 1863 (26 and 27 Vict. c. 24), transferred to the Privy Council.- -See Forsyth's Cases and Opinions, Edition of 1869, p. 377; Roscoe's Admiralty Practice, Edition of 1878, Chap. 8, p. 90.

[TREVELYAN, J. 3 and 4 Will. IV., cap. 41, took away appeals from the Admiralty Courts and gave them to the Privy Council.]

Mr. *Woodroffe*.—It is expressly provided in the Commission (Smoult and Ryan's Rules and Orders, Ap. p. 1) that the appeal lies to the Admiralty Court in England.

Mr. *Evans*.—Yes. 3 and 4 Will. IV., cap. 41, s. 2 transfers the appeal to the Privy Council. *See* the Vice-Admiralty Commission of 1822 (Smoult and Ryan's Rules and Orders, Ap. p. 1), 6 and 7 Vict., Cap. 38, makes further provisions regarding appeals from the Admiralty and Vice-Admiralty Courts, enabling the Privy Council to exercise the same powers which those Courts had. Section 2 relates to appeals; ss. 9 and 10 to inhibitions, citations, etc.; s. 11 has an important bearing on the present question as explaining the position of appeals from the Colonies in the days before the application of steam to navigation.

[PIGOT, J.—The section gives a period within which to prosecute the appeal. At the time of 6 and 7 Vict., cap. 38, Rule 35 was in existence.]

Mr *Evans*. The object of Rule 35 was that the right to appeal should be asserted within fifteen days; but the appellant had a year for prosecuting the appeal. Assertion of appeal is [75] quite different from memorandum of appeal. *The Brenhilda Case* (I. L. R., 7 Cal., 547, S. C., L. R., 8 I. A., 159) decided that the reception of the appeal was not a matter of right, as it had not been asserted within fifteen days. Limitation Act, 1877, Schedule II., Article 151, gives twenty days for an appeal to Privy Council.

*[Art. 151 :—

Description of Appeal.	Period of limitation.	Time from which period begins to run.
From a decree or order of any of the High Courts of Judicature at Fort William, Madras and Bombay in the exercise of its original jurisdiction.	Twenty days ...	The date of the decree or order.]

[PIGOT, J.—Act XX of 1862, s. 6, has not been repealed.]

[TREVELYAN, J.—That is the Act from which the High Court adopted its rules.]

Mr. *Evans*. -Although the Limitation Act says that appeals from orders or decrees must be made within twenty days, s. 6 of Act XX of 1862 says the High Court may prescribe its own time. The decree in this case was made on 22nd February 1889, and on 9th March, the impugnants asserted their appeal in Court. I raise two main points: *First*, what is the true construction of Rule 35? Must everything be carried on under the old Vice-Admiralty Rules, or does it mean that things, not provided for by the ordinary rules of Court, should be governed by the Vice-Admiralty Rules. *Second*, whether or no Rule 35 applies, does that rule apply to appeals to a Division Bench of the High Court under cl. 15 of the Letters Patent, or was it not meant for appeals from Vice-Admiralty Courts to a Superior Court only; and is it possible to apply it to such appeals? The old Supreme Court had power to appoint proctors, but the High Court has not. The work of proctors is now done in this Court by attorneys. The assertion of appeal is made in Court, but an attorney cannot assert anything in Court. When I applied under Rule 38 for an interlocutory decree, and pointed out that there were no Acts attested in the Assignation Book, the Judge held that inasmuch as the Registrar wss present in the High Court building, the Chief Clerk must be taken as doing the duties of the Registrar, who could attest the Assignation Book afterwards. It was also held that the Court Minute Book was good as an Assignation Book.

Mr. *Woodroffe*. - In the Assignation Book is copied out what takes place in Court. There is no other proper Assignation Book kept than the Minute Book.

[76] PIGOT, J. The wording of Rule 35 is inconsistent with copying into the Assignation Book. The first part of the rule shows that the Registrar should make the entries himself in the Assignation Book.]

Mr. *Evans*. My objection was that there was no entry by the Registrar in the Assignation Book of any act done in Court, or by any person acting for the Registrar.

I contend that no proper decree has been made, and that no Counsel has moved under Rule 38.

The last Commission, dated 21st August 1843, to Sir Lawrence Peel (Belchambers' Rules and Orders, p. 184) is nearly the same as the other. It also reserves the appellate jurisdiction of the Admiralty Court. 26 and 27 Vict., cap. 24, does not affect India. See s. 2, and Sch. A. By the Letters Patent of 1862 and 1865 the High Court is empowered to exercise all jurisdictions exercised by any Judge. Section 9 of the Charter of 1861 gives Admiralty and Vice-Admiralty jurisdiction. Letters Patent of 1862, s. 31, and Letters Patent of 1865, ss. 32 and 33, also give Admiralty and Vice-Admiralty jurisdictions. But for the Letters Patent, the appeal would still lie direct to the Privy Council. Under cl. 15 of the Letters Patent, 1865, the High Court has power in its appellate jurisdiction to hear an appeal from the judgment of the same Court through one of its Judges.

It must be admitted that inhibitions and monitions do not apply. Paragraph 6 of Mr. *Watkins'* affidavit of 26th March has in a great degree led to the present difficulty. The Judge reserved the question of apportionment.

[PIGOT, J.— That is no part of the decree.]

Mr. *Evans*. -The notice of 25th February, which was served on the Registrar and impugnants' attorneys, is an assertion (of appeal) to each of them, and practically a compliance with Rule 35.

[TREVELYAN, J.—In the *Brenhilda case* (I. L. R., 7 Cal., 547; S. C., L. R., 8 I. A., 159) the memorandum of appeal with copy of the decree was filed more than a month [77] after decree; and in the other cases I have looked at, only memoranda of appeals were filed. I find no entry of assertion of appeal in the Assignation Book.]

Mr. *Evans*.—Provisions as to what shall be done on the filing of the memorandum of appeal appear in the Civil Procedure Code and in the Rules. In the case of *The Mary Stuart* (Appeal No. 24 of 1883, unreported), *Moorhill* (Appeal No. 36 of 1875, unreported), *Dacca* (Appeal No. 50 of 1875 unreported) and *Brenhilda* (I. L. R., 7 Cal., 547; S. C., L. R., 8 I. A., 159) there was no assertion of intention to appeal.—[Mr. *Evans* then referred to the notice of the 29th March.] If it be held that the Registrar was present as being in the Court building, then I contend that the Judge was present in the building when the memorandum of appeal was presented to the Registrar, and that that is a sufficient assertion of appeal in Court.

In England appeals are asserted before the Registrar--Roscoe's Admiralty Practice, p. 222

[PIGOT, J.—There are two modes of asserting, either in writing or verbally. (Mr. *Evans* referred to his notes of the judgment of NORRIS, J., on his application.) We do not sit to hear appeals from that order. We are sitting to hear an application to receive and admit the memorandum of appeal, and to direct it to be registered. We have noted Mr. *Woodroffe*'s protest, and, if necessary, will hear him thereon.]

Mr. *Evans*.—Mr. Watkins' affidavit stated that he presented the memorandum of appeal and the Registrar refused to receive it. NORRIS, J., has reserved the question releasing the bail, but has passed an *interim* order restraining it till this motion is disposed of

[PIGOT, J. The question of bail is not before us.]

Mr. *Woodroffe*. We appear under protest. This Court has no jurisdiction in the matter: and if it had jurisdiction, the promovents did not assert their appeal within the time prescribed, and whether there be or be not a rule prescribing the time for asserting an appeal or filing an appeal, or apart from all [78] questions of rules, the appeal is perempted. *Tronson* v. *Dent* (8 Moore's P. C., 419) shows that the objection to the right of appeal must be taken at the earliest opportunity.

Mr. *Evans*. -As to this, it is not before the Court, and we should be entitled to answer it.

Mr. *Woodroffe*. -If I can show on materials now before the Court, that the appeal is perempted, and, quite apart from our raising this question later on, we raise it now, because if I can show that the appeal is perempted, your Lordships will not admit a memorandum of appeal. Mr. *Evans* has assumed an appeal lies from the High Court, exercising Admiralty and Vice-Admiralty jurisdiction, to a Division Bench of the Court. That is not so. This question has never before been raised. I contend that, whenever the High Court, either in the person of one or more of its Judges, exercises Admiralty or Vice-Admiralty jurisdiction, the appeal lies direct to Her Majesty in Council, and that there is no appeal to this Court.

[PIGOT, J. How can we hold that this Court has gone on for years receiving these appeals illegally. Must not that be decided by the Privy Council ?]

Mr. *Woodroffe*. - I say the Court ought to reverse that practice. In the four cases referred to, the question was not raised. It was not raised in *The*

Brenhilda (I. L. R., 7 Cal., 547 ; S. C., L. R., 8 I. A., 159), and it did not lie on the respondents there to raise it, as the judgment of the High Court was in their favour. I am ready to argue this point now, unless your Lordships intimate strongly, I should not do so. It goes to the root of the matter.

[PIGOT, J.—We intimate now that we think ourselves bound by the uninterrupted practice of this Court, and we will note that you raised the point.]

Mr. *Woodroffe*.—Then, assuming an appeal lies under cl. 15 of the Letters Patent, 1865, has not the appeal been perempted ? This is not a matter of any appeal, but rests upon this that the Court is very particular in seeing there is no **[79]** peremption—*The Hydroos* (5 Moore's I. A., 137). The question of peremption was raised in *The Brenhilda* (I. L. R., 7 Cal., 547 ; S. C., L. R., 8 I. A., 159). The promovents in the present case attended on the settlement of the decree and they also attended on the apportionment.

[PIGOT, J., referred to *The Ulster* (1 Lush., 424).]

Mr. *Woodroffe*.—That case is long before *The Brenhilda* (I. L. R., 7 Cal., 547 ; S. C., L. R., 8 I. A., 159). Praying to a Judge to rescind an order perempts an after appeal from that order *Greg* v. *Greg* (2 Adams' Rep., 276, 281).

[PIGOT, J.—What are the acts that render this appeal perempted ?]

Mr. *Woodroffe*.—They are set forth in para. 8 of the affidavit of Mr. Watkins of 25th March. You must get an inhibition or appear under protest to save being perempted.—*The Brenhilda* (I. L. R., 7 Cal., 547 ; S. C., L. R., 8 I. A., 159).

[PIGOT, J.—Has any case been cited which shows that an appeal is perempted by an act done in furtherance of the right of appeal. We are prepared to hold that the mere appearance and mentioning the apportionment does not perempt the appeal.]

Mr *Woodroffe*.—*The Aquilla* (6 Moore's P.C., 102), *The Clifton* (3 Knapp. 375, S.C., 3 Hagg. Admiralty Ca., 117).

[PIGOT, J. We do not think you could have been under the impression that the other side acquiesced in the judgment and would not appeal.]

Mr. *Woodroffe*. They took no steps to show that they intended to appeal. *The Ulster* (1 Lush., 424) is quite distinguishable The offer there was an offer of peace.

[PIGOT, J.—We are prepared to say that we do not think that on the present materials the appeal is perempted.]

Mr. *Woodroffe*.—Then, without prejudice to our raising it hereafter, I do not go on with that point now.

[80] As to the Rules : it is quite clear that Mr. Justice NORRIS thought the rules applied. The rules were made under the authority of the Act of Parliament of William IV (2 Will IV., cap. 51). Those rules prevailed here prior to the establishment of the High Court. Do they apply since the High Court was established ? Has the Indian Legislature any power to alter or repeal those rules ?

[PIGOT, J.—There are parts of Rule 35 which seem to show that it was intended to apply to appeals to the High Court of Admiralty.]

Mr. *Woodroffe*.—*The Brenhilda* (I. L. R., 7 Cal., 547 : S. C. L. R., 8 I. A., 159) bears on this point.

[PIGOT, J.—The words "Superior Court" are in your favour to a certain extent.]

Mr. *Woodroffe.* - The rule is applicable to the High Court of Admiralty, or the Court standing in its place as the Privy Council ; but not to the High Court here. Under s. 652, Civil Procedure Code, the Court has power to make rules. —Belchambers, Rules and Orders, Rule 61 *et seq.* Rule 63 expressly refers to the Vice-Admiralty Regulations. In s. 636, Civil Procedure Code, there is no mention whatever of Admiralty or Vice-Admiralty jurisdiction, and one would suppose that the framers of the Act knew that the practice in Vice-Admiralty suits was governed by other regulations. *See* s. 638.—I submit this Court has no power to interfere with an order in Council. Under cl. 26 of the old Supreme Court Charter (Charter of Geo. III, dated 26th March 1774—Smoult and Ryan's Rules and Orders, Vol. 1, p. 1. Belchambers, Rules and Orders, p. 1), Admiralty jurisdiction was to be exercised as in England.

The Hydroos (5 Moore's I. A., 137), decides that the rules and practice of the High Court of Admiralty in England govern proceedings in maritime causes in the Supreme Court of Bombay under the Charter of 1823. The effect of the Regulations is dealt with in *The Aquila* (6 Moore's P. C. 102). The rules were in this case held applicable to the Vice-Admiralty Court in St. Helena. - *See* Lord Brougham's **[81]** remarks as to the force of the rules at p. 104 and 107. No ground has been made out for non-compliance with the rules. This is not a proper case for the Court to direct the Registrar to receive the appeal.

The Letters Patent draw a distinction between the Civil and the Vice-Admiralty and Admiralty jurisdiction.

The **Judgment** of the Court (delivered by PIGOT, J.) was as follows :—

In this case the decree from which it is sought to institute an appeal was signed on the 4th April 1889, the memorandum of appeal against that decree was presented to the Registrar on the 6th April 1889, and was rejected, and this is an application made to us, sitting in the Appellate Jurisdiction from the Ordinary Original Side, for an order directing the Registrar to admit the appeal.

The application is made by the promovents, in whose favour a decree for £1,500 was made in the Court below ; and there is no question that the formalities prescribed by Rule 35 of the Rules and Regulations, made under an order of Council of June 1832, with respect to the bringing of appeals, were not in this case followed, and it is argued that the appeal under those circumstances cannot be admitted, a much longer period than fifteen days having passed since the time at which the decree was pronounced in open Court. It is contended on behalf of the parties seeking to appeal that the matter is to be decided on the practice of this Court in its ordinary appellate jurisdiction ; and that the usual time should be allowed to the appellant from the date on which he was able to obtain a copy of the decree in the case.

The first question then is, in appeals under cl. 15 of the Letters Patent from a single Judge sitting in the Ordinary Original Jurisdiction to the Appellate Bench, does this Rule 35 apply ?

Now there is no doubt that Rule 35 applies in the case of appeals from this Court to the Privy Council. The case of *The Brenhilda* (I. L. R., 7 Cal., 547 ; S. C., L. R., 8 I. A., 159) shows that.

And there is doubt that according to the practice of this Court, so far as it can be ascertained from the records, in appeals which have been brought from the decisions of a single Judge sitting on the original side to the other side of this Court, the **[82]** practice has been not to apply Rule 35, as it is now contended it should be applied.

Four cases have been obtained from the record, namely, *The Moorhill* v. *The Natmoo* [Appeal No. 36 of 1875 (unreported)]; *The Michelino* v. *The Dacca* [Appeal No. 50 of 1875 (unreported)]; *The Brenhilda* v. *The B. I. S. N. Company, Limited* (Appeal No. 7 of 1880).—This case went up to the Privy Council, and is reported in I. L. R., 7 Cal., 547, and L. R., 8 I. A., 159), and *The Mary Stuart* v. *The Nevada* [Appeal No. 24 of 1883 (unreported)].

And in all four cases the practice under the Civil Procedure Code was followed: and in the *Brenhilda case* [Appeal No 36 of 1875 (unreported)], the length of time which elapsed between the date of the decree and the filing of the memorandum of appeal was more than a month, the decree is dated the 6th January 1880, and the memorandum of appeal was filed on the 19th February 1880. The practice of the Court, therefore, so far as these few cases furnish us with a guide, is certainly against the contention of the impugnants.

The terms of Rule 35 show that the appeals contemplated as dealt with by it were appeals to England, which, when the rule was framed, lay to the High Court of Admiralty.

When the rule was framed the Supreme Court was the tribunal here having Admiralty and Vice-Admiralty jurisdiction: and there was not within that Court the practice as to appeals from one branch of this Court to the Full Court or a Divisional Bench of it, such as exists in this Court under the Letters Patent.

Next, we must look to the effect of the Letters Patent of 1865 as bearing on this question In art. 37 of those Letters Patent it is provided that the Court shall, from time to time, make rules for the purpose of regulating all proceedings in (amongst others) its Admiralty and Vice-Admiralty jurisdiction; and it is provided that the Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, which at that time was Act VIII of 1859. Rule 63 of the rules of this Court is as follows: "In cases in the exercise of Admiralty or Vice-Admiralty jurisdiction, in which a ship or a ship and cargo, have been or are to be proceeded against or arrested, or in [83] which goods only have been or are to be proceeded against or arrested, either for the purpose of proceeding against the goods or the freight due thereon, or in which property shall have been or shall be arrested, and no party shall have appeared or shall appear at the return of the warrant, and in all other cases in the exercise of Admiralty or Vice-Admiralty jurisdiction, in *which the rules contained in Act III of 1859 are not applicable*, the practice and procedure shall be regulated as nearly as possible by the rules and regulations made and ordained by order of his late Majesty King William the Fourth in Council."

Now the jurisdiction, on which this appeal is sought to be brought, is one which is the creature of the Act of Parliament establishing the High Court, and of the Acts passed under the Charter, and the fact that it is so created would lead to the conclusion that the practice in the exercise of that jurisdiction would be that of Civil Procedure Code. We speak here of the appeal from the decision of one Judge to two Judges, which is the direct creature of the High Court Act and the Charter.

Having regard to these two facts, (one being the practice of the Court, and the other the proceeding so far as possible under the Charter), the rules of the Civil Procedure Code ought to be applied in the Admiralty jurisdiction within this Court, and we think the contention we are examining cannot be sustained.

Two other points were raised for the impugnants, one was that there is no appeal save to her Majesty in Council from any decision of this Court sitting

in the Admiralty or Vice-Admiralty jurisdiction ; and, involved in that, is of course the contention that there is no appeal from the decision of a single Judge save to Her Majesty in Council.

The applications have been so frequent from a single Judge pronouncing a decree of this Court to a Bench of this Court, that we intimated it would be needless to argue that point before us. If it must be raised, it must be before another tribunal.

It was also argued that the promovent is precluded by his own conduct from pursuing this appeal on the ground that the appeal is perempted owing to the promovents' conduct as set out in the affidavit of Mr. *Watkins*, dated 25th March 1889, in paras. 6, 7, and 8. The contention being that, inasmuch as under the [84] circumstances in the affidavit related, the promovent was led to mention to the learned Judge, and, by so mentioning, to further so far as he could the signing of the decree or order the apportionment of the money amongst the salvors. We are unable to adopt that argument. so far as he acted, he did so against the decree, that is, in the very act of appealing from it and for the purpose of doing so, and it must not be forgotten that under the decree from which he appeals he takes what he has as yet got, and he protests not that he has not got the £1,500 but that he has not got more.

We do not consider either of these contentions good ones, so we think the application must be granted, and therefore we direct the appeal to be admitted.

As to the costs of this application, we think the costs of both sides ought to be costs in the appeal.

Application granted.

Attorneys for the Promovents Messrs *Watkins & Co*
Attorneys for the Impugnants: Messrs. *Morgan & Co.*

C. D. P.

NOTES.

[As regards the Admiralty jurisdiction see also (1889) 17 Cal., 337, (1895) 22 Cal., 511 (1900) 27 Cal., 860.]

[17 Cal. 84]

ORIGINAL CIVIL.

The 20th May, 1889.

PRESENT

MR JUSTICE PIGOT AND MR. JUSTICE TREVELYAN.

In the matter of the ship *Champion*.

Salvage—Arrest Excessive bail—Costs—Salvage services —Amount of award increased on appeal —Practice—Costs of appeal from the Original Side in its Admiralty or Vice Admiralty jurisdiction.

In an action of salvage in which a ship was arrested and the bail asked for was found to be excessive, the Court (PIGOT and TREVELYAN, JJ.) *Held* that the promovents must pay the impugnants, the costs occasioned by the bail required being excessive.

---

*Original Civil Appeal No. 17 of 1889, against the decree of Mr. Justice NORRIS, dated, the 22nd February 1889.

The George Gordon (L. R., 9 P. D., 46) followed.

In this case the Court increased the amount of salvage award from £1,500 to £ 2,400, in consideration of the great risk incurred by the salvors in rescuing the ship and cargo, which were very valuable, from imminent destruction.

[85] Inasmuch as an appeal did lie under the High Court Charter and the Letters Patent from the Original Side in the exercise of Admiralty or Vice-Admiralty jurisdiction, and the procedure was mainly governed by the Civil Procedure Code, the usual practice as to costs on appeal was followed in this case.

APPEAL from a decision of NORRIS, J., awarding £1,500 for salvage services.

This was an action of salvage brought by the owners, master, and crew of the steam tug *Rescue*, against the British sailing ship *Champion*, her cargo, and freight. The action was commenced for Rs. 1,22,219-2-5, and the *Champion* arrested and bail given for Rs. 1,25,000.

The *Rescue* was a steam tug of 1,500 tons gross register, and for the purposes of the action, her value had been, by agreement of the parties, fixed a £19,000. The *Champion* was an iron built and three-masted full-rigged ship of 1,441 tons register. Her value was stated by the impugnants to be £ 9,000, and that of her cargo, at the time the salvage services were rendered, to have been £35,000. By agreement the value of the ship and cargo was for the purposes of the action fixed at £43,000.

The facts of the case, as to which there was really no dispute, were as follows: —

The *Champion* left Calcutta in charge of Mr. Paulson, a master Pilot of the port, for Port Pirie in South Australia, on 20th August 1888, with a cargo of 6,467 bales of gunnies. She was towed down the Hooghly by the steam tug *Clive*, and had proceeded as far as the Upper Gasper Light Ship on the 22nd August, when, on account of the threatening state of the weather, she was obliged to put back and to anchor at Saugor for the night. She proceeded on her voyage next morning, the 23rd August, the *Clive* taking her in tow; but met with violent squalls from the west at about the Lower Gasper Light Ship. Finding the storm increasing, and that instead of making head-way she was going astern to lee-ward on to the Saugor Sands, at about 1 or 2 o'clock in the afternoon she anchored; the hawsers of the *Clive* were slipped, and she steamed away. Finally, the *Champion* was brought up to a point close to the Saugor Sand, a little to the north of the Intermediate Light Ship, and there she remained until the afternoon of the following day, the [86] 24th August During the night of the 23rd the storm increased in violence, the wind was from west to south blowing a hurricane and increasing in force the whole time. The storm was at its worst about 2 A.M., when it began to abate. The ship drew 21 ft. 10 in., and at low-water between 5 and 6 P.M. she began to bump. The masts were very much shaken and were expected every moment to come down; she also shipped heavy seas, losing everything moveable on board. When the flood came she swung to the tide and ceased bumping This was at 11 o'clock. At about 4 A.M. (of 24th August) the ship again began to bump; and continued to do so for about two or three hours, until she again swung to the flood and ceased bumping. The ship was found to be leaking and to be making about 3½ inches of water an hour, and at 5 A.M., the pumps were manned. During the night the sea had made a clean breach over the ship, and the boats were all more or less smashed and unfit for use, nor was there a spar left to rig a raft in case of necessity. Between 7 and 8 A.M., the ship was leaking very badly. Under these circumstances the Pilot and the Captain came to the conclusion that the ship had opened out so much that it would be fatal to stay where they were. Accordingly, they determined to slip

their anchor and run for Saugor Roads, 18 miles off. It was necessary to slip the anchors because during the night the windlass had been broken by the surging of the chain as the ship rode in the very heavy sea. At 1 P.M., when the ship was in six fathoms of water, they slipped their anchors and made sail for Saugor Roads. The weather was then moderating, though still blowing fresh, with heavy squalls and a rough sea.

The *Champion*, according to the evidence, on the afternoon of the 24th August, when running for Saugor, was in this condition. She was strained both in deck and poop from the tremendous bumping she had experienced, and, as appeared from the survey subsequently held, her bottom was also damaged. She was making 3½ inches of water an hour; her boats were all smashed; she had but one anchor left but not sufficient chain to use it, she required 45 fathoms of chains, whereas she had only 25, and to supplement this chain she had a hawser which had been already seriously damaged, and which was afterwards condemned on her [87] return to Calcutta on the 25th August. Her windlass was broken; and the crew were greatly exhausted and unable to get the anchor over the side of the ship. She was in fair trim as to spars, rigging, and sails, although, no doubt, the mast had suffered from the bumping, and some of the sails had been blown away during the night.

In this condition she was running for the Saugor Roads with wind south-west or west-south-west, Saugor Island north or north-east of her, the weather being still severe and the sea high. At 3 P.M. she passed the Lower Gasper Light, and at 4 the Upper Gasper, making for Black Point, the spot where it had been determined to beach her, unless assistance should come.

On the afternoon of 24th August there were in or just outside Saugor Roads four or five tugs, among these the *Rescue* and the *Clive*. Soon after setting sail the *Champion* hoisted signals of distress, she had signals flying at different masts and also a red ensign at the peak with a wheft in it. These signals were flying when the *Clive* passed the *Champion* and entered Saugor Roads. The *Champion* exchanged signals with the *Clive* and asked for assistance, but the *Clive* replied with her flags that she could not assist.

At 5-30 P.M. the *Champion* passed the Long Sand Light Ship and entered the Roads. At quarter to 6, while there was still a little daylight, she began to fire rockets with the view of attracting the attention of the tugs At 6-30 the attention of the Captain of the *Rescue* was directed to the rockets: at that time the *Rescue* was abreast of the Central Saugor Flat Buoy several miles up. He at once turned round with the intention of saving life, and came up to the *Champion* at about 7-30 P.M., it being then perfectly dark.

Up to this point of the case there was no dispute whatever as to the facts.

What followed subsequently to the *Rescue* reaching the *Champion* is thus described by the promovents in their written statement:- . . . "The weather at this time was squally with rain and the wind was blowing a moderate gale from the south-west and it was pitch dark. The *Rescue* sheered alongside as near as it was considered safe to approach the *Champion* and the Pilot, [88] Mr. Paulson, who was still on board that vessel, informed the Master of the *Rescue* that the ship had been ashore on Saugor Sands; that she had neither anchors nor chains; and that, unless the *Rescue* could take her in tow, he would have to beach the ship in the endeavour to save the lives of those on board. The Master of the *Rescue* was at the same time asked to take the *Champion* in tow by lashing the *Rescue* alongside of her, but this the Master of the *Rescue* refused to do for the reason that, in his opinion, such a course

of action would have exposed both vessels to the imminent risk of having their sides stove in colliding one with the other as they were lifted by the sea.

"The *Rescue*, although it was not considered safe to lash her alongside the *Champion*, without the loss of any time steamed ahead of the *Champion* and passed a rope for the purpose of hauling a hawser belonging to the *Rescue* on board. This operation, though successfully carried out, was attended with serious risk to the *Rescue*, as it necessitated the *Rescue* approaching perilously near the bows of the *Champion* in a seaway on a pitch dark night. The necessity for incurring this serious risk without further delay was however imperative, as the *Champion* would otherwise have drifted on to the Saugor Flat, and, once there would in all probability have become a total wreck.

"Having succeeded in passing a hawser on board the *Champion*, the *Rescue* took the *Champion* in tow and turned her round, so that she might stem the flood current. At the moment when the *Rescue* tightened her hawser and had the *Champion* in tow, both vessels had drifted abreast of and close to the Lower Saugor Flat Buoy, which marks the edge of the Saugor Flat, and the two vessels remained about this position, the *Rescue* slowly steaming ahead till midnight when the ebb began to make.

"At this time the wind was blowing strongly from the south-west, and the set of the tide, aided by the force of the wind, made the movements of the *Champion* very unsteady, taking sheers from starboard to port and forging ahead, making it very difficult and dangerous for the tug in those narrow waters. The *Rescue* continued to tow the *Champion* and kept her moving through the water backwards and forwards along a course of two miles, [89] and continued so to tow the *Champion* till day-break of the next day, the 25th day of August.

"At the time of the execution of this manœuvring and during its continuance the position of the *Rescue* and the *Champion* was extremely critical, in that it involved the double risk to both vessels being driven on one of the sandbanks or colliding with one or other of the steamers known at the time to be lying at anchor not far off in the Roads.

"At day-break on the 25th day of August, in the attempt made to turn the *Champion* to the north, the single hawser parted and was lost overboard. The *Rescue* then proceeded to pass a fresh hawser on board the *Champion*, which was effected by one of the crew of the *Champion* dropping a line on the deck of the *Rescue* as she steamed close under the jibboom of the *Champion* at the risk of being cut down by the ship.

"About 9 A.M. on the same day a second hawser was passed on board the *Champion* with the aid of the *Rescue's* life boat. While engaged in this work the boat sustained some injury to her gunwale and stern by colliding against the bows of the *Champion*. Immediately the second hawser was made fast, the *Rescue* proceeded full speed with the *Champion* in tow towards Calcutta.

"The *Rescue* went on in tow of the *Champion* until she arrived at Garden Reach, just before dark, on the evening of the 25th day of August when she cast the *Champion* off, but remained by her until she was safely fastened to her moorings by the Harbour Master's wire hawsers, the *Champion* having, as aforesaid, no ground tackle available for the purpose. It was then about 7-30 P.M.

The impugnants alleged that the *Rescue* took the *Champion* in tow on the night of the 24th after passing hawsers in the usual way, keeping the ship under weigh in Saugor Roads until day-break of 25th, and that she then proceeded with the *Champion* in tow towards Calcutta, where she arrived at about 5 P. M. on the 25th ; that the weather during the night was moderate

and usual south-west monsoon weather, the wind blowing fresh with squalls and rain; that when the *Rescue* took the *Champion* in tow neither was the ship nor the lives or limbs [90] of those on board in any immediate danger, and the *Champion* was within reach of other help. They submitted that the *Rescue* did not render assistance as promptly as she might have done, inasmuch as the *Rescue* had been seen at anchor in Saugor Roads three or four miles off at the time when the *Champion* had passed the Upper Gasper Light Ship and was flying distress signals and letting off rockets, but did not come to the *Champion's* assistance until over two hours after the *Rescue* had been seen by the *Champion*. They also submitted that neither the *Rescue* nor those on board had been exposed to any risk by reason of the services rendered by her, and that no unusual or severe labour was required by the *Rescue* or the crew in the course of such service. The impugnants further submitted that the claim of the promovents was "unjust, unreasonable, exorbitant and enormously out of proportion to the services rendered" by the *Rescue*; that the claim was not calculated in accordance with the principles upon which awards were made by Admiralty and Vice-Admiralty Courts in similar cases; and that the Court in dealing with the question of the costs of the action should take into consideration the unreasonable character of the promovent's claim.

The amount of damages sustained by the *Rescue* was by agreement assessed at Rs. 887-2-0.

The Captain, the Chief Officer, the Boatswain, and the Carpenter of the *Champion* were examined under Commission on behalf of the promovents. The result of their evidence as well as that of the witnesses called at the hearing, and that of the experts who were examined as to the necessity of beaching the ship if assistance had not come, and the danger to life, to the vessels, and to the cargo in rendering salvage services, appear fully from the judgment of the Appeal Court at pages 102 to 105.

No evidence was given on behalf of the impugnants, but near the close of the hearing the learned Counsel for the impugnants was instructed to ask for a short adjournment to enable the impugnants to call two of the Captains of the tugs that were in Saugor Roads on the night of the 24th August, one of whom was stated to be at that time somewhere down the river, and the other actually in Calcutta. This application was refused.

[91] The learned Judge at the original trial found that the tug had rescued the *Champion* from a position of distress and danger, and that the salvage services were rendered in the dark with a heavy sea and wind blowing. He also found that there was some appreciable risk to the tug in passing the rope; and in so far as there was appreciable risk to the tug there was some risk to those on board, but he did not think the risk was of a grave character. He also thought that the only persons who ran any risk were the men who manned the boat which took the line to the ship; but he thought the risk was greater than when performing ordinary towage service. He was of opinion that the evidence proved that those on board the *Champion* did all they could to get the anchor over the side of the ship; but failed to do it He found that it had been resolved to beach the ship if assistance could not be procured, but was of opinion that the necessity to beach her had not been proved He was not satisfied that, if the ship had been beached, she would have become a total wreck, or that, if she had been beached, she would have been suffered to remain so long as to become a total wreck, when there were three tugs and two ocean-going steamers at hand.

The material portions of the judgment of NORRIS, J., were as follows:- -

. . . . The *viva voce* evidence of the Pilot differs in no material

particulars from the evidence of the Carpenter, the Chief Officer, the Boatswain, and the Captain of the *Champion*, whose evidence was taken under Commission. . . . I am clearly of opinion, and there can be no shade of doubt, that, if the ship had been left at anchor at Saugor Sands, another course of bumping in any way approaching what she had gone through would have caused the loss of the ship, and I think those on board did right in slipping her anchors and running into Saugor Roads for the purpose of obtaining assistance. I think the Pilot acted as a prudent, cautious and careful man. . . . . . Upon the best consideration I can give to what was done, it seems to me that everything was done that reasonable and cautious men, careful of the lives and property entrusted to them could do. At half past 5 or 6 on the evening of the 24th [92] there were some steam tugs lying in Saugor Roads, and with the view of attracting the attention of the tugs, rockets were fired from the *Champion*. Ultimately the rockets attracted the notice of the Captain of the *Rescue*. He was running up Saugo Roads for safety, saw the rockets, and bore down in the direction of the rockets and came up to the *Champion* at half past 6 or 7. The *Rescue* came within hailing distance and asked "what do you want?" The answer from the *Champion* was "I have lost my anchors and chains, take me in tow." He said, "what, now?" The answer was "yes, at once." Then Mr. Paulson says "the tug came up alongside again and he decided to take us in tow." . . . . . I think Mr. Paulson's recollection must be at fault when he says the first attempt to pass hawsers was made then from the jib-boom end It does not detract at all from the singularly lucid way in which he gave his evidence. The line was passed by lowering a boat from the steamer and taking it to the ship and passing it. Again Mr Paulson's recollection is at fault. The Captain of the tug says the hawser was got in very quickly by the *Champion*. . . . . The *Champion* was taken in tow of the *Rescue* by the latter lowering a boat and passing hawsers in the usual way. That was done with alacrity.

"It was blowing and a considerable sea was on, considerably more sea than the ordinary monsoon weather in August. Until the tug turned higher up to Saugor Roads there was anticipation of considerably dirty weather. Then the *Champion* was towed during the night up and down over a space of two miles. Then, when daylight came, the second hawser was passed, she was towed up to Garden Reach, when, having no ground tackle of her own, she got a hawser from the Port Commissioners, and was moored for the night. The question I have to determine is, taking those facts into consideration, what is a fair remuneration to cover:

"(1) The amount of labour bestowed by the salvors;

"(2) The risk to the lives of the salvors;

"(3) The risk, if any, to which the salving vessel, the tug, was exposed;

"(4) I have to consider the value of the tug which was £19,000; and

[93] "(5) The value of the *Champion*, *i. e.*, ship and cargo, which was £43,000;

"The degree of distress and peril from which the *Champion* was rescued.

"(6) Having considered all these matters to the best of my ability, I have, on the one hand, to award generously for the protection of life and property and for the benefit of the commercial community; and, on the other, to guard against extortionate demands.

"I cannot but see that the labour of the salvors was at this time of year very much greater than if this ship had been lying to under bare poles. I do

not think the labour was very much greater than in ordinary towage contract. It was rendered in the dark with a heavy sea and wind blowing. I have got to take that into consideration. I do not think there was any risk of life to those on board the tug. That is the chief ingredient to be taken into consideration. I cannot think there was much risk, if any, to life. The only persons who ran any risk of life were the men who manned the boat which took the line to the ship. Looking at the general atmospheric conditions and the time of day, I do not think the risk to the men was much greater than when performing ordinary towage services. I think there was some risk to the tug. . . . I think there was some appreciable risk to the tug in passing the rope, and in so far as there was appreciable risk to the tug, there was some risk to the lives of those on board. But I do not think the risk was of a grave character. The value of the tug has been agreed on. The only question which gives trouble, is the degree of distress the *Champion* was rescued from. From the log and the evidence taken on commission, not an attempt was made to put out the anchor . . . Even if the anchor had been got over the side, . . . I doubt whether it would have been of much use. . . . I think the evidence proves that they did do what they could to get out this anchor, but failed to do it. I also think they did intend to beach the ship. . . . I do not think necessity has been shown to beach the ship. I am far from being satisfied that the ship would have become a total loss or that the cargo was materially injured or damaged. . . I am far from satisfied that the ship would have become [94] a total wreck, if she had been beached. Further, I cannot believe with three tugs and two ocean-going steamers near at hand that, even if she had been beached, she would have been suffered to remain so long there as to become a total wreck. She was in a position of distress and danger, and from that position she has been rescued by this tug. . . . .

"What would a Court of Admiralty have awarded for these services rendered in the Mersey. I think the award I am about to make is in excess of what the Court of Admiralty would have awarded. I am bound to award with a generous hand, and I award to the salvors £1,500 calculated at the rate of exchange of the day on which the services were rendered, *i.e.*, the 24th August. In addition to this sum I award Rs. 887-2-0 agreed upon. I must take a little time to consider as to how that sum should be apportioned. The award will be with costs."

Accordingly his Lordship, by an interlocutory decree, dated 22nd February 1889, condemned the impugnants to pay the said sums of £1,500 and Rs. 887-2-0, and costs, and ordered that, upon payment of the equivalent of £1,500 and of Rs. 5,000 for costs subject to taxation, the amount of bail should be discharged.

From this decree the promovents appealed.

Mr. *Evans* and Mr. *Gasper* for the Appellants.

Mr. *Woodroffe*, Mr. *Phillips* and Mr. *Roberts* for the Respondents.

The appeal came on for hearing before the same Judges who had ordered it to be admitted.

Mr. *Woodroffe* (after stating that the impugnants appeared under protest) said.—I have to take some preliminary objections to the hearing of this appeal.

[PIGOT, J.—Are they the same objections as were taken before?]

Mr. *Woodroffe*.—They are for the most part, but there are one or two others. The first is, whether there is an appeal from a single Judge exercising Vice-Admiralty jurisdiction to this Court.

[PIGOT, J.—That is the point on which we said that, on the practice of the Court, we should hold we had jurisdiction.]

[95] Mr. *Woodroffe*.—The point has never been raised in any previous case. I take the point and ask leave to argue it.

[PIGOT, J.—We had it fully argued before on the application.]

Mr. *Woodroffe*.—I did not argue it, I merely submitted it. I was stopped.

[PIGOT, J.—I do not think you will better your position by arguing it. We must, of course, hear you; but I may say that in the face of the practice of the Court in former cases, we could hardly bring ourselves to alter it.]

Mr. *Woodroffe*. After that intimation I will simply read the protest. (He then read the respondents' protest which was as follows):—

"The impugnants humbly protest against the said appeal of the promovents being heard or otherwise proceeded or dealt with by the Honourable Court for the following reasons:—

"1. For that this Honourable Court has no jurisdiction to hear or determine an appeal from a judgment or decree of a Judge of this Court exercising Vice-Admiralty jurisdiction and for that under the Vice Admiralty Commission of the 19th July 1822 the appeal in all Vice-Admiralty cases lay direct to the High Court of Admiralty in England from which High Court of Admiralty it was by the Statute of 3 and 4 Will. IV cap. 41 s. 2 transferred to the Privy Council, and such right of appeal direct to Her Majesty's Privy Council still exists and has not been taken away or affected by any subsequent enactment of a competent legislative authority.

"2. For that these impugnants have asserted their appeal to Her Majesty in Council against the above-mentioned judgment and decree and such appeal is still pending and undetermined, and the pendency of such appeal operates to suspend all proceedings by this Honourable Court in the exercise of its Vice-Admiralty jurisdiction in the above cause in respect of the said judgment and decree.

"3. For that the said appeal of the promovents was not asserted or proceeded with as it should have been in accordance with the said s. 2 of Act 3 and 4 Will. IV cap. 41 nor with the regulations governing the Vice-Admiralty Courts nor with the practice to be observed with regard to appeals from judgments and decrees of the Vice-Admiralty Courts.

"4. For that in appearing after the said judgment and decree had been pronounced on the apportionment of the amount thereby awarded between the salvors *inter se* the promovents absolutely perempted their appeal and have lost and forfeited all right to appear and to prosecute an appeal from the said judgment and decree."

[96] He also referred to Coote's Ecclesiastical Practice (Edition of 1847), p. 866.

[PIGOT, J.—Have you filed a memorandum of appeal?]

Mr. *Woodroffe*.—When we asserted our appeal, which we say lies to the Privy Council direct, we handed in a memorandum of the grounds of appeal; but we say the Privy Council has to dispose of that. In accordance with what fell from the Court on the last hearing, we have filed objections under s. 561 of the Code.

[PIGOT, J.—We will receive and record your protest, so that you may maintain all the rights you have in the Privy Council.]

(The objections were disallowed.)

Mr. *Evans*.—In cases where facts have been properly found, Courts of Appeal do not, as a rule, interfere. But here the learned Judge has totally misconceived the position, and, in important matters, such as risk to the *Champion*, he has gone in the teeth of the evidence. The evidence of experts shows that there was no alternative but to beach the ship. In other matters,

such as risk to the salvors, he has misconceived the evidence; and in such cases the Appeal Court has never failed to interfere. *The Chetah* (L. R., 2 P. C., 205). The impugnants could not call rebutting evidence, and did not attempt to do so. The written statement of the promovents is amply borne out by the evidence. There was no cross-examination as to evidence stating that, if the ship had gone ashore on Saugor Flat, she would have become a total wreck. Here the ship and cargo are of great value. There was imminent risk of life. Valuable services were rendered and unusual skill and enterprise were shown by the salvors.

[PIGOT, J. - The danger the ship ran at the time she was taken in tow was caused by the fact that she had lost her anchors. If any vessel finds herself in the Saugor Roads without anchors likely to go ashore, and destruction is imminent, what is the measure of the damages to be awarded for salving her?]

[97] Mr. *Evans*. I think the best exemplification of the measure of damages is given in *The City of Chester* (L. R., 9 P. D., 182) and *The Lancaster* (L. R., 8 P. D., 65, 71).

[PIGOT, J.—The strong point in your case is that the other steamers did not take any notice of the signals.]

Mr. *Evans*. *The Amerique* (L. R., 6 P. C., 468) deals with the question of value in estimating the amount of salvage award. In *The Thomas Allen* (L. R., 12 Ap. Cas., 118) the amount awarded was reduced. The two material things in salvage are: *first*, the imminent risk to the vessel salved; *second*, the value of the property salved. When salvors have run great risk, the amount is greatly increased. Here there was no time to bargain. The risk to the *Rescue* was, *first*, attempting to come close enough to the ship to take her in tow; *second*, risk of running in to other vessels enormously increased by darkness; *third*, risk to the boat; *fourth*, risk of towing the *Champion* up and down all night in dark, hazy, squally weather. Therefore the risk was very great, and the services which were rendered show skill courage, and enterprise on the part of the Captain and the crew of the *Rescue*.

[PIGOT, J. - The absence of assessors tends against your case.]

Mr. *Evans*. -But there is the evidence of experts. Their evidence shows the imminence of total loss to the *Champion*: danger to the *Rescue* in passing the hawser; danger to the lives of the boat's crew; danger to the *Rescue* in towing up and down in a hazy night amongst the shipping, and skill, courage, and enterprise on the part of the Captain of the *Rescue*. He referred to *The Lancaster* (L. R., 8 P. D., 65, 71) and *The City of Chester* (L. R., 9 P. D., 182).

[PIGOT, J, referred to *The England* (L. R, 2 P.C., 253)].

Mr. *Evans*.—*The Thomas Allen* (L.R., 12 Ap. Cas., 118) shows that the Appeal Court will not interfere unless the difference between the amount awarded and what it considers ought to have been awarded is about a third.

[PIGOT, J —In that case the other tugs turned back out of her way.]

[98] Mr. *Evans*.—My case is stronger than that one, which is a very strong case. I put it, we ought to get ten per cent., but at least £3,000. We should not have troubled the Appeal Court, unless we thought we should get one-third more, and brought ourselves within *The Chetah* (L. R., 2 P.C., 205): a small percentage on a large value is a sufficient remuneration. In *The Amerique* (L. R., 6 P. C., 468) the principle how the value is to be taken into account is discussed. That was a derelict case.

[PIGOT, J., referred to *The Cleopatra* (L. R., 3 P. D., 145)].

Mr. *Evans* – In the *Glenduror* (L. R., 3 P. C., 589) the award was increased to £2,000 from £1,000. That case is distinguishable in showing that, according to Sir ROBERT PHILIMORE'S other judgments, a larger amount would have been given, if the salvors had not been a life-boat crew. In the *Werra* (L. R., 12 P. D., 52) a smaller percentage was given, although the value was large; but there was no risk. The value of the property salved has always been an element in considering whether the amount should be increased.

Mr. *Woodroffe*. —We do not contend that no salvage services were rendered to the *Champion* by the *Rescue*. There is no desire on the part of the *Champion* to minimise the services rendered to her. The Appeal Court will not interfere unless the amount awarded is so disproportionate to the services as to shock the mind.

The learned Judge has not overlooked any of the ingredients which must be taken into consideration in making an award. He has taken into consideration the risk to the tug, to the lives on board the *Rescue* and the boat. Whatever the risk was it has been amply rewarded. There is evidence that the weather was moderating and had moderated when the *Rescue* came up and took the *Champion* in tow. The presence of the tugs in Saugor Roads must be an element in determining the degree of danger to which the *Champion* was exposed at the time salvage services were rendered. He cited *The Carrier Dove* (2 Moore's P. C., N. S., 243) on the question of assistance being available. Necessity for beaching the ship has [99] not been shown The Privy Council has refused costs to successful appellants in appeals from amount of award: the rule is apparently the same still; and *The City of Berlin* (L. R., 2 P. D., 187) shows the disfavour with which the Court looks upon such appeals.

In case of derelict vessels larger awards are given. In *The Cleopatra* (L. R., 3 P. D., 145) the services were of a most heroic character and the danger was most imminent. *The Lancaster* (L R, 8 P. D., 65, on appeal 9 P D, 14), to a certain extent, is in favour of the promovents. In this case there was an appeal, but the amount was not reduced on account of the rule of non-interference with the discretion of a Judge. As to *The Chetah* (L. R., 2 P. C., 205) the Judge in the lower Court was of opinion that the vessel was in such danger, that she would not only be lost but lost in a few minutes: the Court of Appeal had the aid of nautical assessors, and, with their help, came to the conclusion that the vessel would have come to destruction, but that there had been immediate danger of ruin.

The following cases were also cited and commented upon: *The Werra* (L. R., 12 P. D., 52), *The Thetis* (3 Hag. Adm. Rep., 14); *The Spirit of the Age* (Swabey's Adm. Rep., 209), *The Saratoga* (1 Lush, 318), *The Mary Stenhouse* (Pritchard's Digest, Edn 1865, Vol. 2, pp 844, 1091, 3rd Ed Vol. 2, pp. 1852 1940); *The Argo* (Swabey's Adm. Rep., 112): *The Tigris* (Pritchard's Digest, Edn. 1865, Vol. 2, p. 868, 3rd Ed., Vol. 2, p. 2032); *The Bilton* (Pritchard's Digest, Edn. 1865, Vol. 2, p. 868). *The Skiblander* (L. R, 3 P. D., 24); *The Glenduror* (L. R, 3 P. C., 589), and *The Thomas Allen* (L. R, 12 A. C. 118).

[PIGOT, J., referred to *The Cheerful* (Pritchard's Digest, 3rd Ed., Vol. 2, Salvage Award No. 209, p. 1958) and *The Genoca* (Pritchard's Digest, 3rd Ed., Vol. 2, Salvage Award No. 657, p. 2018)].

[100] As to the amount of bail, the ship was arrested for Rs. 1,25,000, or nearly £8,400, that is, it was arrested for £4,000 more than it ought to have been. Bail is exorbitant when it is more than what the salvors can expect to realize. Costs incurred in giving exorbitant bail have been allowed.—See *The George Gordon* (L. R., 9 P. D., 46) and *The City of Berlin* (L R., 2 P. D., 187).

Mr. *Phillips* followed on the same side and commented in detail on the evidence.

Mr. *Evans* in reply.—The only ground on which the Privy Council reduced the amount of the award in the case of *The Chetah* (L.R., 2 P. C., 205) was the want of imminence of peril. Mr. *Woodroffe* tried to make out that the award in *The Lancaster* (L. R., 8 P. D., 65 ; on appeal 9 P. D., 14) would have been reduced had it not been a matter of discretion. That is not so. The Appeal Court said that it was not a question what amount they would have given, but whether the Judge had acted reasonably.

The England (L. R., 2 P. C., 253) and *The Saratoga* (1 Lush., 318) have no bearing on this case. *The Cleopatra* (L. R., 3 P. D., 145) was quite an exceptional case and ought not to be taken as a guide. The ship salved was not an ordinary ship. It was expressly designed to bring *The Needle* to England. In *The Thomas Allen* (L. R., 12 A. C., 118) the amount was reduced for want of imminence of danger: still a large amount was given.

[PIGOT, J. -*The Thomas Allen* (L. R., 12 A. C., 118) was a case of meritorious service.]

Mr. *Evans*. --No doubt it was a case of very considerable merit and of great risk, but we do not know the amount of the value of the tug, and if there was any anchor. A large amount has been given when the ship salved was of great value, and there was considerable risk, enterprise, and courage. In *The Spirit of the Age* (Swabey's Adm Rep., 209) about six per cent. was given. Life has been taken into consideration in awarding salvage only recently. *The Glenduror* (L. R., 3 P. C., 589) is in my favour. In the cases in Pritchard's [101] Digest, when the amount awarded is small, there is something peculiar in the circumstances of the case.

As to costs: *The George Gordon* (L. R., 9 P. D., 46) has been cited as to exorbitant bail. There the award was very small and the action for £3,000. The amount of bail here is not exorbitant. We have asked for too much bail, but not exorbitant bail.

The **Judgment** of the Court (PIGOT and TREVELYAN, JJ.) was delivered by PIGOT, J., who (after stating the facts of the case) continued as follows:—

This is an appeal from the decision of a Judge of this Court sitting on the Original Side in the Admiralty Jurisdiction of the Court respecting a claim for salvage brought by the owners, master, and crew of the Steam Tug *Rescue* against the British Ship *Champion* and the cargo on board of her.

It was not disputed that salvage services were rendered by the *Rescue* to the *Champion*. The learned Judge in the Original Court held that such services were rendered, and he awarded the sum of £1,500 in respect of them, and he directed Rs. 5,000 to be deposited by the impugnants with the Registrar to meet the promovents' costs.

The appeal is from that decision. The appellants contended that the amount awarded is wholly inadequate, and that the amount ordered to be deposited for costs is wholly inadequate for the purpose.

. . . .

The *Champion*, on the afternoon of the 24th, when running for Saugor, was in this condition. She was strained, both in deck and poop, from the tremendous bumping which she had experienced; as appeared upon the survey held subsequently, her bottom had also suffered some damage. She was making three-and-a-half inches of water an hour. Her boats were all smashed. She had but one anchor, and not chain enough to use it; for she had only 25

fathoms of chain, and 45 would, according to the Captain's evidence, be necessary ; and to supplement this chain, she had only a hawser which had been already seriously damaged on her journey down from Calcutta, and which was afterwards condemned **[102]** on her return there. Her windlass was broken : and the crew were, according to the evidence, greatly exhausted and unable to get the anchor over the side of the ship. She was in fair trim as to spars, rigging, and sails, although no doubt the masts had suffered from the bumping, some of the sails had been blown away during the night, one fore-top-mizzle-stay-sail was blown away as she was running up to Saugor.

Being in this condition, what was her position ? She was running for the Saugor Roads, with the wind south-west or west-south-west. Saugor Island north or north-east of her, the weather being still severe and the sea high. At 3 she passed the Lower Gasper Light, and at 4 the Upper Gasper ; she had then 2 hours 24 minutes before sunset. Making as much sail as she could carry, she could not in all probability, according to the evidence, have got so far as Black Point, the spot where, as appears from the evidence to be presently mentioned, it had been determined to beach her, should assistance not be procured. She was in fact in a trap, sailing into the Saugor Roads, no doubt in perfect safety as long as she had water to sail in : but with no means of coming to an anchor, with nowhere, as the Captain says, to go to. She could not, as the evidence shows, have gone up the river after sunset ; the alternative suggested in cross-examination, namely, that of beating about in the Saugor Roads, being stated in the uncontradicted evidence in the case, to be an absolutely impossible one.

It was under those circumstances that Mr. Paulson says that, if the *Rescue* had not come up (as she did soon after sunset), he would, in another quarter of an hour, have beached the ship. Of the fact that the resolution to beach her unless assistance should come, was arrived at, there is no doubt. It is recorded in the log, in the protest, and is deposed to by the Captain as well as by Mr. Paulson.

On the afternoon of the 24th there were, in or just outside Saugor Roads (which begin above the Long Sand Light Ship) either four or five tugs ; *viz.*, the *Clive*, the *Rescue*, *Hunsdon*, *Retriever*, and, Mr. Paulson believes, the *Electric*.

As the ship was running up to Saugor, the *Clive* was in sight : the Chief Officer says, "We saw the *Clive* almost the **[103]** whole day of the 24th : we lost sight of her at 5 30 P.M., when it got dark." The Captain says "We first saw her at 3, she was alongside steaming into Saugor the same way we were." Mr. Paulson says : "During the time I was going from the place where I slipped my anchor, nearly where I started, I hoisted signals." The first signal was "I want a steam tug." The next was "I want immediate assistance." These signals were flying at different masts, and I had a red ensign at the peak with a whelt in it. That means, "that when you put up that signal any ship that sees it, is bound to come to your assistance."

"During this time I saw the *Clive* coming up astern of us. I saw her about half an hour after we started. When I first saw her she was four or five miles, three to four miles from us, and she came up astern of us. She overtook me and passed me, she was about a mile or a mile-and-quarter when she was nearest me . . . The signals we had were flying. We exchanged signals with him. She replied 'I cannot assist.' She did that with her flags."

He says, "The *Clive* is a new vessel of 600 or 650 tons. She is a very powerful tug. . . . . A comparatively new ship, and very powerful . . . I know the *Rescue*, of the two I think the *Clive* is more powerful but the *Rescue*-pulls better ; she has more nominal horse power ; she is a more modern

steamer." The Captain says "The *Clive* when she left us on the bank and when we passed her subsequently entering Saugor, was quite seaworthy." They passed her on entering at about 4 P.M.

The Captain says, that when they first saw the *Rescue* about between 5 and 6, they had then passed the *Clive* which was at anchor by the Long Sand Light Ship.

It is plain that so far as the *Clive* was concerned, her presence in the Saugor Roads did not in any way diminish the risk to which the *Champion* was then exposed. Whether it was the actual state of the weather, or an apprehension of worse weather, caused by the signals from Saugor, or any other reason more or less sufficient which prevented her from giving assistance, does not appear. There certainly was no assistance to be had from her.

Captain Stone of the *Rescue* says: "I remember the cyclone, I was anchored at Saugor at the time. I remained anchored there from 22nd night to night of 24th. I steamed up on the 24th to [104] upper part of Saugor for shelter. There was a signal flying at Saugor that a cyclone was raging. That was the first time I saw it, at 5 o'clock. The signal was a drum over a ball No. 9. I saw this signal at 5 o'clock and proceeded up Saugor Roads." Later on, in cross-examination, "I got under way at 5 P.M. I was then lying a little below the Long Sand Light and steered up for shelter to Saugor Road. Three other tugs had gone before me."

"About half an hour after the *Rescue* had left the Long Sand Light, that is, at 5-30, according to the log the *Champion* passed that Light Ship and entered the Roads. She had, as we have said, been flying signals since about 4 P.M., and at quarter to 6 began to fire rockets. There was a little daylight, it was twilight." Mr. Paulson says: "When some of the rockets were fired, at about 6-20, it was sufficiently dark to see rocks well. They would be fairly visible at 6-30. About twenty rockets were fired."

The *Champion*, when passing the Upper Gasper, took in some sail, to spin out the time, so as to attract the attention of the tugs whilst there was light, but, as Mr. Paulson says "they did not come to us." He says, he noticed some tugs turn round and pass up: one was the *Rescue*. "She was about two miles from me when she steamed away." At 6-30 Captain Stone's attention was directed to the rockets fired by the *Champion*.

At that time the *Rescue* was abreast of the Central Saugor Flat Buoy several miles up. He at once turned round with the intention of saving life; that, he says, was uppermost in his thoughts.

He rounded under the *Champion's* stern and hailed her at, he says, about 7-30 P.M., it being then perfectly dark. The Captain of the *Champion* puts it at 7, 6-30, or 7: Mr. Paulson says, about 7. The log says "at 7-30 the *Rescue* came to our assistance." Having regard to the fact that the *Rescue* was so far to the north as the Central Saugor Flat when she turned back at 6-30, and that she went so far south as the Upper Middleton Buoy where she met the *Champion*, we think 7-30 is most probably correct.

In cross-examination Mr. Paulson says: "The tugs were all able to render assistance, but did not come."

This is the state of the evidence as to the amount of assistance to be hoped for by the *Champion* from the tugs. After the tugs spoken of by Captain Stone are shown moving away, before the [105] *Rescue's* departure, for a place of shelter, they disappear from the case. There is nothing to show where they went to, or whether, when darkness came on so as to allow the *Champion's* rockets to become visible, they or any of them were in a position to see them;

or whether, if so, they were near enough to be in time to render any assistance; or, if so, able and willing to do so.

We have stated in detail what appears to us to be the effect of the evidence on this subject; because it was strenuously argued before us that the presence of these tugs at or near Saugor must be an element of much importance in determining the degree of danger to which the *Champion* was exposed at the time salvage services were rendered. We have arrived, upon a consideration of this evidence, at a contrary conclusion. We think that, looking at what actually happened, the *Champion*, when the *Rescue* saw her rockets and turned back to assist her, had no help to look for from any of the tugs but that one: and that in forming an opinion as to the danger in which she was, the other tugs may be left out of consideration as completely as the *Clive* must be.

We do not forget that near the close of the hearing in the Original Court, the learned Counsel for the impugnants was instructed to ask for an adjournment to the following Monday to enable the impugnants to call the Captains of two of those tugs, one of whom was stated to be at that time some where down the river, and the other actually in Calcutta; and that the learned Judge, as might have been expected, refused the application coming at such a stage of the case. Beyond showing that one at least of those Captains was available for the purpose of giving evidence, if the impugnants had thought it desirable to ensure his atttendance, and that they did not do so, we do not see that this application bears materially upon the case.

We have said that there is no doubt that it had been resolved to beach the ship, if assistance did not come. The learned Judge in the Original Court finds that this was so: but he adds "I do not think necessity has been shown to beach the ship, and before us it was contended that no such necessity was shown. We have not had, nor had the Original Court, the advantage of hearing this case with the assistance of nautical assessors. There were, however, expert witnesses examined in the Original [106] Court. Their evidence was given chiefly upon the facts as stated in the voluminous evidence of Mr. Paulson. No evidence was given on behalf of the impugnants. The promovents examined on Commission Captain Noel, theChief Officer, Boatswain and Carpenter of the *Champion* in October 1888. The case was heard in Court in the following February.

The Captain said that if the *Rescue* had not taken him in tow, he would have had to beach the ship. The Chief Officer said the same.

Mr. Paulson in his evidence says: "We had arrived at a conclusion as to what we should do. Captain Noel and I were agreed as to what we should do. The conclusion was that if, we did not get a tug, we should beach the ship." As to the anchor they had left he says: "The anchor was not ready. The crew were so exhausted we could not get it ready. We had a chain below which we could not bring up. Between pumping and taking in sail it was all that the crew could do." Later on, "I made up my mind to beach her because there was nothing to be done but beach her. My object in beaching her was to save the ship, if possible, which was very doubtful, and to save life as well. I say doubtful, because of the state of the sea at the time: there were breakers on the beach." In cross-examination he says: "If beached, she would have been wrecked. If the tug had not come, we would have gone higher up. It would have been a matter of only a quarter of an hour longer, and I would have beached her." To the Court he said: "It was night time and that prevented my sailing up to Diamond Harbour. It was night, I could not see narrow and dangerous channels. If I could have gone up to Diamond Harbour that night I would, but it was impossible."

Mr. Elson, Branch Pilot as we understand the highest rank in the Pilots of this port, says that he would have beached the ship, and supposing the ship to have been at the Lower Gasper, at 3, as she was, "I would not have been able to get to Diamond Harbour that day: the distance would have been too great. I could not have got beyond Saugor by dusk. It would not have been prudent to go through the narrow channel. The ship would have been utterly lost if I had tried to do so." The evidence of **[107]** Mr. Cox, Pilot, and of Mr. Alison, a seaman of experience, lately Marine Surveyor, and now Superintendent in the Licensed Measurers Department, is to the same effect as to the necessity which existed to beach the ship, if assistance had not come. They all say, however, that they would have tried the anchor still on board, if it was possible to do so, before beaching the ship.

Now, as to the possibility of using this anchor, and so avoiding the beaching of the ship, much argument was addressed to us. The suggestion is, that the state of exhaustion of the crew is exaggerated by Mr. Paulson, and that they could have got the third anchor over the ship's side, and that by supplementing the 25 feet of chain with the hawser, they could have saved her.

The learned Judge says: "I accept Mr. Paulson's statement that they had the anchor on board, that they lifted it to the forecastle and endeavoured to get it over the side, but the crew were unable to do it. Even if the anchor had been got over the side, having regard to where the chain was looking to the fact as to the hawser, looking to the fact that the windlass lever was broken and that it was only left to them to take a double turn round the mast, I doubt whether it would have been of very much use. I accept Mr. Paulson's evidence that they did attempt to get the anchor over but failed. Probably he has exaggerated the state in which the crew was; still I think the evidence proves they did what they could to get out this anchor, but failed to do it."

With this conclusion, upon the evidence, we fully agree It seems to us quite established that it was wholly impossible for the crew in their then state, exhausted from hard-work, exposure, and want of food (a description of their condition at 1 P.M., that day, in para. 7 of the impugnants' written statement), to get the anchor over the ship's side: we see no reason to doubt, either, that Mr. Paulson is right in saying that they could not have got up the chain, or, we think, fitted the tackle to the anchor, so as to use it effectually even if they could have got the anchor over the side.

This being so, it appears to us to be established on the evidence, that the necessity for beaching the ship would have arisen but for the *Rescue*; for we do not think it necessary to consider the **[108]** possibility of the ship's beating about all night in Saugor Roads, in a heavy sea, with an exhausted crew, with a great wind from the west-south-west or south-south-west blowing with occasional squalls, and with Saugor Island on her lee, and some shipping in the Roads.

Nor do we think that, upon the evidence, we need enter on any conjecture as to the possibility of the ship's being saved by one of the two ocean steamers which appear to have come into the Roads at or about the time the *Champion* was saved by the *Rescue*.

The next question is what conclusion can be reasonably drawn from the evidence as to the result of beaching the ship in her then condition upon the Saugor Flat. We think it clear, that, having regard to the lives of the crew, this, on evidence was the best place to beach her: the higher up the better; for the flat hard stretch of sand which forms the Saugor Flat, narrows as it extends north from three-fourths of a mile to one quarter of a mile at Black Point, which, or as near it as she could go, was the spot where Mr. Paulson

meant to take the ship But the *Rescue* came up to the ship at 7-30, when she was about the Upper Middleton Buoy, and taking it, that until she hove to, the *Champion* was making five miles an hour, she had shortened sail to increase her chance of being assisted in answer to her signals, we cannot see that there was any prospect of her getting so far north as Black Point: unless indeed Mr. Paulson's expression of a quarter of an hour means that, after the expiration of that time, he would have given up all hope of rescue and have directed the ship solely with a view to beaching her Even taking that view of his meaning we think the doubt expressed by him as to the possibility of getting as high as Black Point well founded, the ship must, we think, have most probably been beached lower down This however relates only or chiefly to the greater or less probability of loss of life. There would have been the longer space of shoal water for the crew to struggle through the farther south the ship was beached.

At the best, having regard to the state of the sea-breakers on the Flat, as Mr. Paulson says, serious danger to the lives of the crew there must have been, and from that danger, they were saved by the *Rescue*.

[109] As to the danger to the ship and cargo, the Captain said that had the ship been beached she would not, in his opinion, have come off again. The Chief Officer said that in all probability she would have gone to pieces. Mr. Paulson said that to save the ship was very doubtful, because of the state of the sea at the time, there were breakers on the beach. There was little, if any, cross-examination on this matter. No evidence was tendered to contradict the promovents' witnesses upon it, or to show facts which might lead to a contrary conclusion, nor were the promovents' expert witnesses asked anything on the subject.

The evidence as to the consequences of the bumping sustained by the ship at the Saugor Sands the night before, which was not challenged, is to the effect that she would have gone to pieces had she had another low tide of bumping; and we see no reason to doubt that the uncontradicted opinions of the witnesses we have referred to were well founded. No means are suggested in any part of the evidence by which either ship or cargo could have been saved from, what would have been practically, destruction. Even from the amount of water which reached the cargo during the cyclone, although, according to the evidence of the Carpenter, which we see no reason to doubt, the water was kept by the pumping low enough (14 inches) to prevent its reaching the cargo, more than 300 bales were damaged by mildew from contact with the water which got in through the straining of the decks, though the ship was battoned down. We think the *Rescue* saved the lives of the crew of the *Champion* from great peril, and the ship and cargo from imminent destruction.

The next question is, as to the character of the services rendered by the *Rescue*, having reference to risk incurred, skill and enterpise shown, and value of any property endangered in the act of salvage.

The learned Judge finds that the salvage services were rendered in the dark, with a heavy sea and wind blowing. He finds that there was some appreciable risk to the tug, and so far some risk to the lives of those on board; but does not think the risk was of a grave character. He does not think the risk much greater than when performing ordinary towage services. Upon this point also the learned Judge's decision is appealed from.

[110] The case for the promovents is that the *Rescue*, after rounding the *Champion*, and learning her condition, passed a rope on board of her for the purpose of hauling a hawser belonging to the *Rescue* on board; and that in doing this it was necessary for the *Rescue* to approach near to the *Champion*; that

having regard to the darkness, to the heavy sea and wind, and to the fact that the *Champion* was, as she lay hove to, sheering about from time to time, such necessary proximity to her was very dangerous to the *Rescue* and to the crew on board of her. Further, that the line to which the hawser was attached had ultimately, at any rate, to be passed on board the *Champion* by a boat manned by some of the *Rescue's* crew; and that this was a service of great danger in the then state of the weather. This is the first branch of the case of the *Rescue*, so far as danger to herself and crew, labour and skill deserving reward, are concerned.

The second is this: after the hawser was passed on board, and before it was tightened, the two ships got to the Long Stand Flat Buoy. Then the *Rescue* took the *Champion* in tow and turned her round so as to stem the flood which was then running. In this position both vessels remained until the ebb began to make. It then became necessary, the wind still blowing strongly from the south-west, that the *Rescue* should move the *Champion*; as Captain Stone puts it, " the ebb tide began to make, and of course the ship would come on top of me. I turned round and round I turned round eight times in the space of two miles." In fact, until daylight they passed another, and afterwards another; and that day towed the ship up the river, bringing her to Garden Reach that evening.

As to what occurred in passing the hawser Mr. Paulson gives a perfectly clear and detailed account of an attempt to pass a line between the jibboom of the *Champion* and the *Rescue*; an attempt which he describes as having been made twice unsuccessfully, and as being attended with danger to the *Rescue*. No other witness describes this, although no one says it did not take place. Mr. Paulson had the best opportunity of knowing whether it was done or not. It is not inconsistent with any of the other evidence that such an attempt was made. [111] But Mr. Paulson says that in the morning when a second hawser was passed it was done by a boat. In this his recollection is in conflict with that of Captain Stone, who says, " we did not lower a boat, a line was thrown from the jibboom. We could see then."

The learned Judge in the Original Court is of opinion that Mr. Paulson's memory is at fault in this matter, that he confounds one occasion with the other; and we think we ought not to dissent from that view entertained as it is by the Judge who heard the evidence. We think we should leave out of the case any supposition of danger to the *Rescue* from an attempt to throw a line on board her from the *Champion's* jibboom.

As to the passing of the hawser by boat: taking it, then, that the Captain of the *Champion* refers to any risk run by the *Rescue* as run in passing the hawser by boat, we must consider his evidence.

" *Q.*—Had the *Rescue* any difficulty in passing hawsers ?

" *A.*—Well, yes she had.

" *Q.*—Did she incur any danger ? (objected to)

" *A.*—The danger she would run would be of coming across our bows and standing a chance of being run into by us.

" *Q.*—Did she as a matter of fact incur the danger ?

" *A.*—Well, yes she did certainly."

In cross-examination he says: " The tug was 30 yards off. He was on both sides of me, he had to watch his chance; the ship was sheering about "

We own that we were somewhat struck with this phrase " watch his chance " as being appropriate to an attempt to approach the ship to take a line

thrown from her. It is, however, in any case sufficient to indicate that the ships were in dangerous proximity in the course of the discharge of the duty which the *Rescue* had undertaken.

The Chief Officer:

"*Q.*—Had the *Rescue* any difficulty in getting alongside of you? (objected to)

"*A.*—Yes. It certainly required some skill to come alongside of us with that sea that was running and the breeze that was blowing."

[112] We shall not refer to Mr. Paulson's evidence as to the danger of dropping the line. He says, and, we have no doubt upon the evidence as to the state of the weather, correctly, that there was danger in the boat helping to pass the line.

As to the towing up and down Mr. Elson says: "I heard what the state of the weather was. It was very hard weather. There was great risk of the tug being collided with in towing on an ebb and the wind aft and towing at night. Tugs do not generally tow at night. As to passing the hawser, there was danger to the lives of the crew of the boat." Mr. Cox says (passing over for the moment his opinion as to the danger in passing the hawser as Mr. Paulson described it):—"I heard how the *Rescue* towed the *Champion* up and down: In doing that, the *Rescue* was exposed to very considerable risk; the weather being hazy at the time would cause the risk."

To Court: "Yes: it amounts to this, that there is more risk in a hazy night than a bright night. The danger to the men in the boat was, I think, extraordinary danger."

As to the passing of the hawser, we understand Mr. Cox to regard the necessary proximity of the tug to the *Champion*, even while the line was being passed by boat, as involving danger to the tug.

Mr. Alison's evidence is also to the effect that the danger of towing up and down a ship with no anchor, in dirty weather, was a real one.

Upon the whole evidence of these witnesses, parts of which we have above referred to, we have to form our opinion. We consider it, with reference to what is we think established, that though the severity of the weather had moderated it was still blowing hard with squalls: that the squalls continued during the night, with bursts of rain occasionally obscuring the Saugor Light, and as we have already said the sea was high.

Upon this part of the case it is established, we think, that the salvage services of the *Rescue* were attended with: *first*, danger to the lives of the crew of the boat; *second*, danger to the safety of the tug (*a*) when engaged in passing the hawser line, (*b*) when towing the *Champion* up and down during the night in the confined space of the Saugor Roads and with shipping lying there; and, *third*, so far as the tug ran that danger, there was risk to the [113] crew other than the boat's crew. We do not think the latter danger to life was of a very grave kind: but we are satisfied that the danger of injury to this valuable ship was serious, though such as might be, as it was, avoided by the exercise of skill in the management of her.

Therefore, in the view of the evidence which we take, we differ from the learned Judge in the Original Court as to the danger from which the *Rescue* saved the *Champion*, and as to the risk incurred by the *Rescue* and the nature of the work performed by her which we conclude to have been very greatly more than ordinary towage services.

We have said that the impugnants tendered no evidence upon the different points arising in the case, the evidence given on behalf of the promovents is

explicit, and is, save in respect of, *first*, the dropping of the hawser line, *second*, a manifest error as to the depth of water in the pumps, *i.e.*, 26 inches in place of 14, and, *third*, a mistake of one hour made by Mr. Paulson as to the time when the Gasper Light Ships were passed, none of which mistaken statements in any way influence our judgment in favour of the appellants, unshaken in cross-examination.

No doubt there are cases in which evidence, even uncontradicted, may, as to matters of fact, be so incredible, and, as to matters of professional or expert opinion, so absurd, as to disappear in the face of hostile criticism. But we are of opinion that the evidence in this case is very far from being of such a character. As to the sources from which much of the evidence in the case comes, they are, in the first place, the officers and two men of the *Champion* herself: persons whose evidence might naturally have been expected to come from the impugnants: and who if their minds were biased at all, might be expected to show a bias in favour of the *Champion*: while as to Mr. Paulson and the expert witnesses, there is nothing, either in their position or in the character of the evidence given by them, to entitle us to suspect a prejudice on their part in favour of the promovents and they give their evidence, it must be remembered, with the guarantee of that professional reputation which they are no doubt highly interested in preserving.

It has been justly observed to us, that in this large port abounding in persons skilled in nautical matters, and well [114] acquainted with the navigation of the river, there must have been ample means of adducing skilled evidence to challenge the evidence given on behalf of the promovents, had that evidence and the conclusion to be derived from it been really open to substantial criticism. Nor can it be disregarded, that the written statement of the promovents gave, from the outset, ample notice of what their case was.

It has been often stated as a rule followed by the Judicial Committee of the Privy Council, in cases of salvage, that the Court will not disturb the conclusion of the Original Court as to the amount of reward, save in the case of some great difference between what the Appellate Court and the Original Court consider proper for the services rendered.

In the present case any difficulty arising from that rule hardly arises. The learned Judge in the Original Court has awarded £1,500 to the promovents, upon the footing that the *Rescue* did not save the *Champion* from a position in which it would have been necessary to beach her; that if beached, it does not appear that her destruction would have been imminent or even highly probable; and that the *Rescue* in performing her salvage services did not run substantial risk. We do not dissent from the estimate which he has made, upon that footing, of the reward to which the *Rescue* was entitled; and we may, we think, assume that if, upon the evidence, he had found what, after the advantage of hearing a very careful argument in appeal, we have felt bound to find, in addition to the conclusion arrived at by him, he would, as we now feel bound to do, have awarded a higher sum than the £1,500.

We hold that the due and proper salvage award for the services of the salvors in this case is £2,400 to be calculated at the exchange of the day mentioned in the decree of the lower Court; and to be apportioned in the like proportions to the same persons as provided by the Original Court with respect to the £1,500.

We think the bail was excessive: and that we should adopt the course followed by BRETT, J., in The *George Gordon* (L. R. 9 P D., 46) to this extent: that the impugnants should have as costs of the excessive bail required from them, the difference between the interest on [115] Government Paper in

which the bail has stood and the market rate from the time the bail was given until the excessive bail be released, and that that amount be set off against the judgment debt. It should be referred to the Registrar to fix the amount but if the parties agree as to the amount before the decree is signed, the reference need not be included in the decree, and the amount agreed on may be inserted in the decree as the amount to be deducted from the judgment debt. The amount of bail was excessive so far as it exceeded £4,000 for salvage reward, and £500 for costs.

We think the appellants must have their costs of the appeal. The appeal, as we have already held, is under the High Court Act and the Letters Patent, and the procedure in it is mainly governed by the Civil Procedure Code, and we think the usual practice of this Court in appeals from the Original Side should therefore be followed.

Costs of filing cross-objections will be allowed to the respondents. The appeal is allowed with costs on scale No. 2.

Appeal allowed.

Attorneys for the Appellants: Messrs. *Watkins & Co.*

Attorneys for the Respondents: Messrs. *Morgan & Co.*

C. D. P.

NOTES.

[As regards excessive bail see also (1899) 24 Bom., 55; 1 Bom., L. R., 557; as regards assessing the award, see also (1899) 27 Cal., 860.]

[17 Cal. 115]

CIVIL REFERENCE.

The 1st July, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Toomey............Plaintiff

versus

Rama Sahi............Defendant.*

Contract—Personal Contract—Assignment—Suit by assignee—Construction.

When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent so as to entitle the assignee to sue him on it.

Stevens* v. *Benning (1 K. and J., 168) referred to.

By an agreement in writing, dated 13th December 1882, and executed in favour of *M. D.* and *H. D.*, who were the proprietors of an Indigo concern, the defendant Rama Sahi agreed to sow indigo, taking the seed and *tandi* from *M. D.* and *H. D's* concern, on four biggahs of land

* Reference No. 2A of 1889, made by Moulvie Abdul Barry, Munsif of Mozufferpore, dated the 9th of May 1889.

out of his holding [116] selected, measured, and prepared by *M. D.* and *H. D.* or their Amlah: and when the indigo was fit for weeding "to weed, re-weed and turn it up to the extent necessary according to the directions of the Amlah of the concern;" and when the indigo was fit for reaping to "reap and load it on carts according to the directions of the Amlah of the concern;" and "if any portion of the said indigo land" was "in the judgment of the Amlah of the concern found bad," in lieu thereof to get some other land in his holding measured, and "on the land so measured in Bysack" to "sow Bhabdon crops only which will be reaped in Bhadur." The defendant also agreed not to sow on the land measured any crop that might "cause obstacle to the cultivation of indigo," and, if he did so, "the Amlah of the concern" should "be at liberty to destroy such crop," and he should not "oppose the destruction thereof nor sue in the Courts Civil or Criminal for destruction of the same." As regards a breach of any condition it was provided: "If I or my heirs depart from the conditions of this indigo engagement directly, or indirectly, or in any way neglect to cultivate or do not cultivate indigo, I or they shall pay to the above-named *M. D.* and *H. D.* damages for the same from my or their person and property and shall raise no plea or objection."

In 1886, *M. D.* and *H. D.* assigned the entire benefit of this agreement to the plaintiff.

In a suit by the plaintiff against the defendant for damages on account of his alleged failure to cultivate indigo for the plaintiff's concern in accordance with the terms of the agreement of the 13th December 1882: *Held*, that the agreement must be construed as one, which had been entered into by the defendant with reference to the personal position, circumstances, and qualifications of *M. D.* and *H. D.* and their Amlah; and that therefore, it was not assignable so as to give the assignee a right to sue upon it in his own name as for a breach of contract.

THIS was a reference by the First Munsif of Mozufferpore exercising Small Cause Court powers, and arose out of a suit for damages for breach of contract.

The plaintiff, George Toomey, who was the owner of the Kanti indigo concern, brought a suit against the defendant Rama Sahi for damages, on account of his alleged failure to cultivate indigo for that concern in the years 1293, 1294, and 1295 Fasli, in accordance with the terms of an agreement, dated the 13th December 1882, and executed by him (the defendant) in favour of Baboos Mathura Das, and Hanuman Das, who had assigned the agreement to the plaintiff.

At the time when Baboos Mathura Das and Hanuman Das established a rival factory, called the Mirzapore indigo concern, there [117] was a dispute between them and the owner of the Kanti concern, the plaintiff. This dispute was shortly after settled, and the owners of the rival factories entered into an agreement, dated the 4th March 1886, whereby a certain boundary line was fixed, and the proprietors of each of the two factories agreed not to have their indigo sown by ryots holding jotes outside the boundary line so drawn on their side of the factory. In consequence of this agreement the jotes of some of the ryots, who had executed agreements to sow indigo for Baboos Mathura Das and Hanuman Das, fell within the area over which the Baboos had given up their rights to have indigo sown for themselves; and accordingly the Baboos assigned the entire benefit under the agreements executed by these ryots in favour of the Kanti concern. The defendant was one of these ryots; and the agreement to sow indigo, which he executed in favour of the Baboos, was dated the 13th December 1882 The plaintiff sued the defendant on that agreement as the assignees of the Baboos. The defendant contended that the plaintiff was not entitled to sue him on his agreement of the 13th December 1882, inasmuch as he had never agreed to cultivate indigo for the assignees of Baboos Mathura Das and Hanuman Das, and there was no provision in the agreement that the representatives or assignees of the Baboos should have the right to enforce it. On behalf of the plaintiff it was urged that, although the term "heirs" was

not expressly mentioned in the defendant's agreement, it must nevertheless be implied, especially as s. 45* of the Contract Act of 1872 provided for such an omission; and that similarly the word "assignees" must be implied. The Munsif dismissed the suit with costs, contingent on the opinion of the High Court to which he referred the following question:—

"Whether by operation of law the word assignees could be imported into the agreement of the defendant dated the 13th December 1882."

This agreement was as follows:—

. . . .

"I the declarant do of my own free will and accord appear before Baboo Mathura Das and Baboo Hanuman Das proprietors of Mirzapore Indigo Concern Chakleh Nye Pergana Besarah give [118] in writing this indigo engagement for cultivation of indigo on four biggahs of first class land by a six and half cubit measuring pole within the area of mouza Beerpore Tuppeh Bhatsala Pergana Besarah out of my holding as per details at foot from 1290 to 1296 (one thousand two hundred and ninety-six) Fasli on receipt of Rs. 16 as advance and validly declares as follows:- In the commencement of the month of Assin and Kartick I or my heirs in company with the Amlah of the concern shall on the requisition of the above-named Baboos get the said (four) biggahs out of my holding as selected by the Amlah of the concern and the above-named Baboos measured and till, plough and turn up the same well as may be necessary for the term of this indigo engagement: And when the indigo land in the said mouza will be fit for sowing indigo the above-named Baboos or their Amlahs shall get it measured and prepared: After the measurement and preparation when the sowing season will come in Falgoon and Chait I or my heirs shall sow it taking indigo seeds and *tandi* from the concern: When the indigo will be fit for weeding I or my heirs shall forthwith weed re-weed and turn it up. . . . to the extent necessary according to the directions of the Amlah of the concern for the term of this indigo engagement: When the indigo will be fit for reaping I or my heirs shall in the indigo manufacturing season reap it and load it on carts according to the directions of the Amlah of the concern: I or my heirs shall plough the land with stumps in time and when the indigo grown from stumps will be fit for manufacture I or my heirs shall in the season of manufacturing indigo grown from stumps reap and load on carts the same also: If any portion of the said indigo land is in the judgment of the Amlah of the concern of the above-named Baboos found bad I (or my heirs) shall in lieu of such bad land again get measured some other land in my holding in the month of Bysack for the future and shall on the land so measured in Bysack sow Bhadhoi crops only which will be reaped in Bhadur: I or my heirs shall not sow on the land so measured in Bhadur any *rabi* crop such as *rahar bunga* etc., the sowing of which may cause obstacle to the cultivation of indigo from the commencement of the month of Assin: Should I or my heirs do so the Amlah of the concern of the above named Baboos shall be [119] at liberty to destroy such crop and I or my heirs shall not oppose the destruction thereof nor sue in the Courts Civil or Criminal for destruction of the same: Should I or my heirs sue in the Courts Civil or Criminal such suit shall under the terms of this indigo engagement be inadmissible and invalid:

*[Sec. 45:—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.]

Devolution of joint rights.

As regards the bad land that the above-named Baboos or their Amlah may of their own will and accord give up on taking some other land in exchange I shall sow on it any crop I like: I shall take from the above-named Baboos value of the indigo at Rs. 12 per biggah year by year for the term of this indigo engagement: As regards the sum of Rs. 16 now taken as advance I shall at the end of the year 1296 Fasli which is the last year of the term of this indigo engagement set off this sum against the value of the indigo of that year and take the remaining value due to me according to account: I shall take advance on the 1st Assin make weeding in Bysack and take value in full in Bhadur every year during the term of this indigo engagement: If I or my heirs depart from the conditions of this indigo engagement directly or indirectly or in any way neglect to cultivate or do not cultivate indigo I or they shall pay to the above-named Baboos damages for the same at Company's Rs. 20 per biggah from my or their person and property and shall raise no plea or objection. To this purport I give in writing these few words in the shape of an indigo engagement for a term of seven years to come to use when required"

Mr. *Evans*, and Mr. *O'Kinealy*, (instructed by Mr. *G. B. McNair*) for the Plaintiff.

Baboo *Kali Kishen Sen* for the Defendant.

The **Opinion** of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

This is a reference made by the First Munsif of Mozufferpore upon a point arising in a suit brought by the owner of the Kanti Indigo Concern against the defendant for damages on account of his alleged failure to cultivate indigo for that concern in the years 1293, 1294, and 1295, in accordance with the terms of an agreement entered into by him and dated the 13th of December 1882. The Munsif has referred to us the question [120] whether by operation of law the word "assignees" can be imported into that agreement. The agreement was made with Baboos Mathura Das and Hanuman Das, who assigned, or attempted to assign it to the plaintiff, and the plaintiff as such assignee now sues on that agreement.

The arguments of the two learned Counsel, who appeared before us on behalf of the plaintiff, went over a very wide range. In stating our opinion that the conclusion of the Munsif was right, we shall limit ourselves to one ground only. We do not propose to deal with the general questions with regard to the rights of persons to whom contracts of various kinds are assigned in this country. Assuming for the purposes of the argument as a general rule the assignability of contracts in this country, and the power of the assignees to sue upon them, we do not think that in the present case the contract was one, which, upon a fair construction of it, can be held assignable so as to give the assignee a right to sue upon it.

This agreement is described by the defendant Rama Sahi as an "engagement for cultivation of indigo on four biggahs of first class land by six and a half cubit measuring pole within the area of mouza Beerpore Tuppeh Bhatsala, Pergana Besarah out of my holding as per details at foot from 1290 to 1296 Fasli on receipt of Rs. 16 as advance." It provides that "in the commencement of the month of Assin and Kartick I or my heirs in company with the Amlah of the concern shall on the requisition of the above-named Baboos get the said four biggahs out of my holding as selected by the Amlah of the concern and the above-named Baboos measured." When it is fit for sowing indigo the Baboos or their Amlah shall get it measured. "After the measurement in Falgoon or Chait, I or my heirs shall sow it taking indigo seeds and *tandi* from the concern. When the indigo will be fit for weeding I or my heirs shall forthwith

weed, re-weed and turn it up . . . . . to the extent necessary according to the directions of the Amlah of the concern." When the indigo is fit for reaping I shall "reap and load it on carts according to the directions of the Amlah of the concern." Then again "if any portion of the said indigo land is in the judgment of the Amlah of the **[121]** concern of the above-named Baboos found bad, I or my heirs shall in lieu of such bad land again get measured some other land in my holding," and, on the land so measured "sow Bhadbon crops only which will be reaped in Bhadur." Then there is a provision that he is not to sow on the land measured any crop which may cause obstacles to the cultivation of indigo. Should he do so, "the Amlah of the concern of the above-named Baboos shall be at liberty to destroy such crops, and I or my heirs shall not oppose the destruction." Then as to the bad land which the Baboos or their Amlah give up on taking other land in exchange, he is to be entitled to sow it as he pleases. Then there is a provision for payment of damages to the Baboos in case of his neglecting to cultivate.

We think that this contract is one which may reasonably be viewed as having been entered into with reference to the personal position, circumstances, and qualifications of the Baboos and their Amlah. It makes the Baboos and their Amlah sole judges in matters of great importance; and it does seem to us that it would be an unreasonable construction of this agreement were we to hold that it could possibly have been in the contemplation of the provision that any persons, the servants of any persons, the managers of any concern to the owners of which the Baboos may please to assign this contract, were to stand in the place of the Baboos and exercise the powers conferred by this agreement on the Baboos and their Amlah. When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent, so as to entitle the assignee to sue him on it.

We have not before us the question whether or not the benefit of such a contract as this would have passed to the executors of the Baboos, supposing they had any. We should perhaps in that case be disposed to construe the contract as one which, together with the right to sue on it, the defendant might reasonably be supposed to have intended to be passed to the executors carrying on the same concern. This of course is but an *obiter dictum*, as the question does not arise in the case.

[122] We may, with reference to the principle to which we have just referred, that when considerations relating to the person with whom a man is willing to contract, as, if personal relations between the parties, or the personal condition or qualifications of the promisee, form an element or may fairly be supposed to have done so in the entering into of the contract, mention a passage in Vice-Chancellor WOOD'S judgment in the case of *Stevens* v. *Benning* (1 K. and J. 168), at pp. 175-6. In this case we limit ourselves to the proposition that this contract cannot be construed as one which was entered into save with reference to the person, qualifications, status, and position of the Baboos of the concern of which they had charge. Therefore, we hold that neither by importation into the agreement, nor by any equitable principle, is the plaintiff entitled to sue in this case in his own name as for a breach of contract.

C. D. P.

NOTES.

[*See* also (1894) 17 Mad., 168; (1906) 36 Cal., 702; 34 Cal., 289; (1903) 5 Bom., L. R., 373.]

[17 Cal. 122]

PRIVY COUNCIL.

The 27th and 29th March and 14th May 1889.

PRESENT.

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR R COUCH.

Tarachurn Chatterji .... Defendant

versus

Sureshchunder Mukerji and others............Plaintiffs.

[On appeal from the High Court at Calcutta.]

Hindu law—Will—Construction of will of Hindu testator—Power to adopt conferred on testator's widow ended on estate vesting in his son's widow—Gift of beneficial interest.

On a claim by the children of the testator's daughter, as against his brother's son, held that the testator's direction to his executor (who was his elder brother), to make over what ever remained of his estate, after payment of debts, to his, the testator's son ("when he comes of age") had the effect of a gift to that son operating at that time, and that the words in the will, "if my minor son dies," meant, in order to be consistent with the above, "dies before attaining full age"

On the death of the testator's son, after attaining full age and leaving a widow, the testator's widow, although empowered by the will to adopt if the testator's son should die without son or daughter (which he did) could not exercise this power after the estate had consequently upon the son's death, vested in his widow for her widow's estate

[123] *Thayammal* v *Venkatarama Aiyan* (L R, 14 I A., 67 I L R, 10 Mad, 205) referred to and followed

The testator's son, having succeeded to the estate under the above provisions, himself made his will, whereby he directed that "his cousin brother" (the defendant above mentioned), on attaining full age, "becoming *dakhilkar* of my share as well as the shares of my elder uncle," should maintain his, the testator's mother and widow

Held, that this was not an absolute gift of the beneficial interest, and that the claim of the children of the daughter of the parent testator was valid

APPEAL from a decree (7th March 1886) of the High Court, which reversed a decree (10th September 1884) of the Second Subordinate Judge of the District of the 24-Pergunnahs.

The present questions related to the construction of two wills The suit was for a declaration that the plaintiffs, minors suing by their mother, were entitled as heirs to the whole estate of the late Kalichurn Chatterji, only son of the late Madhub Chunder, whose daughter, Thakomoni, having been married to one Jogesh Chunder Mukerji, was the mother who now sued on behalf of her children. Madhub Chunder died in 1845, having been joint with his elder brother, Anund Chunder, who died in 1850, leaving a son, the defendant Tarachurn and a widow Pearimoni, also a defendant. Madhub Chunder by his will, of which his elder brother Anund Chunder was appointed executor, gave a half share in his estate, in case his son Kalichurn should die a minor and without issue, to the son of

his daughter, if she should have one; and the other half to Anund Chunder's son, Tarachurn. He also gave to his widow a power of adoption to be exercised in events which however did not occur.

At an earlier stage it was determined, and was not now disputed, that Tarachurn was born before the death of Madhub Chunder. Calichurn attained full age in 1850, when he, along with his uncle's widow Pearimoni, took the management of the family property. Three years later, in 1854, he died without issue, but leaving a widow Matangini, a minor. He had made a will, dated 14th December 1853, providing as to Tarachurn's becoming *dakhilkar,* and directing the adoption of one of the sons of the latter, in certain circumstances, by Matangini; which provision occasioned some of the doubts in the construction of the document.

[124] Both the wills appear in their Lordships' judgment.

The plaintiff's case was that they were entitled to their shares upon a partition by right of inheritance. Tarachurn, in his defence, relied upon the wills as negativing the claim. He also set up a surrender to himself by Kalichurn's widow of her estate, and adverse possession beyond the period of limitation.

The Second Subordinate Judge held that, under the will of Kalichurn, the defendant had a life estate in his property, and that the plaintiff's title would not accrue till his death.

On the plaintiffs' appeal to the High Court, a Divisional Bench (PRINSEP and TREVELYAN, JJ.) reversed this decision, being of opinion that the plaintiffs' title as heir was not affected by anything in the will either of Madhub or of Kalichurn, or by surrender or by adverse possession.

That part of the judgment, which bears upon the only questions to be disposed of on this appeal, was as follows:—

"Madhub's will may be shortly described in the following terms:—After appointing his elder brother Anund to be his executor, and making provision for payment of his debts and certain expenses connected with his family, it provides that his widow should receive a certain sum as maintenance. Anund was appointed to manage the estate as heretofore, until the testator's minor son Kalichurn attained majority, when Anund is directed to account to him. Permission to his widow to adopt with the consent of Anund is given, if Kalichurn should die without issue. In the event of Kalichurn dying, it is provided that if Thakomoni, his daughter, should be married and give birth to a son, then on that son attaining majority he should receive one-half of the testator's estate, the other half going to Anund's son, and in the event of her dying without a son, she would receive maintenance."

In regard to the will of Kalichurn, the Judges expressed the following opinion:—

"On Tarachurn attaining majority, it was further provided that he should become *dakhilkar* of the entire estate, including both his own and Kalichurn's share. The testator's widow is directed to adopt a son of Tarachurn, or, in the event of Tarachurn having no son, to adopt a suitable person. The testator's wish is expressed that the property should remain joint; that his widow should [125] live with the family; and that, if there should be any disagreement and she should live in her own father's house, she should receive maintenance. In the event of her not making an adoption, it is provided that she should have no concern with, or right to, the goods and properties; but inasmuch as no term is specified within which she was to adopt, this stipulation would have no effect until she became physically incapable of adopting. There is nothing

in the will to show any intention on the part of the testator to disinherit his widow. The only portion of the will bearing in that direction, as has been already pointed out, relates to her receiving maintenance in a certain sum in the event of her finding it necessary to leave the family house and reside with her father, and on her failure to adopt, which, for reasons stated, is inoperative.

"The object of the testator in giving her maintenance only in the event of her leaving his house, was not to disinherit her but to ensure that the property should remain joint.

"The will declares that 'he who will be heir for the time being will jointly continue in possession of all the aforesaid properties with his co-sharers.' Looking at the general scheme of the will, we think that the widow would be included in the term 'heir for the time being.'

"In our opinion, therefore, on the death of Kalichurn, his minor widow became entitled to his estate, which was to be under the management, *first*, of his step-mother Srimati Debi, and then on his attaining majority, of the senior male member Kalichurn; that a son was to be adopted, but that no provision was made for the inheritance in the event of failure to make this adoption."

Tarachurn appealed to her Majesty in Council.

Mr. *T. H. Cowie*, Q C., and Mr. *R. V. Doyne*, for the Appellant, argued that he took an estate for his own benefit in Kalichurn's half of the joint family property, liable only to be defeated in case of an adoption by Matangini, in accordance with the power given to her by her husband's will. The appellant did not take as a mere trustee for her and the heirs of Kalichurn. He was, in the event that had occurred, entitled to one-half of Madhub Chunder's estate, under his will, and that this was so, was confirmed by the will of Kalichurn and the expressions used in it.

[126] Mr. *J. D. Mayne*, for the Respondents, argued that the High Court had correctly construed the wills of Madhub Chunder and Kalichurn.

Mr. *T. H. Cowie*, Q.C., replied, claiming in the end that the High Court ought not to have made Tarachurn liable for the costs of the suit.

Afterwards, on 14th May, their Lordships' Judgment was delivered by

Sir R. Couch. The appellant (one of the defendants in the suit) is the son of Anund Chunder, who died in 1850. The respondents (the plaintiffs in the suit) are the grandsons of Madhub Chunder, the brother of Anund. He died on the 14th October 1845. Madhub Chunder had a son, Kalichurn, who died on the 23rd October 1853, after attaining majority, and a daughter, Thakomoni, the mother of the respondents Kalichurn left a widow, Matangini, who died on the 21st December 1879. The property in suit is the share of Madhub in the joint property of himself and Anund, and the respondents are entitled to it by inheritance if it is not disposed of by the will of Madhub, which was made shortly before his death, or by the will of Kalichurn, by virtue of one or the other of which the appellant claimed to be entitled to the property. It was not disputed that the will of Kalichurn was genuine, and Madhub's was found to be so by both the lower Courts. The only questions in this appeal are the constructions of these wills.

The will of Madhub addressed to this brother Anund, after stating that he had a half share in their joint property, and giving directions for the payment of debts and the maintenance of his wife and son and daughter, and the education of the son and other matters, says: "God forbid, but if my minor son should die and my daughter should get married and a grandson be born, then on the said grandson's attaining majority you will give him half of my share, whatever it may be, and give half to your son. God forbid, but if she having no son becomes a widow, then you will pay her Rs. 4 a month

for maintenance. You shall perform the Sharodia (Durga) puja, srads of parents and others, and pay perquisites and presents to the spiritual guide and family [127] priest according to the circumstances and your sense: God forbid, if you die before my son and daughter attain majority, then you may appoint attorney whomsoever you may think fit. You shall account for and make over whatever remains of the estate after payment of debts to my son when he comes of age. If you be of opinion that my half share should be sold and Company's papers should be purchased (with the proceeds), you may sell it for its proper value. Further, if my only son dies before he gets children, my wife may, with your consent, adopt a son." It has been found by the High Court, and is not now disputed, that Tarachurn was born before the date of this will.

The direction to make over the estate to the son when he comes of age has the effect of a gift to him to take effect at that time, and the words, "If my minor son dies," in order to be consistent with that, must mean dies during minority. On the son's death after coming of age leaving Matangini his widow, Madhub Chunder's wife would not have power to adopt a son, the estate of Kalichurn having become vested in his widow.—*Thayammal* v. *Venkotarama Aiyan* L. R., 14 (I. A., 67; I. L. R., 10 Mad., 205).

The will of Kalichurn is now to be considered, as, if the appellant has any title to the property, it must be under that. In the official translation of it in the Record of Proceedings it is said in several places to be torn and illegible, and it was agreed before their Lordships that the statement of it in the judgment of the Subordinate Judge should be taken as correct. This is as follows (the figures 1, 2, etc., being inserted by the Judge):—

"The testator after describing the properties standing *swanami* and *benami* and in possession and out of it, and stating that his father, Madhub, and Madhub's elder brother, Anund, had jointly acquired them with their own earnings, and were in joint possession and enjoyment (*dakhal roge*) thereof, and were performing the ceremonies and maintaining the family with the profits and their own earnings, says in the will: "As my younger uncle died, leaving no issue or widow, in 1248, during the life-time of my father and the elder uncle, they remained in possession (or were possessors, *dakhilkars*) of all the estate. In the meantime, through the influence of evil stars, they became heavily involved in debts, and before they were all paid off, my father died in Assin 1252. I was then a minor, and *my mother*, [128] *Srimati Debi, was my guardian in law Courts under the guidance of My elder uncle*, who (with his own earnings and the profits of the estate, performed the ceremonies, and maintained the family, myself and my mother, as before, and paid off a large proportion of the debts) died in Srabun 1257, leaving his minor son, Tarachurn Chatterji, and my aunt, his widow, as his heirs. The said aunt, through evil advice of bad men, being about to divide the properties, I, on attaining my majority in 1257, made statements in some Courts with regard to some of the properties as if they were my father's self acquired and exclusive properties, with a view to prevent the threatened division (or partition), and, taking upon myself the payment of debts due to some of the creditors, made arrangements with them and am gradually paying them off. But, in fact, maintaining those properties, debts, and dues still joint, I am in joint possession (*dakhilkar*) of the whole estate in conjunction with my said aunt, and am performing the ceremonies and maintaining the family. But I am so seriously ill now that my life is despaired of, and man is mortal and life is uncertain. I, therefore, deem it proper to make a will of the properties that will fall to my share. So laying down these rules I make my will, that (as) ere this my mother was my guardian according to the *anumati-patra* of my mother and my elder uncle's consent, (1) I appoint my mother (step) the executrix of my said whole estate. So long as my cousin brother Tarachurn does not attain majority, my mother, in conjunction with my aunt, shall maintain and protect my minor wife, Matangini Debi, and perform the ceremonies and maintain the family

as before, pay off the creditors' debts, conduct the law suits already pending in Courts or to be instituted hereafter, file documents, pay debts howsoever incurred, take back documents and realise dues. (2) Afterwards on attaining majority, my cousin brother, Tarachurn, becoming possessor (*dakhilkar*) of my share *as well as the share of my elder uncle*, shall maintain my mother and wife. (3) Further, I, being the only son of my father, *it is provided in his said anumati-patra that if I die before the birth of any issue, my mother shall adopt a son according to Shastras.* If my mother does adopt a son, well and good; otherwise on attaining majority my wife shall adopt one of Tarachurn's sons, and shall pass her time (life) under the kurtaship (management and protection) of Tarachurn. God forbid, if Tarachurn does not get issues, then she may adopt a son of somebody else fit for the purpose. (4) When the ijmali properties have not hitherto been partitioned, they shall remain joint. (5) And save and except turuf Belpukhuria chuck lands purchased in auction, *nobody shall have power to dispose of any other property by mortgage gift, or sale.* (6) The heir for the time being shall remain in possession (*dakhilkar*) of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family, take proper notice of my sister and cousin sister, and my wife shall accept *muntra* (spiritual or religious initiation) according to the *kulachar* (family custom) from my **[129]** spiritual guide, or whomsoever may be living of the family of my *guru*, and shall live in my house. (7) *My mother and others* shall cause her to perform the proper religious ceremonies. (8) If there be disagreement in any respect and she lives in her father's house, she shall get Rs. 10 per month for her maintenance from my *mother and others.* (9) If she does not adopt a son in the manner heretobefore provided for, there shall remain (or be) no concern (*elaka*) with and right (*sattwa*) to the estate and things, etc., on the part of my wife. (10) My clothes and raiments are left in the care of my mother and aunt. Tarachurn shall get them (*paibek*) when he comes of age. (11) Except those (clothes and raiments) the *ijmali* metal plates and utensils and those used for puja and the whole of the immoveable and moveable estate are left *ijmali*. (12) My mother and aunt may sell the said Belpuknuria chuck lands . . . . to pay off debts or to purchase other properties nearer home." . . .

In the lower Courts much stress appears to have been laid on the word *dakhilkar*, which it was contended applied to one holding by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee. The ordinary meaning of the word is "occupant," but the testator where he says he is in joint possession of the whole estate in conjunction with his aunt, and where (at No. 6) he says "the heir for the time being shall remain in possession of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family," appears to give it a large meaning. In order to see what it means in the sentence, "Afterwards on attaining majority my cousin brother, Tarachurn, becoming possessor (*dakhil-kari* of my share as well as the share of my elder uncle, shall maintain my mother and wife," the context must be looked at. These are the only words that can operate as a gift to Tarachurn. The testator begins by appointing his step-mother executrix, meaning manager of estate. So long as Tarachurn does not attain majority, she is to manage in conjunction with his aunt. On attaining majority, Tarachurn is to become possessor of the share, whether in the same capacity as the step-mother or otherwise is doubtful, but what follows assists in discovering the intention of the testator. He alludes to the provision in his father's will that if he dies without issue, his mother should adopt a son, who apparently, he thinks, should take the estate; and he says that if mother does not adopt a son, his wife shall adopt one of Tarachurn's sons, and if Tara-**[130]** churn has no sons, she may adopt the son of somebody else. That he wished an adoption to be made is apparent from the direction (9) that if his wife did not adopt a son she was to have no concern with, and right "to, the estate and things, etc.," and the words at (6), "the heir for the time being

shall remain in possession," seem to be intended to refer to an adopted son rather than to Tarachurn. If the intention was that Tarachurn on attaining majority was to take the estate for his own benefit, it would be giving him a direct interest to prevent the wife making an adoption, which he might do by refusing to give one of his sons, and thus defeat that intention. It is more reasonable to suppose that the intention was to benefit the family of Anund by obliging the wife to adopt a son of Tarachurn, than by giving the estate absolutely to Tarachurn on his attaining majority. Their Lordships are of opinion that the proper construction of the will is, that it provided for the management of the property on the death of Kalichurn, and gave power to his widow to adopt, under certain limitations; that, on his death, his widow Matangini, became entitled to his estate, and on her death, the plaintiffs became entitled. This was the opinion of the High Court, which made a decree accordingly, reversing the decree of the first Court. That Court had ordered the costs of Tarachurn and another defendant, Ram Krishen Nuskur, to be paid out of the estate of Kalichurn, but the High Court ordered those defendants to pay the plaintiff's costs in the High Court and also in the first Court, and the other defendants to bear their own costs in all Courts. Their Lordships think that the costs of all parties in the appeals to the High Court and in the first Court should be paid out of the estate of Kalichurn, and they will humbly advise Her Majesty to vary the decree of the High Court accordingly, and in all other respects to affirm it. This variation ought not to make any difference in the order as to the costs of this appeal, and the appellant will pay the costs of it.

C. B. *Appeal dismissed.*

Solicitors for the Appellants: Messrs. *Barrow & Rogers.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

NOTES.

[As regards the determination of the power to adopt upon the vesting in the son's widow, notwithstanding subsequent vesting in the adopter, see also (1906) 33 Cal., 1306; (1905) 32 Cal., 861; (1898) 23 Bom., 327; (1890) 14 Bom., 463.]

[131] PRIVY COUNCIL.

The 10th April, 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR RICHARD COUCH.

Tilukhdari Singh and others... ....Plaintiffs.

versus

Chulhan Mahton...........Defendant.

[On appeal from the High Court at Calcutta.]

Abwabs, Meaning of—Long period of payment of abwabs—Effect of ss. 54, 55 and 61 of Regulation VIII of 1793.

Payments over and above rent, and described as abwabs in the zemindar accounts, for which, as abwabs, the tenant was sued, were held to be rightly treated as abwabs, and not as forming part of the rent fixed. They were held not to be recoverable from the tenant, although they had been paid for a period of unknown length and according to a long standing practice, not having been, if payable at the time of the permanent settlement, consolidated with the rent, as they should have been if then payable. under s. 54 of Regulation VIII of 1793. Not having been so consolidated, they could not be recovered under s. 61. If not payable at the time of the permanent settlement, they came under the term of new abwabs, and in that case were illegal under s. 55.

APPEAL from a decree (19th January 1885) (I. L. R., 11 Cal. 175) of the High Court reversing on second appeal a decree (21st March 1883) of the Judge of the Gaya District, and restoring a decree (30th June 1882) of the Subordinate Judge of that district.

The question raised on this appeal was whether the appellants were entitled to recover, as landlords, from the respondents, as tenants, sums entered in the zemindari papers, as customary abwabs, and paid for a long period. The suit out of which this appeal arose was brought by the appellants, thikadars of mouzas in the Gaya District, to recover from a ryot holding under them, Rs. 1,105, arrears of rent, both *nakdi* (or cash) and *bhaoli* (in kind), for the years 1286 to 1288 (Bengali), together with customary abwabs alleged to have been paid from time immemorial. The defendant admitted holding land under the plaintiffs, some at *nakdi*, other at *bhaoli*, rent; and also admitted that one anna, "*hajjatana*," and three pice for "batta company" were payable by him. It was also found by both the Courts in the district that a sum was payable for road-cess. Other items claimed as abwabs, other than the *assul* rent, were denied by the defendant. They are set forth in a list printed in the report of [132] the reference of this case by a Division Bench to a Full Bench at p. 176, I. L. R., 11 Cal., amounting to fourteen items in all; comprising, among other things, contributions for the pay of watchmen and other village servants; also dak-cess, etc.

The Subordinate Judge of the Gaya District, Babu Dwarkanath Mitter, held that these items could not be decreed under the law. He referred to s. 11 of the Rent Law (Bengal Act VIII of 1869) and to s. 54 of Regulation VIII of 1793*. For the rent both as regards the cash and the quantity of produce,

* Section 54 of that Regulation enacts: "The impositions upon the ryots under the denomination of abwab, mahtoot and other appellations, from their number and uncertainty having become intricate to adjust, and a source of oppression to the ryots, all proprietors of land and dependent talukdars shall raise the same in concert with the ryots, and consolidate the whole with the *assul* into one specific sum." The end of the Fasli year 1198 is then fixed as the time within which the consolidation was in the Behar Districts to be effected.

Section 55 provides that "No actual proprietor of land or dependent talukdar of whatever description shall impose any new abwab, or mahtoot upon the ryots under any pretence whatsoever."

he found the claim proved, and decreed it, together with the items of abwabs admitted. He stated in his judgment: "The expediency of the law is fully demonstrated by the facts of this case. Here the plaintiffs claim several kinds of abwabs, *bandhwara*, *purohi*, *nocha*, *sidha*, *khurcha* and *manga*. The evidence is discrepant as to the rate of each kind of impost, and even the plaintiff's gomashta, whose business it is to realize them, cannot state all the rates. Add to these the abwabs claimed in respect of the *nakdi* jote, and the number becomes very large indeed. These abwabs are fees payable to the village watchman, the putwari, the gomashta, the barahil, the weighman, the purohit, and the landlord These fees, which are exacted over and above the rent, have been repeatedly held by the High Court to be illegal and unrecoverable through the Court, unless the ryot has distinctly agreed to pay them."

The Subordinate Judge added: "I think it right to add here that the plaintiffs have attempted to show that, in lieu of the abwabs claimed, the ryots enjoy certain corresponding advantages: an allowance of two seers per maund of grain is made them, and [133] they get all the straw and chaff. The plaintiffs' pleader offered to give up the claim for the abwabs if the defendant agreed to give half of the straw and chaff This was, to my mind, a fair offer, but the defendant refused to accept it. The total of the abwabs, I am told, would, on calculation, come up to two seers two chittaks per maund. The landlord, besides, has to maintain an irrigation scheme, peculiar to this part of the country, at his own cost."

Both parties appealed to the District Judge, who reversed the decision as to the abwabs. Regarding the *bhaoli* rents, he said: "I may notice a few of the salient features of this system In the first place, the landlord does not get a full half share. The straw, chaff, etc, is appropriated entirely by the cultivator. It will be noticed that the lower Court offered the defendant to divide the whole produce equally between him and the landlord, but this offer was refused; and why? because it has always been the custom for the ryot to take the straw, &c. If so, the landlord should surely be allowed to plead that he is entitled to the dues he claims, because the ryot has always been in the habit of paying them. Again, the expenses connected with the maintenance of irrigation works, on which depend the crop, fall on the landlords; they also have to defray the costs of any litigation connected therewith. The very existence of the crop in this district depends on an artificial system of irrigation, which has to be kept up at the landlords' expense." He also found that such cesses had, without doubt, been, from time immemorial, prevalent in the district.

The District Judge concluded his judgment as follows:—"In the present case the evidence adduced establishes two facts: *first*, that these dues have been collected and paid from time immemorial; *second*, that having regard to the peculiarities of the *bhaoli* system, they are not excessive. In the case of *Budhua Orawan Mathoon* v *Juggessur Doyal Singh* (24 W.R., 5), it was held by the High Court that certain payments, which were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform, and had been paid by the ryot from the beginning according to local custom, were not illegal cesses; [134] and so in this case I find that these so-called abwabs are not illegal cesses, and I may here notice that in many cases which have been tried by the Collector, the putwari has succeeded in establishing as against the zemindar his right to these dues; and I hold, therefore, where the custom is proved, that the zemindar is entitled to levy a half share thereof from his tenants. For the above reasons I set aside that portion of the decision of the lower

Court which disallows the dues claimed both on the *nakdi* as well as on the *bhaoli* tenure."

The defendant then preferred a second appeal to the High Court. A Division Bench (Sir R. GARTH, C.J., and BEVERLEY, J.) doubting whether, under the present Rent Law, this claim for abwabs could be enforced, and pointing out that the authorities upon the point were apparently conflicting, referred to a Full Bench the question whether, assuming that the abwabs had, by the custom of the estate of which the lands formed part, been paid by the defendant and his ancestors for a good many years, they were legally recoverable by the plaintiffs, although they were not actually proved to have been paid, or to have been payable, before, or at the time of, the permanent settlement.

A Full Bench (Sir R. GARTH, C.J., with MITTER, PRINSEP, TOTTENHAM and PIGOT, JJ.) answered the question in the negative. Their judgments are printed at length in the report of the appeal at p. 175 of I. L. R., 11 Cal.

The judgment of the District Judge was accordingly reversed, and that of the Subordinate Judge restored.

The plaintiffs appealed to Her Majesty in Council.

Mr. *C. W. Arathoon*, for the appellants, contended that the ruling was erroneous. The liability of the tenant for the abwabs in question was the result of the incidents and circumstances of the tenancy; and, though not expressed in the contract between the parties, was plainly deducible from the usage or custom with reference to which the contract was made. The evidence established that abwabs were prevalent in the district, and were paid according to custom established from time immemorial. A distinction must be drawn between legal and illegal cesses. Those which had been collected for a long period, extending back, presumably, to the permanent settlement, [133] were not illegal, nor had any enactment prohibited their recovery by the landlord. On the contrary, under Regulation V of 1812, s. 3, such cesses might be enforced in certain cases. also s. 9 of Regulation IX of 1825, saved certain cesses, levied according to ancient custom. Abwabs existing at the time of the permanent settlement could be recovered, notwithstanding the provisions of Regulations VIII of 1793, IV of 1794, or anything in Act X of 1859, the Bengal Rent Law, or in the Bengal Act VIII of 1869. Section 54 of Regulation VIII of 1793 contained merely a direction for the consolidation of abwabs with the assul rent, but no penalty for the omission was enacted. He referred to *Lachman Rai* v. *Akbar Khan* (I. L. R., 1 All., 140) regarding the question of each cess as a separate issue; and he contended that the items claimed were in effect, in themselves, part and parcel of the rent, referring to *Bholanath Mookerji* v. *Brijomohun Ghose* (14 W. R., 351) In *Budhua Orawan Mahtoon* v. *Juggessur Doyal Singh* (24 W. R., 5) the High Court said: "With respect to what are called the cesses in this case, we think they are not so much in the nature of cesses as of rent in kind; and it is not describing them correctly to say of them that they are uncertain and indefinite," and a decree was given.

Reference was also made to *Serajgunge Jute Company* v. *Sorabdee Akoond* (25 W. R., 253).

No writing, nor any other formality was required by law in regard to such items; and s. 61 of Regulation VIII of 1793 in providing that persons suing on engagements in which the *assul* and abwabs shall appear to have been consolidated, shall be non-suited, does not prohibit or render illegal the collection of payments such as those now in dispute. The latter were lawful at the time of the permanent settlement, and nothing had, since then, rendered them ille-

gal. Although they had been described in the plaint as "old usual **abwabs**," yet they were part of the rent, and a definite and certain addition to it; this, in itself, excluding them from being rendered illegal by the operation of Regulation VIII of 1793, s. 55, or in any other manner.

[136] On the question of the intention of the Legislature, he referred to Harington's Analysis, Vol. II, p. 19, Regulation XXX of 1803, Regulation VII of 1822, where, in reference to the North-West Provinces, the rules as to the formation of the record of rights contained a provision for the recording of cesses. Regulation XII of 1817, also, in connection with the payment of putwaris, treated such a payment as legal. The edition of the Regulations of the Bengal Code by Mr. Justice FIELD, at p. 61, was also referred to and Mr. A. Phillips' work on 'Tenures.' In regard to the finding of both Courts, that these were abwabs payable under old custom, the landlord receiving an equivalent, they were not, within the meaning of the sections of Regulation VIII of 1793 on the subject, illegal from any cause.

Reference was made to *Dhalee Puramanick* v. *Anand Chunder Tolaputtur* (5 W. R., Act. X Rul., 86), *Sonnum Sookul* v. *Elahee Buksh* (7 W. R., 453), *Juggodish Chunder Biswas* v. *Turrikoollah Sircar* (24 W. R., 90), *Kamalakanta Ghose* v. *Kalu Mahomed Mandul* (3 B. L. R., A. C., 44; 11 W. R., 395.) *Bholanath Mookerjee* v. *Brijomohan Ghose* (14 W. R, 351), and *Yeeatoolah Paramanick* v. *Jugodindro Narain Roy* (22 W. R., 12)

The respondents did not appear.

Their Lordships' **Judgment** was delivered by

Lord Macnaghten. -Their Lordships are of opinion that this appeal ought to be dismissed. The first question seems to be this: Are these payments, over and above rent, properly so called, abwabs, within the meaning of the word as used in Regulation VIII of 1793? They are described in the plaint as "old usual abwabs." and they are also described as abwabs in the zemindari accounts. It appears to their Lordships that the High Court was perfectly right in treating them as abwabs, and not as part of the rent. Unquestionably they have been paid for a long period; how long does not appear. They are said to have been paid according to long standing custom. Whether that means that they were payable at the time of the permanent settlement or not is not plain. If they were payable at the time of the permanent settlement they ought to **[137]** have been consolidated with the rent under s. 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered under s. 61 of that Regulation. If they were not payable at the time of the permanent settlement, they would come under the description of new abwabs in s. 55; and they would be in that case illegal.

Under these circumstances it appears to their Lordships that the High Court was right in treating them as payments or cesses which could not be recovered.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[This was followed in (1890) 17 Cal, 726 F.B. See also (1895) 22 Cal., 680; (1913) 18 C. L. J., 83.]

[17 Cal. 137]

PRIVY COUNCIL.

The 10th April, 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Mahammud Amanulla Khan............Plaintiff

versus

Badan Singh and others............Defendants.

[On appeal from the Chief Court of the Punjab.]

Limitation Act (XV of 1877), Sched. ii, Arts. 142, 144 – Proprietors having refused at the first regular settlement to engage, and others having been admitted as malguzars of the land, effect of lapse of time – Discontinuance of possession.

Article 144 of sched. ii of Act XV of 1877, as to adverse possession, only gives the rule of limitation where there is no other article in the schedule specially providing for the case.

The proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished; but if a claim comes within the terms of art. 142 (enacting that when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued possession, limitation shall run from the date of the dispossession or discontinuance), in such a case, by the law of Act XV of 1887, and previously of Act IX of 1871, adverse possession is not required to be proved in order to maintain a defence.

At the regular settlement in the Delhi District (1843) the plaintiffs' ancestors, *ex-mafidars* of a plot on which the rent-free tenure had been resumed in 1838, declined to engage for the revenue; and the plot was assessed along with the village in which it was; the village proprietors through the *lambardars* engaging for and obtaining the land.

At the revision of settlement, more than thirty years after, the plaintiffs [138] claimed possession, alleging their title, and that the village co-parceners held only in farm from the Collector for the period of settlement.

Held, that there had been a dispossession, or discontinuance of possession, within the meaning of art. 142; and that whether any proprietary right had existed or not in the plaintiff's ancestors, the twelve years limitation ran from the date of the dispossession or discontinuance.

APPEAL from a decree (8th May 1885) of the Chief Court of the Punjab, reversing a decree (24th June 1884) of the Commissioner of the Delhi Division, and restoring a decree (29th October 1883) of the Judicial Assistant Commissioner.

The ancestors of the plaintiff, who now appealed, were said to have been the owners of about 320 bigahs of land, formerly a *mafi* plot, of which the *mafi* was resumed in 1838 before settlement, in Mouza Ghanaur in the Sonipat Pergunnah of the Delhi District. To recover possession of this land the suit was brought by the descendants of the *ex-mafidars*. The defendants, respondents, who were the zamindars and *lambardars* of that village, having engaged for the revenue upon the whole of it, including the plot in question, at the first regular settlement in 1843, when the plaintiffs' ancestors declined to engage, now relied upon limitation, besides denying the plaintiffs' title.

The question now raised was whether, in regard to the defendants having obtained possession of the land from the Collector, there was a dispossession or discontinuance of possession on the part of the plaintiffs, from which time had run under art. 142 of sched. ii of Act XV of 1877.

The plaintiffs were descended from one Lutuffulla Sadik, who held the land as *mafi*, and was "*malik*." The earliest sanad produced was a grant from one Afiz Khan in the sixth year of the reigning King of Delhi. The *mafi* was resumed by an order, dated 9th October 1837; and the *ex-mafidars* were offered an engagement for the land revenue, which they declined on the 5th April 1838. The *lambardars* at the first regular settlement, as they regarded the land as belonging to the village, would not engage for it separately, and the result was that it was for some time held by the Collector "*kham tahsil.*" In 1842, however, engagement for the *jama* of the whole village was made with the *lambardars*, as part of the settlement operations, and lasted throughout the settlement.

[139] At the revision in 1879 of the old regular settlement, the plaintiffs claimed the land. By their plaint, filed in August 1883, they claimed that, their ancestral rights having remained under suspension during the term of settlement, they now were (having been, by their ancestors, proprietors all along, as well as *mafidars* and *ex-mafidars* of the plot) entitled to re-entry and possession, upon cancellation of what they designated as "the farm" from the Collector to the defendants, which they alleged was only for the term of settlement. The defendants insisted on their title as village proprietors; and that the plaintiffs having been deprived of possession, as the result of the orders of the revenue authorities, made as far back as 1837, and again acted upon in 1843, the suit was barred by time.

The Judicial Assistant Commissioner, Delhi, dismissed the plaintiffs' claim; but the Commissioner, reversing his decision, decreed for the plaintiffs. The latter was of opinion that, independently of the presumption arising in their favour, one which was recognised under Regulation XXXI of 1803, the plaintiffs had proved their rights as proprietors, prior to the resumption of the quality of freedom from revenue assessment which was taken away from the lands in 1837; and that they had also proved that they were set aside from the possession simply for refusing to engage at settlement. He did not consider that this refusal, and the fact that the land was managed *kham tahsil* "abrogated the plaintiffs' proprietary right," or gave a starting point for limitation. Nor had, in his opinion, the subsequent occupation of the defendants, which he concluded to be that of farmers, from 1842, for the terms of settlement, any such effect. He quoted Regulation VII of 1822, which, in s. 4, refers to the kind of arrangement which had been made in this case; that section enacting as follows:—"In admitting particular parties to engage, it was in no degree the intention of Government to compromise private rights or privileges, or to vest the *sudr malguzars* with any right not previously possessed by them, etc., etc., etc. On the contrary, it is the anxious desire of Government, and the bounden duty of its officers, to secure every one in the possession of the rights and privileges which he may lawfully possess, or be entitled to possess." He held that the suit was within **[140]** limitation, and that the plaintiffs were proprietors at the time when the defendants got a farm of the land for the period of settlement, the plaintiffs being therefore entitled to recover possession.

On appeal to the Chief Court, a Bench (C. A. ROE and T. W. SMYTH, JJ.) reversed the above judgment. The Judges agreed with the Commissioner that, in 1838, the plaintiffs' ancestors were proprietors; but they held that the claim must be dismissed as barred by limitation. "The plaintiffs had not shown that the defendants in exercising, as they had done, all the rights of proprietors over the land, exercised those rights, not as proprietors under the old settlement of 1843, but as farmers; nor had they shown that limitation did

not begin to run against the plaintiffs until the expiration of the settlement in 1879. A continuous possession the plaintiffs had not shown. There was no documentary evidence to show that the defendants held as farmers; nor were there sufficient grounds for the inference that their holding was only upon such terms. The inference to be drawn from the settlement proceedings was that the defendants had the land made over to them. At the settlement in 1842, the land was entered in the record by the description *milk mafi* of Bakar Ali, who had died three years before, and from whom the plaintiffs were descended. But the land was treated as part of the *shamilat* of the village, and had remained as such with the defendants ever since. The plaintiffs had exercised no rights over it, of any kind, certainly since 1842; and, as far as could be seen, not since the resumption in 1838." The Judges, accordingly, held the suit barred by limitation, and dismissed the suit; but, considering that the result of the order was to confirm the defendants in the possession of property which once belonged to the plaintiffs' ancestors, without costs.

The first plaintiff, the Nawab Amanulla Khan, appealed alone to Her Majesty in Council.

On this appeal, Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant. —They contended that the claim did not fall within the terms of any one of the articles of schedule ii of the Limitation Act XV of 1877. They referred to Act XXXIII of 1871, and to a case in the Chief Court in **[141]** 1881, *Latf Ali* v. *Khushwakt Rai*.* There was no effective dispossession, or discontinuance of possession, within the meaning of Article 142 of Schedule ii; nor was there, on the other hand, any adverse possession on the part of the defendants which could render Article 144 applicable.

The Respondents did not appear.

Counsel for the appellant having been heard, their Lordships' **Judgment** was delivered by

Sir R. Couch. The plaintiffs in this suit are descendants of one Lutuffulla Sadik, who held the land which was the subject of the suit as *mafi*. The earliest sanad appears to have been, as far as the evidence shows, a grant by one Afiz Khan in the sixth year of the reign of the King of Delhi. It is not material when the title commenced. This *mafi* was resumed in 1837, and at that time the ancestors of the plaintiffs, who had the *mafi*, were offered an engagement for the land revenue. They, on the 5th of April 1838, declined to take the land and engage for payment of the revenue. Then the defendants, who are called in the judgments of the lower Courts the *lambardars*, and were the representatives of the villagers, and held a large quantity of land in the village, undoubtedly as proprietors, were asked if they would take up the engagements They appear, in the first instance, to have declined to do so, alleging that they had got a settlement which included this land. However, it was found that this was not correct, and for a time the settlement operations were discontinued and the Government appears to have held the land as khas. In 1842 a settlement was made, and then an engagement was made with the *lambardars*, or representatives of the villagers, for the whole of the village, including the land which is the subject of this suit, and making no distinction between the way in which this land and the other land, of which the villagers were undoubted proprietors, was to be held. That settlement was to last for thirty years, and would expire in 1872. Steps do not appear to have been taken immediately upon the expiration; but on a revision of settlement in 1879, the

* Reported in the Punjab Record, Civil Judgments, 1881, p. 89. This is the case referred to in their Lordships' judgment.

plaintiffs applied for what they called a [142] cancelment of the farm to the defendants, and to have possession of the land as their ancestral estate. The defendants refused to surrender the land, and consequently the plaintiffs were referred to the Civil Court, and then the present suit was brought.

Two questions were raised in the suit. One was, whether the plaintiffs (or rather their ancestors) were the proprietors of the land, as they alleged ; and the other was, whether the suit was barred by the law of limitation.

Upon the first question, the Commissioner, before whom the case came by way of appeal, and whose finding on this matter was conclusive in the further appeal to the Chief Court, found that the plaintiffs were the proprietors ; and no question remains about that.

The question which has now to be determined is, whether the suit is barred by the law of limitation. The Chief Court, upon the further appeal from the decision of the Commissioner, has held that it is barred. The Act applicable to the case is Act XV of 1877, and the Article is No. 142, which says that for possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued the possession, the time from which the period allowed for bringing the suit begins to run is the date of the dispossession or discontinuance. It appears to their Lordships to be clear that when there was this refusal on the part of the plaintiffs, or their ancestors, to make the engagement for the payment of the revenue, and the Government made the engagement with the villagers, the defendants, there was a dispossession, or a discontinuance of possession, of the plaintiffs within the meaning of this article.

It is to be observed that the lower Courts in their judgments treat it as being a dispossession. The Commissioner, where he deals with the facts of the case, says : "Independently therefore of the presumption afforded by Regulation XXXI of 1803, the plaintiffs have, in my opinion, afforded most satisfactory evidence of their character as proprietors prior to the resumption of the lands in free tenure." Then he goes on · "And their dispossession for refusing to engage at settlement." In his opinion what took place was that at the time when they so refused they became dispossessed. Then Mr. Justice PLOWDEN, in the passage [143] which is quoted from his judgment, treats it also as a dispossession, for he says : "When, upon the occasion of a settlement, a proprietor is in proprietary possession of the estate, and asserts his proprietary title, and it is formally recognized, but in consequence of his refusal to engage for the revenue, he is excluded from the enjoyment of his estate" (which was the case here) "which is therefore transferred to a farmer for a defined period, it is intelligible that there is not such a discontinuance of possession or dispossession as would support a plea of limitation ;" and he goes on to give as the reason that the dispossession is not "adverse," which word is not in Art. 142. The Chief Court in their judgment say also : "All this shows that in 1838 plaintiffs were undoubtedly proprietors ; but the land is now, and has been since 1842, equally undoubtedly in the possession of the defendants, who have exercised over it all the rights of proprietors." There has been no possession of any description in the plaintiffs or their ancestors since the period of the engagement with the defendants ; and whether any proprietary right may have existed is not the question : it is whether there has been a dispossession or discontinuance, which there clearly was. No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished ; but upon the question whether the law of limitation applies, it appears to be clear that it comes

within the terms of the Art. 142 and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Article 144, as to adverse possession, only applies where there is no other article which specially provides for the case.

In this case their Lordships think Art. 142 does provide for the case, and that the suit is barred by the law of limitation. Consequently the decision of the Chief Court should be affirmed and the appeal dismissed, and their Lordships will so humbly advise Her Majesty. *Appeal dismissed.*

Solicitors for the Appellant: Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[*See* also (1890) 14 Bom., 458; (1892) P. R., 109; (1893) P. R., 104; (1907) 12 C. W. N., 273; (1912) 15 I. C. 285.]

[144] APPELLATE CIVIL.

The 10th July, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE GORDON

A. M. Dunne, Receiver to the Bhukoilash Ghosal Family Estate............Claimant No. 3

versus

Nobo Krishna Mookerjee, and after his demise, his son Binod Behari Mookerjee and another............Claimants Nos. 2 and 4.*

Land Acquisition Act (X of 1870)—Apportionment of compensation—Mokurari maurasi title, evidence of—Presumption of permanent tenure.

A person claimed to hold a maurasi mokurari title to certain land which was acquired under the Land Acquisition Act, but could produce no pottah or evidence of title, other than certain rent receipts, which showed that he or his predecessors in title had held the land in question for nearly one hundred years at, presumably, a fixed rent, the nature of the tenure not being mentioned in such receipt: *Held*, that the presumption was, in the absence of any evidence to the contrary, that the claimant had a permanent and transferable interest in the tenure, and not merely an interest in the nature of a tenancy at will; and that this presumption was strengthened by the fact that his superior landlord, the lakhirajdar had made no attempt to eject him or his predecessors in title during this long period.

The mode of apportionment of compensation between landlord and tenant considered.

THIS was a case under the Land Acquisition Act.

*Appeal from Original Decree No. 92 of 1888, against the decree of R. F. Rampini, Esq., Judge of the 24 Pergunnahs, dated the 7th of February, 1888.

The land acquired amounted to 21 bighas 5 cottahs 8 chittacks; for which a sum of Rs. 11,751, as compensation, had been allowed.

The appellant, claimant No. 3, as receiver of the estate of Sutynanando Ghosal, claimed as lakhirajdar, admitting however that one Nobo Krishna Ghosal, claimant No. 2, was lakhirajdar of 5 bighas 12 cottahs, under whom he held a maurasi mokurari tenure of this 5 bighas 12 cottahs at a yearly rent of Rs. 14-14-9. Claimant No. 2 claimed to be entitled to 8 bighas 14 cottahs as his lakhiraj land, admitting that claimant No. 3 held a tenure under him at a yearly rental of Rs. 14-14-9, but denying that it was one of a permanent transferable nature. Claimant No. 4 was a small tenant of certain bustee lands under claimant No. 3, in support **[145]** of his claim, claimant No. 3 being unable to produce any pottah showing the nature of his right to the 5 bighas 12 cottahs in question, put in evidence receipts showing that he held under claimant No 2 a tenure for which the rent was Rs. 14-14-9, which receipts were considerably over thirty years old; and oral evidence was given to show that the predecessors in title of this claimant had held possession of their land at a fixed rent for nearly one hundred years.

The Judge held that claimant No. 3 had not made out that he held a maurasi tenure under claimant No. 2, and awarded Rs. 2,800, the amount of the compensation-money for the 5 bighas 12 cottahs in dispute, to claimant No. 2.

Claimant No. 3 appealed to the High Court on the ground that his maurasi mokurari right in the 5 bighas 12 cottahs had been established.

Baboo *Hem Chunder Banerjee* and Baboo *Uma Kali Mookerjee* for the Appellant.

The Advocate-General (Sir *Charles Paul*), Baboo *Gopinath Mookerjee* and Baboo *Surendra Nath Roy* for the Respondents.

The **Judgment** of the Court (PETHERAM, C. J., and GORDON, J.) was delivered by—

Gordon, J.—This is a compensation case under the Land Acquisition Act (Act X of 1870). The Collector acquired 21 bighas 5 cottahs and 8 chittacks of land for public purposes, namely, for the construction of the Kidderpore Docks, and he assessed a sum of Rs. 11,751 as compensation for the same, and as the tenant of a portion of the land so acquired refused to accept the compensation tendered, the Collector referred the case to the Judge under s. 15 of the Act.

The parties who appeared before the Judge agreed to accept the amount of compensation assessed by the Collector, but they were unable to agree as to the proportion in which the compensation was to be divided among themselves. The appellant before us claimed a share of the compensation on the ground that he held 5 bighas and 12 cottahs of the land as a maurasi mokurari tenure under the lakhirajdar, who, while admitting that the appellant held the tenure, alleged that it was merely **[146]** a tenure held as a tenancy at will, and not of a permanent transferable character, and that therefore the appellant was not entitled to any share of the compensation.

The learned Judge has held on the evidence that the appellant has failed to prove that his tenure is of a permanent or mokurari nature, and he has accordingly awarded the whole value of the 5 bighas 12 cottahs, which he has fixed at Rs. 2,800 to the lakhirajdar.

The learned Vakil for the appellant contends that the Judge was wrong, and that he ought to have held upon the evidence that the tenure was of a permanent transferable character; and, after carefully considering the matter, we think that this contention must prevail. Indeed, under any circumstances,

we think that the judgment of the Judge could not be upheld, for, even allowing that the tenure was not of a permanent character, it is quite clear that the appellant has a valuable interest* in the land which could not be determined without a notice to quit, and, under these circumstances, he would be entitled to some share in the compensation.

Then, as to the existence of the tenure: it is true, as the Judge points out, that the appellant has produced no document to show under what circumstances and conditions his tenure was created, but we do not think that for this reason his claim should be rejected, if he can satisfy us by other evidence that his tenure is in fact one of a permanent character. Now, there is other evidence to which we think proper effect has not been given by the learned Judge. That evidence shows that the appellant and his predecessors in title have been in undisturbed possession and enjoyment of this tenure at apparently a fixed rent since the year 1203 (1796), *i.e.*, for nearly one hundred years, and having regard to these circumstances, and in the absence of any evidence to the contrary, we think a very strong and reasonable presumption arises that the appellant has a permanent and transferable interest in the tenure, and not an interest of the nature of a tenancy at will, which is liable to be determined at the pleasure of his landlord.

Further, having regard to the habits and customs of the people of this country in matters of this kind, it appears to us [147] that the fact that the lakhirajdars have stood by and allowed the appellant and his predecessors in title to continue in uninterrupted possession and enjoyment of the tenure for so many years, without attempting to eject them or vary their rent, strongly indicates that they have all along regarded and treated the tenure as one of a permanent character, and their conduct in this respect gives additional strength to the presumption, which, as I have already said, arises in favour of the appellant from long possession.

On the whole, we think that the Judge was wrong in the view he took, and that the appellant, having a permanent interest in the tenure, is entitled to compensation.

As to the apportionment of the amount of Rs. 2,800: we think that it should be made in the manner laid down in the appeal from Original Decree No. 311 of 1886, *Mohendra Nath Bose v. Mohini Bewa* [r] decided on the 20th August 1887 by TOTTENHAM and BEVERLEY, JJ., referred to by the learned Judge in his judgment, and the shares will be ascertained in the office when preparing the decree.

Then as regards the appeal against the ryot: we think there is no ground for our interference. The amount in dispute between him and the appellant is small, and we are not prepared to say that the conclusion which the Judge came to with regard to it is wrong.

For these reasons the appeal of the appellant will be decreed with costs as against the lakhirajdar, and it will be dismissed as against the tenant, but without costs.

T. A. P. *Appeal allowed.*

---

* In this case in which it was admitted that the tenant had a right of occupancy, but it was denied that the right was transferable, and the tenant claimed to be a mokurari maurasidar their Lordships said :—"We think we cannot do better than follow a decision of a Division Bench of this Court in Appeal No. 477 of 1875, in which the parties were the zemindar and a ryot with a right of occupancy. In that appeal both parties were represented, and this Court held, with the assent of both parties, that a fair apportionment would be obtained, by allowing fifteen years of the rental to the landlord (abatement being granted to the ryot), and by dividing the balance between the two parties in equal shares."

NOTES.

[This decision was in subsequent cases criticised as incorrect, (1907) 5 C. L. J., 662; (1903) 30 Cal., 801; see also (1900) 27 Cal., 570; (1900) 28 Cal., 146; (1897) 3 C. W. N., 202; (1897) 2 C. W. N., 153; (1898) 25 Cal., 896 at 902.]

---

[148] APPELLATE CIVIL.

The 16th July, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Chowdhry Jogessur Mullick and others, sons and heirs of Chowdhry Janmejoy Mullick, deceased............Late Defendant No 4

versus

Khetter Mohun Pal, Plaintiff and others............Defendants.*

Sale for Arrears of Revenue—Act XI of 1859, ss. 10, 11, 28, 53, 54 and Schedule A—Rights of purchaser of share of estate admitted to special registration under ss. 10 and 11 of Act—Rights of mortgagee of share against purchaser.

There is a clear distinction between the rights acquired under s. 53 and under s. 54 of Act XI of 1859. Under the former section the terms of the certificate given under schedule A are limited, and a purchaser under that section acquires the estate subject to all encumbrances *existing at the time of sale*, whether created before or after the default, and even up to the date of the sale; but there is no such limitation to the terms of a certificate given to a purchaser under s. 54, and all encumbrances created after the date on which a purchase under that section takes effect, that is, after the date on which the default was committed, are void.

A share of a taluk admitted to special registration, under ss. 10 and 11† of Act XI of 1859 was advertised for sale under that Act in default of payment of the June *kist* of Government revenue. On the 25th July the recorded sharer mortgaged his interests in that share to the

* Appeal from Appellate Decree No. 1707 of 1888, against the decree of R. Towers, Esq., Judge of Midnapore, dated the 25th of June 1888, affirming the decree of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 16th of August 1887.

†[Sec. 11:—When a recorded sharer of a joint estate, whose share consists of a specific portion of the land of the estate, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the land comprised in his share, and of the boundaries and extent thereof, together with a statement of the amount of sudder jumma heretofore paid on account of it.

Separation of shares consisting of specific portions of land.

On the receipt of this application, the Collector shall cause it to be published in the manner prescribed for publication of notice in the last preceding section. In the event of no objection being urged by any recorded co-sharer within six weeks from the time of publication, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account shall be held to be that from which the separate liabilities of the share of the applicant commenced.]

plaintiff. The sale took place on the 26th September, and the share was purchased by the defendant who obtained a sale certificate in due form under the Act declaring, in accordance with s. 28, that his title accrued from the 29th June the day after the latest date allowed for payment of the June *kist*: *Held*, that the mortgage was of no effect as an encumbrance under s. 54 of the Act.

THIS was a suit on a mortgage bond executed in favour of the plaintiff on 25th July 1884 by defendants Nos. 1 and 3, Russick Chand Masanta, one of the sons of Koer Narain Masanta, and Thakurmoni, the widow of Uman Chand Masanta, another of his sons. Koer Narain died, leaving five sons, Prem Chand, Arun Chand, Uman Chand, the defendant Russick Chand, and the defendant No. 2, Jibun Chand, who were all co-sharers in the ancestral property left by their father, and of whom Jibun Chand was a minor at the date of the mortgage. Of the mortgaged property, a 5 annas, 6 gundas 2 cowries 2 krants' share, bearing [149] a revenue of Rs. 320-9-3, formed the taluk of the defendants Nos. 1, 2 and 3. The mortgage was made in order to raise money to defray the instalments of Government revenue due in March and June 1884, in consequence of non-payment of which the estate of the mortgagors and their co-sharers was advertised for sale. The March instalment of revenue was paid, but that estate was sold for the June instalment, and was purchased on 26th September 1884 by Janmejoy Mullick, the father of the other defendants. The sale certificate was in the form given in Appendix A to Act XI of 1859, and, in accordance with s. 28 of that Act, the certificate declared that the title of the purchaser accrued from 29th June, the day after the latest date allowed for payment of the June instalment of revenue.

Various defences were raised, the only one of which material to this report was, that the purchase at the sale for arrears of revenue by the father of the Mullick defendants was not subject to the plaintiff's alleged mortgage lien. This question was argued for the first time before the Judge, whose decision upon it was as follows :--

"There remains the last and most important question taken, viz., was Janmejoy Mullick's purchase free of the encumbrance created by this mortgage? His purchase took effect before the date of the mortgage. Section 28 says that on the sale becoming final and conclusive, the Collector is to give the purchaser a certificate of title in the form prescribed in Sched. A of the Act, and this is to be sufficient evidence of the estate or share sold being vested in the purchaser from the date specified. That date is in the present case the 29th June. Plaintiff did not lend his money or get his mortgage from defaulting proprietors until the 25th July. There had been already default in the March kist, and the 25th July was fixed for the sale in consequence. There had also been default in the June kist, the latest day for payment of that kist being the 28th June. By the money borrowed from plaintiff the March kist was saved, but not so the June kist. The auction purchase was one regulated by s. 54 of the Act. The question is, was plaintiff's mortgage an encumbrance within the meaning of that section? Section 53*, I think, throws some light on this. The purchasers therein mentioned are subject to certain disadvantages; they acquire the estate subject to all encumbrances "existing at the time of sale." Then s. 54, which applies to Janmejoy Mullick's purchase, lays down that he acquires his share subject to all encumbrances; it does not repeat the words "existing at the time of sale," but they are probably to be understood. The sale certificate given to both kinds of purchasers (those under s. 53 and [150] s. 54) would be in the same form. There is, in fact, only one form, viz., that in Appendix A to the Act, so that in the case of a purchaser under s. 53 although his purchase would take

* [Sec. 53:—Excepting shares in estates under butwarrah who may have saved their shares from sale under sections XXXIII and XXXIV, Regulation XIX, 1814 and sharers whom the Collector, under sections X and XI of this Act, has opened separate accounts, any recorded or unrecorded proprietor or co-partner, who may

Rights of a purchaser being a sharer in any estate.

effect on the day after the latest day for payment, he would acquire subject to subsequent encumbrances created between the last day of the payment and the time of sale. Why should not the case be the same with a purchaser under s. 54? It is only the form of the sale certificate which is relied on by him: yet a purchaser under s. 53, getting exactly the same kind of certificate, is still subject to encumbrances created before the time of sale. It is true, of course, that the words "existing at the time of sale" do not occur in s. 54, and hence I am by no means certain that my construction is the right one. No precedents, however, having been quoted on the point, I am left to my own resources, and, for the reasons given above, I think I ought to decide the question in the plaintiff's favour. The appeal is therefore dismissed with costs."

From this decision the Mullick defendants appealed.

Baboo *Rash Behari Ghose* and Baboo *Ashutosh Mookerjee* for the Appellants.

Baboo *Umakali Mookerjee* for the Respondent.

The **Judgment** of the Court (PRINSEP and HILL, JJ.) was as follows:—

The question raised in this appeal relates to the construction of s. 54 of the Revenue Sale Law (Act XI of 1859). A share admitted to special registry under ss. 10* and 11 was advertised for sale for arrears of Government revenue for the June *kist*. Subsequent to the default and before the sale, the recorded sharer mortgaged his interests in that share. The question before us, therefore, is: what are the rights under this mortgage as against the purchaser at the subsequent sale for arrears of revenue?

Section 54 declares that in a sale of this description "the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." The certificate granted to such a purchaser is by s. 28 declared to be a certificate in the form prescribed in Sched. A, and this form declares that the purchase under which the title accrues takes effect on a date which is the day after that fixed for the last day of payment, that is to say, the day on which the estate fell into default by failure of the sharer to pay his share of the Government revenue It would seem clear, [131] therefore, that any encumbrance, such as the mortgage now before us, created after what is declared to be the date on which the title under a purchase for arrears of revenue takes effect, would be null and void. But much

purchase the estate of which he is proprietor or co-partner; or who by re-purchase or otherwise may recover possession of the said estate, after it has been sold for arrears under this Act; and likewise any purchaser of an estate sold for arrears or demands other than those accruing upon itself shall by such purchase acquire the estate subject to all its encumbrances existing at the time of sale, and shall not acquire any rights in respect to under-tenants or ryots, which were not possessed by the previous proprietor at the time of the sale of the said estate.]

And of a purchaser of estate not sold for its own arrears.

*[Sec. 10:—When a recorded sharer of a joint estate, held in common tenancy, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the share held in the estate by the applicant. The Collector shall then cause to be published in his own office in the Courts of the Judge, Magistrate (or Joint Magistrate, as the case may be), and Moonsifs, and in the Police Thannahs in whose jurisdiction the estate or any part thereof is situated, as well as on some conspicuous part of the estate itself, a copy of the application made to him.

Separation of shares held in common.

If within six weeks from the date of the publication of these notices no objection is made by any other recorded sharer, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account, shall be held to be that from which the separate liabilities of the share of the applicant commence.]

argument, both here and in the Courts below, has been directed to the terms of s. 53, and it is contended that those terms apply equally to s. 54, although that section is expressed differently and in language not necessarily conveying the same meaning. A purchaser within the terms of s. 53, not being the purchaser of a share admitted to special registration, is declared entitled to acquire the estate subject to all the encumbrances "existing at the time of sale." The words "existing at the time of sale" do not appear in s. 54. To hold that the two sections confer the same rights on different kinds of purchasers would be to assume that the Legislature unintentionally omitted those words in s. 54, or that they are redundant in s. 53. This we cannot do. It is clear that, in order to give effect to the law, a distinction must be drawn from the omission of these words in s. 54. The Legislature appears to have directed that, ordinarily by reason of a certificate in terms of Schedule A, all encumbrances created after the date on which a purchase takes effect, that is to say, created after the date on which the default was committed, are void; but that, under the circumstances described in s. 53, the terms of that certificate shall be limited, and a purchaser under s. 53 will acquire the estate subject to all encumbrances existing at the time of sale whether created before or after the default, and even up to the date of the sale. It is unnecessary for us to do more than point to the injury which might be done to the property of other sharers if the owner of a share admitted to special registration were allowed, subsequent to default in payment of revenue, to create encumbrances which would bind his share after it passed into the hands of the purchaser. The encumbrance, if a valid encumbrance, would necessarily diminish the price bid for the share, so as in all probability to make it less than the amount of revenue in arrear. The entire estate, including the shares of other recorded sharers, would then be liable to sale, and thus to save an encumbrance created by a defaulting share after the default, the property of other sharers who had paid their portion [152] of Government revenue would become liable. The result would be that the encumbrance on the share would become a burden on the entire estate. It was probably to avoid such an injustice that the terms of s. 54, as distinct from s. 53, were enacted. One of the principal objects of Act XI of 1859, which was to give relief to co-sharers who had protected their rights by special registration, would be frustrated if such an opportunity were given to a defaulting co-sharer. We are, therefore, of opinion that there is a clear distinction between rights acquired under s. 53 and under s. 54, and that in the present case the mortgage which was created after the last day of payment, that is to say, the date of default in payment of Government revenue, was of no effect as against the purchaser at a revenue sale which subsequently took place. The orders of the lower Courts will, therefore, be set aside, and plaintiff's suit dismissed. The defendants will be entitled to costs both in this Court and in the lower Courts.

J. V. W. *Appeal allowed.*

NOTES.

[*See* also (1904) 3 C.L.J., 52; (1907) 7 C.L.J, 1; 387.]

[17 Cal. 152]

APPELLATE CIVIL.

The 17th July, 1889.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Lal Mohun Chowdhuri............Judgment-debtor

versus

Nunu Mohamed Talukdar, Auction-purchaser and others, Decree-holders.*

Sale in execution of decree - Disparaging remarks by bystanders or purchasers other than the decree-holder—Irregularity—Practice regarding sales in execution of decrees -Adjournment of sale--Civil Procedure Code (Act XIV of 1882), ss. 311 and 291.

Disparaging remarks made by bystanders or by purchasers at an execution-sale other than the decree-holder do not constitute such an irregularity as is contemplated by s. 311 of the Code of Civil Procedure.

Gunga Narain Gupta v. *Annunda Moyee Burroanee* (12 C.L R., 104) followed; *Woopendro Nath Sircar* v. *Brojendroonath Mundle* (I. L. R., 7 Cal., 316; 9 C. L. R., 263) and *Rukhinee Bullubh* v. *Brojonath Sircar* (I. L. R., 5 Cal., 308) distinguished.

It is the practice of the Courts under the Rules of the High Court, which have the force of law, to place all properties intended for sale in execution of decrees on a list and to proceed with the sales from day to day, com-[153] mencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of s 291 † of the Civil Procedure Code.

APPEAL from an order of the Munsif of Thakurgao refusing to set aside a sale under s. 311 of the Civil Procedure Code.

Baboo *Rash Behary Ghose* and Baboo *Mukund Nath Rai* for the Appellant.

Mr. *Evans* and Baboo *Ram Churn Mitter* for the Respondents.

For the purposes of this report the facts of the case sufficiently appear from the **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ.), which was as follows:—

This is an order of the Munsif declining to set aside a sale on the alleged ground of irregularity in publishing and conducting it, and on the allegation that, in consequence of such irregularity, the property was sold for an inadequate price.

* Appeal from Order No. 125 of 1889, against the order of Baboo Nil Madhub Mookerjee, Munsif of Thakurgao, dated the 29th of January 1889.

† [Sec. 291 :—The Court may in its discretion adjourn any sale under this chapter (other than a sale by the Collector) to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment: Provided that when the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court. Whenever a sale is adjourned under this section for a longer period than seven days, a fresh proclamation under section 289 shall be made, unless the judgment debtor consents to waive it. Every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale.]

Power to adjourn sale.

Stoppage of sale on tender of debt and costs, or on proof of payment.

The Court below has found that there was no irregularity; and, therefore, although the price really was inadequate, the petitioner is not entitled to any relief; and in that decision we agree. The burden of proving the irregularity in publishing and conducting the sale lies on the judgment-debtor, and he must prove that no proclamation was duly published. The evidence on this point is as unsatisfactory as could be imagined, and, as the learned Pleader for the appellant pointed out, is of the most ordinary character, which never carries any weight. But it has also been brought to our notice that the petitioner more than once obtained the adjournment of the sale on the understanding that he would have no objection on the ground of non-publication of the sale proclamation. We think, therefore, that as far as the publication of the sale proclamation goes, the judgment-debtor has failed to prove that there was any irregularity whatever.

Then, as to the irregularity in the conduct of the sale, the only irregularity pointed out is, that the person who purchased the property, who is not the decree-holder, spread disparaging remarks calculated to deter intending purchasers from bidding for the property, the disparaging reports being that the property in question was mortgaged to several persons, and that it had [154] already been sold at a previous execution-sale. The cases of *Woopendronath Sircar* v. *Brojonath Mundul* (9 C. L. R., 263; I. L. R., 7 Cal., 346) and *Rukhinee Bullubh* v. *Brojendronath Sircar* (I. L. R., 5 Cal., 308) were cited to us; in which it was held that conduct of this kind did amount to irregularity. But, in those cases, the persons who committed the irregularity, in the one case was the decree-holder himself, and, in the other case, his mookhtear; and, in the case of the decree-holder, it is evident that he being, to a certain extent, concerned in the conduct of the sale, his interference, no doubt, unchecked by the Court, might amount to irregularity in the conduct of the sale. But those cases do not meet the case before us. In this case the irregularity is alleged to have been committed by an outsider, who was afterwards the purchaser. The case of *Gunga Narain Gupta* v. *Annunda Moyee Burrooanee* (12 C. L. R., 404) seems to us to be in point. There it was held that the disparaging remarks made by bystanders, or by persons who purchased the property, not the decree-holder, could not constitute such irregularity as would render the sale liable to be set aside under s. 311.

The other point taken before us was that there was a further irregularity inasmuch as the sale did not take place on the day appointed. It appears that the sale was fixed for the 1st of October: then it was adjourned to the 6th November, on which date the sales commenced, the sale of this particular property taking place on the 10th. The practice of the Courts under the Rules of this Court, which have the force of law, is to place all properties intended for sale on a list; and the sales commence on the day fixed, which must go on from day to day till the list is cleared. It appears that the sales commenced on the 6th, and went on from day to day; this particular property did not come on, for want of time, on any of these days; its turn came on the 10th. We think that that is no adjournment within the meaning of s. 291, and that there was no irregularity.

We accordingly dismiss the appeal with costs.

C. D. P. *Appeal dismissed.*

[155] APPELLATE CIVIL.

The 22nd July, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Matra Mondal and another............Defendants

versus

Hari Mohun Mullick *alias* Mothura Mohun Mullick............Plaintiffs.*

Subordinate Judge, Jurisdiction of—Civil Procedure Code (Act XIV of 1882), ss. 15 and 578.

Section 15 of the Civil Procedure Code does not preclude a Subordinate Judge from trying a suit within the jurisdiction of the Munsif's Court.

Ledgard v. *Bull* (I. R., 13 I. A., 134) distinguished.

The words "not affecting the jurisdiction of the Court" in s. 578† of the same Code mean "not affecting the competency of the Court to try."

The error in instituting a suit in a Subordinate Judge's Court instead of in that of the Munsif is not an error which affects the jurisdiction of the former Court within the meaning of s. 578.

THIS was a suit to recover possession of a certain *jala* with mesne profits. It was filed in the Court of the Subordinate Judge of Rajshahye, being valued at Rs 1,260.

The plaintiff, Hari Mohun Mullick, alleged in his plaint that the *jala* appertained to his putni taluk of Madhupore; that the name of the *jala* was Daur Patherghata; that he and his predecessors had been in adverse possession of the *jala* for more than twelve years; and that defendant No. 2, the Nawab Bahadoor of Murshedabad, had, in collusion with defendant No. 1, Sheikh Matra Mondal, dispossessed him from the *jala* in Assar 1289 (July 1882). The defendants alleged that the disputed *jala* did not belong to the plaintiff's putni, but formed part of the rent-free mahal Imamgunj, the property of defendant No. 2, the Nawab Bahadoor of Murshedabad. They admitted that the plaintiff had the lease of Imamgunj from 1252 to 1258 (1845 to 1851), and from 1278 to 1284 (1871 to 1877), during which time he held the *jala*, as the ijaradar of defendant No. 2, but denied his possession at any other time, and further alleged that defendant No. 1 had been in possession since 1286 (1879) as the ijaradar of defendant No. 2. They also alleged [156] that the value of the suit was below Rs. 1,000; and therefore contended that the suit was cognizable by the Munsif's Court, and that the Subordinate Judge had no jurisdiction to try it.

Subsequently, but before the settlement of issues, it appeared that the examination of the parties or their pleaders took place: and that the plaintiff then substituted for his original allegation that the *jala* appertained to his putni taluk of Madhupore, the allegation that the *jala* formed part of Chuck Askaran which also belonged to his putni.

* Appeal from Appellate Decree No. 1675 of 1888, against the decree of F. W. Badcock, Esq., Judge of Rajshahye, dated the 18th of July 1888, affirming the decree of Baboo Aughore Nath Ghose, Subordinate Judge of Rajshahye, dated the 25th of July 1887.

No decree to be reversed or modified for error or irreuglarity not affecting merits or jurisdiction.

† [Sec. 578 :—No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court.]

The Subordinate Judge found that the property in suit was worth more than Rs. 1,000, and accordingly held that he had jurisdiction to try the suit. On the merits he held that, although the *jala* did not appertain to the plaintiff's putni taluck of Madhupore, it formed part of Chuck Askaran, of which the plaintiff was in possession, and also that the plaintiff had been in adverse possession of the *jala* for more than twelve years. Accordingly the Subordinate Judge decreed the suit.

The defendants appealed to the District Judge before whom they repeated their objection that the suit had been over-valued, and that the Subordinate Judge had no jurisdiction to try it. The District Judge was of opinion that the suit had been over-valued and that it could not exceed Rs. 675 in value, but held that the effect of this was, that the plaintiff could only recover costs on the scale allowed in the Munsif's Court. On the merits the District Judge held that the plaintiff had established his title to the *jala* by proving that it appertained to Chuck Askaran, of which he was in possession, and that he had also established his title by adverse possession. Accordingly the District Judge affirmed the decree of the Subordinate Judge giving the plaintiff costs on the scale allowed in the Munsif's Court; and dismissed the appeal.

The defendants appealed to the High Court.

The Advocate-General (Sir *Charles Paul)*, Baboo *Ram Charan Mitter*, and Moulvie *Siraj-ul-Islam*, for the Appellants.

Baboo *Sreenath Dass* and Baboo *Nil Mudhub Bose* for the Respondent.

[157] The **Judgment** of the Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

This was a suit to recover possession of a *jala* with *wasilat*. It was filed in the Court of the Subordinate Judge of Rajshahye, being valued at Rs. 1,260. The plaintiff claimed this *jala* as appertaining to his putni taluk Madhupore, and alleged that the name of the *jala* was Daur Patherghata.

The defendants alleged that this *jala* did not belong to the plaintiff's putni, but belonged to a property called Imamgunj, belonging to the defendant No. 2, the Nawab Nazim of Bengal. They disputed the value of the property in suit, alleging that it was below Rs. 1,000, and therefore contended that the suit was cognizable by the Munsif's Court and not by the Court of the Subordinate Judge.

The Subordinate Judge was of opinion that the property was worth more than Rs. 1,000, and he proceeded to try the case on the merits.

Before the issues were framed it seems that the examination of the parties or their pleaders took place, and the plaintiff substituted for his original allegation the statement that the *jala* was a part of Chuck Askaran, which also belonged, as he stated, to his putni. But from the plaint it appears that he also set up a case of title by adverse possession.

On the merits the Subordinate Judge held that the *jala* did in fact belong to the plaintiff, though not appertaining to his putni of Madhupore. He held that it belonged to Chuck Askaran, of which the plaintiff was in possession, and also that the plaintiff had held adverse possession for more than twelve years.

The defendants appealed to the District Judge, and repeated the objection that the suit had been over-valued, and that therefore the first Court had no jurisdiction, with reference to s. 15 of the Code of Civil Procedure. The lower Appellate Court was of opinion that the suit had in fact been over-valued, and that the value could not exceed Rs. 675; but it held that the effect of this

would be that the plaintiff could recover costs only on the scale of the Munsif's Court. Upon the merits the District Judge held that the plaintiff had established his title [158] by adverse possession, and had also established his title by reason of the *jala* belonging to Chuck Askaran; and the decree of the first Court was affirmed.

In this second appeal it has been contended by the learned *Advocate-General* for the defendants, appellants, that the change of case adopted by the plaintiff vitiates his suit; and that he had no right to a decree upon a state of facts not stated in the plaint, namely upon the allegation that the *jala* belongs to Chuck Askaran within his putni. He further contended that the Subordinate Judge was precluded by the provisions of s. 15 of the Code of Civil Procedure from trying the suit at all; that he had no jurisdiction; and that, consequently, his decree must be set aside. It is contended, lastly, that the finding of the lower Court of title by adverse possession is an improper finding upon the evidence.

As to this last point, we think that both the Courts below distinctly found upon the evidence that the plaintiff had established his title by adverse possession. The finding is unequivocally expressed in both judgments: and we think that no ground for a second appeal can be raised upon that finding.

As to the alleged change in the plaintiff's case, we think that that does not constitute any real objection to the decree obtained by the plaintiff. The change, if there was any, was effected before the issues were laid down; and the issues are in all cases framed not only upon the pleadings, but also upon the examination of parties and their pleaders The fact that the *jala* has been found not to belong to the plaintiff's putni is, we think, no reason why he should not get a decree, because he has proved his title, though not in the way first set out in his allegations, namely, by satisfying the Courts below that the *jala* belonged to another property of his, and that his possession has been adverse to the defendants for more than twelve years. We do not think that the Judge below was right in saying that the fact that the *jala* belonged to Chuck Askaran is sufficient reason for giving the decree; but the finding of title by adverse possession is, we think, amply sufficient.

The only other question is as to the jurisdiction of the first Court to try the case. No doubt s. 15 of the Code of Civil [159] Procedure provides that "every suit shall be instituted in the Court of the lowest grade competent to try it." But this is an objection which was not taken in the petition of appeal to this Court. The District Judge only allowed this defect to operate as against the amount of costs to be obtained by the plaintiff; and against that ruling of the lower Court, no objection was taken until the learned *Advocate-General* raised it in his argument. We think, however, there is nothing in s. 15 which bars a Subordinate Judge from trying a suit below Rs. 1,000 in value. There is no doubt that a Subordinate Judge is competent to try all suits of a civil nature the trial of which is not barred by some special statute—*vide* s. 19 of the Civil Courts Act.

The learned *Advocate-General* called our attention to a case decided by the Privy Council, *Ledgard* v. *Bull* (L. R., 13 I. A., 134), but that was a case which had been instituted in a Court not competent to entertain it. It was afterwards, by consent of parties, transferred to the proper Court, and then tried. The defendant, however, had, from the first and throughout, objected that the suit had been filed in the wrong Court and could not be tried. The Privy Council held that the defendant's contention was correct, and that the transfer to a competent Court of a suit instituted in a Court not competent to try it did not cure the defect, and the suit was dismissed by their Lordships. That case is

clearly distinguishable from the present one. That was a suit brought under a special Act which excluded the jurisdiction of every Court but that of a District Judge. It was filed in the Court of the Subordinate Judge. It was filed, therefore, in a Court not competent to try it. The present suit was filed in a Court of the lowest grade competent to try it.

We think that the worst that can be said of the plaintiff's mistake in this respect is, that it was an irregularity coming within the scope of s. 578. But the words of s. 578, "not affecting the jurisdiction of the Court," we construe, as meaning, not affecting the competency of the Court to try. It appears to us, therefore, that the error in instituting the suit in the Subordinate Judge's Court rather than in that of the Munsif's, is [160] not an error which affects the jurisdiction. Had the converse been the case, that is, if a case cognizable only by a Subordinate Judge had been instituted in the Court of a Munsif, that would have been a case of want of jurisdiction. As it is, however, we think that there is nothing in the objection raised by the learned Advocate-General.

The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[This was followed in (1892) 15 Mad., 241; (1899) 23 Mad., 367, (1901) 28 Cal., 324; (1904) 31 Cal., 819; (1906) 8 Bom. L. R., 516; (1911) 10 I. C., 731; See also (1890) 14 Mad., 183.]

[17 Cal. 160]

APPELLATE CIVIL.

The 22nd July, 1889.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Dwarka Nath Mitter (as Shebait of the Idol Radharaman Jin and also for self and others) and others............Plaintiffs

versus

Tara Prosunna Roy and others............Defendants.*

Parties Co-sharers—Right of some of several co-sharers to sue alone—Refusal to join suit as plaintiffs.

It is only when plaintiffs can show that those entitled as co-sharers to join with them have refused to join, or have otherwise acted prejudicially to the plaintiffs' interests, that they are entitled to sue alone and make their co-sharers defendants in the suit.

THE plaintiffs alleged that they had inherited with other persons whom they had made *pro forma* defendants, the *shebaiti* and proprietory interest in certain fractional shares in some taluks recorded in the Collectorate of Burdwan; that they were in possession thereof by receipt of rent from the defendant Tara Prosunno Roy, as putnidar of their entire interest; that the defendant Sashi Bhusun Roy, alleging that he had obtained from Tara Prosunno a transfer of the putni, brought a suit against the plaintiffs and their co-sharers

* Appeal from Appellate Decree No. 1746 of 1888, against the decree of F. Taylor, Esq., Judge of Burdwan, dated the 15th of June 1888, reversing the decree of Baboo Raj Narain Chuckerbutti, Munsif of Katwa, dated the 7th of February 1888.

the *pro forma* defendants for registration of his name in their *sherista* as putnidar; that the suit was opposed by the plaintiffs, and Tara Prosunno was made a party to the suit, which resulted in a compromise, whereby Tara Prosunno and Sashi Bhusan undertook to relinquish the putni and the plaintiffs agreed to accept the relinquishment on payment of the amount of rent and cesses due to them.

[161] The present suit was brought for the balance due under that compromise.

The plaintiffs stated that their co-sharers were residents of a distant place, and that they therefore sued alone, making them *pro forma* defendants. They also stated that they would on recovery of the whole amount pay the respective shares thereof due to their co-sharers.

The *pro forma* defendants filed a written statement, stating that they had no objection to the plaintiffs obtaining a decree for the whole amount.

The principal defendant took several objections to the suit; the only one of which material to this report was, that the plaintiffs were not entitled to sue separately for their shares.

The Munsif held that the suit was maintainable, as the defendants had since the suit was brought, given the plaintiffs permission to carry on the suit on their behalf.

The Judge found that the plaintiffs had not brought their suit until the very last day within the period of limitation, and that the bringing the suit without their co-sharers' consent and making them defendants was an attempt to evade the limitation law, and that the subsequent consent of the co-sharers, given after the period of limitation had expired, could not be considered as an authority under s. 35 of the Civil Procedure Code to the plaintiffs to sue on behalf of their co-sharers. He therefore dismissed the suit.

The plaintiffs appealed to the High Court.

Baboo *Bhowani Churn Dutt* for the Appellants.

Baboo *Mohini Mohun Roy* and Baboo *Monmoth Nath Mitter* for the Respondents.

The **Judgment** of the Court (PRINSEP and HILL, JJ) was as follows:—

We think that the judgment of the District Judge is correct, and that this appeal must be dismissed.

The plaintiffs, as some of a body of persons entitled to a balance of arrears of rent, have brought this suit making their co-sharers defendants. They state that they have made them defendants because they are residents of a distant place; from **[162]** which it may be inferred that they would have had some difficulty in obtaining their consent; and, no doubt, this is true, because it would seem that the suit has been brought on the very last day of the period prescribed by the law of limitation.

An objection as to the form of the suit was, as stated by the District Judge, sed from the very first by the defendants. We have no doubt that it is only when the plaintiffs can show that those entitled to join with them have refused to join or have otherwise acted prejudicially to their interests, that they are entitled to sue alone and to make the reluctant or refusing co-sharers defendants in the suit. As authority for this we may refer to the case of *Luke* v. *South Kensington Hotel Co.* (L. R., 11 Ch. D., 121) also to the cases of *Patiharipat Krishnan Unni Nambiar* v. *Chekur Manakkal Nilakandan Bhattathiripad* (I. L. R., 4 Mad., 111) and *Kalidas Kevaldas* v. *Nathu Bhagvan* (I. L. R., 7 Bom.. 217); and we may further refer to *Ramsebuk* v. *Ramlall*

Koondoo (I. L. R., 6 Cal., 815). In the case of *Prem Chund Luskur* v. *Mokshoda Debi* (I. L. R., 14 Cal., 201) it was expressly stated that the co-sharers of the plaintiffs had refused to join in the suit. On these grounds, therefore, we think that the suit was rightly dismissed, and that this appeal must be dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[*See* (1899) 26 Cal., 409 wherein this was overruled ; see also (1891) 19 Cal., 760 ; (1896) 21 Bom., 154 ; (1902) 24 All., 226 ; (1907) P. R. 149, (1911) P.R., 850 ; 14 Mad., 489.]

[17 Cal. 162]

APPELLATE CIVIL.

The 13th August, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE GORDON.

Gyanada Kantho Roy Bahadur and others............Defendants

versus

Bromomoyi Dassi, Executrix to the Estate of Kishen Kishore Ghose, deceased...........Plaintiff.*

Regulation VIII of 1819, ss. 5, 7—Putni tenure, Transfer of, by sale—Bengal Tenancy Act (VIII of 1885), ss. 13, 195 (e).

Regulation VIII of 1819 is not affected by the Bengal Tenancy Act of 1885 ; the Regulation being specially saved from its operation by s. 195 (e) of that Act.

[163] THIS was a suit brought to recover from the defendants, arrears of rent of a putni taluk in Pergunnah Dantia, for a period intervening between Kartik 1293 and Aughran 1294 B.S., together with cesses and interest, the yearly rent being claimed at the rate of Rs. 9,013-8.

The defendants contended that Pergunnah Dantia had been sold for arrears of Government revenue for the June *kist* of 1887, and the plaintiff was not, therefore, entitled to recover the arrears of rent subsequent to that period. They also contended that their interest in the putni had been sold on the 12th Falgoon 1293 B.S., at an auction sale, the tenure being purchased by one Bromomoyi Dassi who had taken possession of the putni, after paying into Court the landlords' fee ; and that, consequently, they were not liable for the rent after such sale. They futher contended that the purchaser of the putni tenure should have been made a party to the suit, and claimed a set off of Rs. 1,401, which the plaintiff used to collect directly from an under-tenant of a certain mouza included in the putni ; and lastly contended that the putni was a losing concern, and they were, therefore, entitled to ask the Court in the first place to direct a sale of the tenure in execution of any decree the Court might pass in the suit.

---

* Appeal from Original Decree No. 195 of 1888, against the decree of Baboo Sambho Chunder Nag, Subordinate Judge of Khulna, dated the 5th of July 1888.

The Subordinate Judge found that a sale had taken place for arrears of Government revenue, but that the Government of Bengal had annulled the sale; he further found that the putni tenure had been sold on the 12th Falgoon 1293 B. S. in execution of a decree of a Civil Court other than the decree for arrears of its rent, and that at such sale Bromomoyi Dassi (who appeared to be at the time of suit in possession of the putni) had become the purchaser. He further found that the landlord's fee payable under s. 5 of Regulation VIII of 1819 had been paid into Court, but there was no satisfactory evidence to show that the plaintiff had notice of such deposit. He further found that the defendants had not followed the procedure laid down by s. 13 of the Bengal Tenancy Act, 1885, for the transfer of permanent tenures. He therefore held that the plaintiff was not bound to recognize Bromomoyi Dassi or to make her a party to the suit. He further found all the other points raised by the defendants in favour of the plaintiff and gave her a decree for the amount prayed.

[164] The defendants appealed to the High Court.

The Advocate General (Sir *Charles Paul*, with him Baboo *Amarendra Nath Chatterjee*), for the Appellants, contended that the purchaser of the putni had complied with the provisions of s. 13 of the Bengal Tenancy Act by paying into Court the landlord's fee plus the fee for service of notice on the plaintiff, and that the plaintiff was, therefore, bound to recognize the purchaser as the holder of the putni tenure, and that it was unnecessary to prove the receipt of the fee and of the notice by the plaintiff; the presumption being that these matters had been legally carried out. That even assuming Regulation VIII of 1819 applied to the case, s. 5 of that Regulation not having been complied with, it was the duty of the landlord to take steps under s. 7 of that Regulation which he did not do.

Mr. *Woodroffe* (with him Baboo *Grija Sunker Mozumdar*), for the Respondent, contended that the law regarding the transfer of putni tenures was governed by Regulation VIII of 1819 and not by the Bengal Tenancy Act, and that under s. 195 (*e*) of the latter Act, the Regulation was not affected by the Act; and that inasmuch as the provision of s. 5 of the Regulation had not been complied with, the plaintiff was not bound to recognize the transfer of the tenure, the plaintiff not being bound to take steps under s. 7 of the Regulation; compliance with that section being optional on the part of the landlord.

The **Judgment** of the Court (PETHERAM, C. J., and GORDON, J.) was delivered by

Petheram, C.J.—This is a suit for arrears of rent of a putni taluk from Kartick 1293 to Agrahan 1294, that is, for fourteen months, and the amount, claimed, including cesses and interest, is Rs. 12,511-14-5.

The defence, so far as it is material in the present appeal, is that the interest of the defendants in the putni was sold in execution of a decree on the 12th Falgoon 1293 and was purchased by one Bromomoyi Chowdhurani, who, by virtue of her purchase, obtained possession of the putni and deposited in Court what is called the landlord's fee, and the further fee for service of notice of the sale on the landlord as required by the Bengal Tenancy **[165]** Act, that this notice was duly served on the plaintiff, and that, under these circumstances, the defendants are not liable for the rent which has accrued subsequent to the sale. The Subordinate Judge who tried the case finds that the putni was sold on the 12th Falgoon 1293 in execution of a decree other than a decree for arrears of rent due in respect thereof, and that it was purchased by Bromomoyi Chowdhurani who seems to be in possession since her purchase. He also finds that the landlord's fee and the further fee for service of notice of sale on him have been paid into Court by the purchaser as required

by s. 13 of the Bengal Tenancy Act, but he considers that this is not sufficient to relieve the purchaser from all responsibility in the matter, or to compel the plaintiff to recognize her as her tenant, because there is no evidence to prove plaintiff has received notice of the deposit, and further, because the provisions of s. 15 of the Bengal Tenancy Act have not been complied with. He therefore holds that the defendants are liable for the rent, and has accordingly decreed the claim in full. The defendants appealed and the learned Advocate-General on their behalf contends that as the purchaser of the putni has complied with the provisions of s. 13 of the Bengal Tenancy Act by paying into Court the landlord's fee and the further fee for service of notice of the sale on the landlord, and the sale has, in consequence, been confirmed under s. 312 of the Civil Procedure Code, the transfer of the putni tenure is complete, and therefore the plaintiff is bound to recognize that transfer, although it is not proved that she has received her fee and the notice of sale. On the other hand, Mr. *Woodroffe*, for the respondent, argues that s. 13 of the Bengal Tenancy Act has no application to the present case, because the rules to be observed on the transfer of a putni tenure are contained in Regulation VIII of 1819, which, being an enactment relating to putni tenures, is, under s. 195 (*e*) of the Bengal Tenancy Act, not affected by that Act, and as the rules of the Regulation as regards the registration of her purchase have in no wise been observed by the purchaser, the plaintiff is not bound to recognize her as her tenant, but has a right to recover arrears of rent from the defendants, who are the heirs of the putnidar whose name is recorded in her books.

[166] After carefully considering the matter, we think this argument is sound. The first question to be decided is whether Regulation VIII of 1819 is applicable to the present case. Now s. 5 of Regulation VIII of 1819 provides as follows :- "The right of alienation having been declared to vest in the holder of a putni taluk, it shall not be competent to the zamindar or other superior to refuse to register and otherwise to give effect to such alienations, by discharging the party transferring his interest from personal responsibility, and by accepting the engagements of the transferee. In conformity, however, with established usage, the zamindar or other superior shall be entitled to exact a fee upon every such alienation ; and the rate of the said fee is hereby fixed at two per cent. on the jumma or annual rent of the interest transferred until the same shall amount to Rs. 100, which sum shall be the maximum of any fee to be exacted on this account. The zamindar shall also be entitled to demand substantial security from the transferee or purchaser, to the amount of half the jumma or yearly rent payable to him from the tenure transferred, the condition of furnishing such security on requisition being understood to be one of the original liabilities of the tenure. The above rules shall apply equally to the case of a sale made in execution of a decree or judgment of Court as to all other alienations." And s. 6 lays down that "it shall be competent to the zamindar or other superior to refuse the registry of any transfer until the fee above stipulated be paid, and until substantial security to the amount specified be tendered and accepted." Having regard to these provisions it seems to us that the purchaser in the present case ought to have applied to the zemindar to register the transfer of the tenure, and, at the same time, to have paid or tendered the prescribed fee, and had she done so and also furnished the security which the zamindar was entitled to demand, the zamindar could not have refused to register the transfer. The purchaser, however, did nothing of the kind, and therefore the zamindar was not bound to register the transfer or recognise the purchaser as the tenant, and, under these circumstances, we think the plaintiff has still a right to look to the ostensible tenants, that is, to the defendants in the **[167]** present suit, for her rent. The learned Advocate-General has drawn our

attention to s. 7 of Regulation VIII of 1819,* which lays down a particular procedure to be followed by the zamindar, when the putni has been sold in execution of a judgment of Court (as in the present case), if the rules of s. 5 have not been complied with by the purchaser, and (assuming that this Regulation applies to the present case) he contends that this is the procedure which the plaintiff ought to have adopted. We think, however, that even allowing that the plaintiff had notice of the sale, which it does not appear she had, it was not obligatory on her to proceed in the manner provided by s. 7. We think the plaintiff had two courses open to her: she could either refuse to recognise the transfer and the purchaser as her tenant until the rules laid down in s. 5 had been complied with by her, or she could take proceedings under s. 7. She had chosen the former course, which, having regard to the provisions of the Regulation, we think she had a legal right to do.

There remains the question whether s. 13 of the Bengal Tenancy Act has any application to the present case. If it has, then this curious state of things will arise that, under the enactments at present in force, (Regulation VIII of 1819, has not been repealed), there will be two totally different systems of registration of certain transfers of putni tenures. The Bengal Tenancy Act has introduced what may be called a system of public and official registry of transfers of permanent tenures under which the landlords' fee has to be paid to and the notice of transfer to be served on him through the medium of the District Collector, while under the law relating to putni tenures the registration of transfers is of a private nature as it has to be made in the sherista of the zamindar, and the prescribed fee has to be paid or tendered directly to him without the intervention of any public officer.

If this dual system be in force, then the purchaser, in the present case, would have the option of following the procedure provided in s. 13 of the Tenancy Act instead of proceeding under the putni Regulation, a procedure which is clearly in derogation of the right of the zamindar under Regulation VIII of 1819 to have the transfer registered in her books in accordance with [168] the rules therein laid down, and which, therefore, affects an enactment which is specially saved from the operation of the Bengal Tenancy Act by s. 195 *(e)* of that Act.

We think, therefore, that s. 13 of the Tenancy Act does not apply to the present case, and that the rules laid down in Regulation VIII of 1819 ought to have been observed by the purchaser, and as they have not been observed, the plaintiff is entitled to a decree against the defendants.

The result is that although we are unable to accept the reasons given by the learned Subordinate Judge for the conclusion he has arrived at, we think, for the reasons we have given, that the suit has been properly decreed, and therefore this appeal must be dismissed with costs.

T. A. P. — *Appeal dismissed.*

NOTES.

[This was followed in (1909) 10 C.L.J., 453.]

* [17 Cal. 168]

APPELLATE CIVIL.

The 27th June, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

Abrahim Khan and others...........Defendants
versus
Faizunnessa Bibi...........Plaintiff

Abrahim Khan and others...........Defendants
versus
Khairunnessa Bibi and others...........Plaintiffs.*

Remand—Procedure on remand—Practice—Appeal from remand order—Civil Procedure Code (Act XIV of 1882), ss. 562, 588, cl. 28.

Upon an appeal under cl. 28 of s. 588 of the Civil Procedure Code, against an order of remand under s. 562, the High Court is not restricted to the consideration of the form of the order, but may examine it on its merits.

Where an Appellate Court passed an order under s. 562,† remanding a case which had been disposed of in the Court of First Instance upon points, which were not preliminary points, but points directed to the merits of the case, the High Court on appeal set aside the remand order, directing the Lower Appellate Court to hear the appeal according to law.

THESE were appeals from orders of remand under s. 562 of the Civil Procedure Code.

The facts, so far as they are material to the present report, are sufficiently set forth in the judgment of TOTTENHAM, J.

[169] Baboo *Mohini Mohun Roy*, Baboo *Jogesh Chunder Roy*, and Baboo *Makunda Nath Roy*, for the Appellants.

Baboo *Sreenath Das* and Baboo *Dwarkanath Chuckerbati* for the Respondents.

The following **Judgments** were delivered by the High Court (TOTTENHAM and BANERJEE, JJ.) :--

Tottenham, J.—These are appeals against orders of remand purporting to have been made by the Lower Appellate Court under s. 562 of the Code of Civil Procedure. That section provides that if the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, and the decree upon such point is reversed in appeal, the Appellate Court may, if it thinks fit, remand the case, and direct the lower Court to proceed to investigate the case on the merits.

* Appeals from Orders Nos. 29 and 30 of 1889, against the orders of Baboo Purno Chunder Shome, Subordinate Judge of Mymensingh, dated the 10th of December 1888, reversing the orders of Baboo Mohendro Lal Ghose, Munsif of Pingna, dated the 30th of April, 1888.

†[Sec. 562:—Remand of case by Appellate Court. If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit on the merits.

The Appellate Court may, if it thinks fit, direct what issue or issues shall be tried in any case so remanded.]

The suits were to recover mesne profits in respect of land of which the plaintiffs had been dispossessed, and for which apparently they had obtained possessory decrees.

The first Court laid down various issues : in one case six, and in the other eight ; and having tried most of those issues, it dismissed the suits apparently upon their merits. The issue the first Court did not try was as to the amount of mesne profits the plaintiffs were entitled to recover. The findings upon some of the other issues being sufficient for the dismissal of the suits, the Munsif thought it unnecessary to try this last issue.

The plaintiffs appealed ; and the Lower Appellate Court having set out the various issues arising in the two cases, proceeded to give its decision upon them *seriatim*. The result was that all the issues decided by the Munsif against the plaintiffs were decided by the Lower Appellate Court in favour of the plaintiffs. The Lower Appellate Court, thereupon, remanded the cases to the Munsif under s. 562 with reference to the issue as to the amount of mesne profits which the plaintiffs might have been entitled to recover, upon the ground that the judgment of the Court below on the preliminary points dealt with must be set aside, and the evidence on the record did not enable the Lower Appellate Court to come to a decision on the merits, the merits being the amount of mesne profits.

[170] Against this order of remand these appeals have been preferred. The arguments occupied a considerable time, not apparently because there has been any difference of opinion on either side, or any doubt in the mind of the Court that the order was obviously unsustainable, but because the learned pleader for the appellant wished the Court to go beyond what is usually done in similar cases, and to allow him to enter upon the merits throughout with a view to show that the Lower Appellate Court was wrong in its decision upon the several issues that it had considered. Ultimately, the learned pleader did not press us to restore the judgment of the first Court by which the suits were dismissed, but said that he would be satisfied if we simply set aside the order of remand, and all the observations made by the Court in its order.

In dealing with the first part of the argument, the learned pleader for the appellants laid before us many authorities of this Court and of the Allahabad and Bombay High Courts, to show that, where an appeal is made against an order of remand under s. 562, the High Court is not limited to the consideration of the form of the order to see whether it is precisely in accordance with the section, but it is at liberty, and in fact is bound, to enter upon the merits of the preliminary point upon which the case has been disposed of by the first Court : and I think that those decisions are perfectly right. But I think that they apply only to cases in which the points in question are really preliminary points. Where the Court of First Instance has disposed of a suit upon what really is a preliminary point, and the Lower Appellate Court has reversed its decision on that point, no doubt the High Court should and must decide between the two, which came to a right decision upon such point : but where, as in the present case, the points upon which the first Court disposed of the suit, and which points were also discussed by the Lower Appellate Court, are not in any sense preliminary points, but are points directed to the merits of the cases, I think that the High Court, upon appeal from the remand order, ought not to enter upon the merits of those points. It is quite enough to point out to the Lower Appellate Court that it has committed an error in applying s. 562, when that section does not apply, and that is the course I propose to observe in the present instance.

[171] In these cases the points tried by the Munsif (who evidently did not consider them preliminary points) touched the merits of the cases. The lower Appellate Court could not, therefore, legally remand these cases under s. 562, because s. 564 prohibits an Appellate Court from doing so, except under the circumstance prescribed by s. 562. What the Court ought to have done if it thought any further enquiry or further evidence necessary to enable it to come to a decision, was to have complied with s. 566, keeping the bases on its own file.

This being my opinion, I set aside the order of remand under s. 562, and send these cases back to the lower Appellate Court. That Court must hear the appeals in the manner provided by law, and some to a final determination upon them. Of course, should it think it necessary, it may remit the case to the first Court for trial of any issue; but the decision now rests with the lower Appellate Court, and not with the Munsif.

Costs will abide the result.

Banerjee, J.— I concur in the order made by my learned brother.

The questions raised in these cases, which are of some importance, are, *first*, whether a party appealing under cl. 28 of s. 588, against an order of remand under s. 562 of the Code, is to be limited to grounds touching the correctness of the order appealed against merely in point of form, or is entitled to go into the merits of the case in so far as they bear upon the correctness or incorrectness of that order; and, *secondly*, if he is so entitled, whether he can ask this Court to examine the grounds upon which that order is based with reference as well to matters of fact as to points of law.

As to the first question, there does not appear to be much room for doubt. If a party is entitled to appeal against an order of remand, he is certainly entitled to ask the Court, not merely to consider whether that order is correct in point of form, but also to decide whether it is substantially and on the merits a correct order; and I think the view taken of the matter in the two cases referred to in argument, the case of *Loki Mahto* v. *Aghoree Ajail Lall* (I. L. R., 5 Cal., 144) and the case of *Badam* v. *Imrat* (I. L. R., 3 All., 675), is quite correct.

[172] The second question does not, however, seem quite free from difficulty; and if it had been necessary to decide the point in this case, I should have felt considerable hesitation in accepting the appellant's view as correct, namely, that upon an appeal from a remand order the appellant is entitled to go into questions of fact, when, if the very same matter had come up before this Court by way of appeal from appellate decree, his contention must have been limited to points of law. This is an anomaly which the Legislature is not likely to have intended. Under the Procedure Code of 1859, second appeals, whether from decrees or orders, were limited to questions of law; and under the present Code, s. 585 is, I think though not without some hesitation, sufficiently wide to limit the consideration of all second appeals to matters of law, whether they are appeals from appellate decrees or are appeals from orders in which the matter discussed is really raised by way of second appeal.

In the present case, however, it is not necessary to come to any definite decision upon this point, as the lower Appellate Court's decision on the so-called preliminary issues, upon which the order of remand appealed against is based, does not properly come before us for consideration now; that order clearly, and on the face of it, being bad in law as an order under s. 562. The points which have been regarded as preliminary points, not being preliminary points in any sense of the expression, no remand order under s. 562 ought to have been made. That being so, we cannot be

called upon at the present stage to determine whether the lower Appellate Court's decision on the so-called preliminary points is right; and the learned Vakil for the appellants very properly concedes that he is not entitled to ask us in these cases to restore the judgment of the Munsif. What he asks for is, that the decision of the lower Appellate Court upon certain of the issues, which it has regarded as preliminary issues, should not have any binding force, so far even as that Court was concerned. If the points disposed of by the lower Appellate Court in its decision under appeal are not, as we think they are really not, preliminary points, any decision arrived at upon those points cannot have the effect that a decision properly arrived at under s. 562 can have; and this is all that I think it is necessary for us to say at present.

C. D. P. *Orders set aside.*

NOTES.

[*See* also (1893) 15 All., 413; (1889) 14 Bom., 14, (1899) 21 All., 291, (1897) 24 Cal., 774; (1894) 16 All., 252, (1907) 12 C W N., 590; (1896) 19 Mad., 122.]

---

[173] APPEAL FROM ORIGINAL CIVIL.

The 30th August, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE PIGOT.

Jadu Rai and others............Plaintiffs

versus

Bhubotaran Nundy and others.........Defendants.

Evidence—Parol evidence—Evidence to vary written contract—Evidence Act I of 1872), s. 92—Bought-and-sold notes—Oral evidence as to matter on which document is silent—Reservation of question on evidence—Damages.

The defendants agreed to purchase to arrive, from Messrs Ralli Brothers, 3,000 maunds of copper, July shipment, and, on the 13th August, the defendants entered into a contract with the plaintiffs to sell to them 750 maunds out of this copper. The bought-and-sold notes, forming the contract between the plaintiffs and the defendants, corresponded one with the other, and constituted a contract for delivery of 750 maunds conditional on arrival within four months. Fifteen hundred maunds or thereabouts of this copper arrived at Ralli Brothers' godowns within the time mentioned in the contract between the plaintiffs and the defendants. The defendants* delivered to the plaintiffs 375 maunds 6 chittacks of copper within time, and made no further delivery to the plaintiffs, no other shipment of the copper contracted for arriving within time at Calcutta.

In a suit brought by the plaintiffs to recover damages for breach of contract to deliver, the defendants sought to show, by oral evidence, that the contract was for delivery of 750 maunds, if one-fourth of each of the successive arrivals at Ralli Brothers' godowns should in the aggregate, amount to 750 maunds. *Held*, that such evidence was inadmissible under s. 92 of the Evidence Act, and that the plaintiffs were entitled to recover.

* Original Civil Appeal No. 11 of 1889 against the decree of Mr. Justice TREVELYAN, dated the 15th of February, 1889.

Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given.

APPEAL from the judgment of TREVELYAN, J.

The plaintiffs sued to recover from the defendants Rs. 3,834-2-6 as damages for the non-delivery of certain copper. The facts were as follows: On the 23rd July 1887, the defendants bought from Messrs. Ralli Brothers 3,000 maunds of copper, July shipment at Rs. 21-2 per maund, and on the 13th August, the defendants through a broker contracted to sell to the plaintiffs 750 maunds of the said copper, at the rate of Rs. 21-5 per maund. Bought-and-sold notes corresponding one with the other [174] were prepared and signed by the broker; the sold note ran as follows:—

"To Jadu Raiji, Ramgopal Raiji, this is written by Dhunsook Madun Chand with salutations. Further, we have bought for you Furrakawa copper, 750 maunds, as *amdani* (to arrive) of (or from) Mudusudan Nundy, Ramprosunno Nundy, and Bhubotaran Nundy at the rate of Rs. 21-5, the goods of the house of Ralli, *Parbhars*. Time limited (for delivery) four months. Interest at the rate of Rs. 10, *Kothi* weight in Compnay's Rupees, you will give (pay). The conditions as to weighment (delivery) to be 45 days after the goods shall have come into the *ghur* (house and godown, etc.). You are to deduct interest (discount) at the rate of Rs. 8. Sumbat 1944 dated the 9th day of the dark side of Bhadro.

Signature of Jadu Rai, Ramgopal Rai,

By the pen of GRIDHARI LALL."

On the 21st October 1887 a portion of the copper arrived, and in November, a further portion, amounting in all to 1,497 maunds; and the defendants, on the 23rd October, gave to the plaintiffs a delivery order on Ralli Brothers for 375 maunds 6 chittacks of such copper; and this quantity of copper was duly delivered to them under the delivery order. Two hundred and twenty-five maunds out of this copper were, under a contract for 150 maunds, delivered by the defendants to another purchaser, and they themselves took delivery from Ralli Brothers of the remainder of the quantity selling it in the bazaar at a rate higher than Rs. 21-5. No more copper arrived in Calcutta within the terms of the defendants' contract with Ralli Brothers, nor did any other copper of the kind mentioned in the defendants' contract with the plaintiffs arrive in Calcutta for the defendants during the time mentioned in their contract with the plaintiffs.

Subsequently to the delivery to the plaintiffs of the 375 maunds 6 chittacks of copper the defendants agreed with Ralli Brothers to cancel the contract, and Ralli Brothers paid over to them the sum of Rs. 12,500 in consideration of this agreement. The plaintiffs sued the defendants to recover damages for breach of their contract.

[175] The defendants, in their written statement, stated that, at the time the contract was entered into, it was distinctly agreed that the defendants should sell and deliver to the plaintiffs 750 maunds of copper by instalments of one-fourth of each shipment of copper of which they should receive delivery from Ralli Brothers.

The evidence adduced on this point was that of the broker and of one of the defendants.

The broker's evidence was to the effect that there was no arrangement as to delivery, but that it was understood that delivery was to be taken from Ralli Brothers, who were to deliver the copper to the defendants, and out of that copper the defendants were to deliver to the plaintiffs in proportion as they got delivery from Ralli Brothers, viz., that if the defendants got delivery of

* Mr. Owen's (the translator's) note stated this to mean literally "'outside,' *i.e.*, bought and sold without taking delivery."

only half from Ralli Brothers, the defendants would only deliver half to the plaintiffs; if they got the whole, they would deliver the whole; and that he (the broker) told the plaintiffs' gomashta that he would have to take delivery in the same way as the defendants got delivery from Ralli Brothers; and that all that was arranged between the parties had been put down in the contract, the bought-and-sold notes.

The evidence of the defendant Nilmoney was to the effect that, after the rates were fixed, he told the broker that the plaintiffs would get delivery of the copper as often as they (the defendants' firm) obtained it from Ralli Brothers; that if they got all at one time, delivery to the plaintiffs should be given at one time; if by two instalments, delivery to the plaintiffs should be by two instalments, and so on; and that he told the broker that as his firm was only selling the copper "to arrive," if only half arrived, the plaintiffs should get one-half; if only one-fourth, then one-fourth; that the broker obtained the consent of the plaintiffs to these arrangements, and that the contract was then made.

The defendants further contended that as the plaintiffs were aware, when they took delivery of the 375 maunds 6 chittacks, that more than sufficient copper to satisfy their entire contract had at that time arrived in Ralli Brothers' godowns, they had, by insisting on full delivery, waived all claim to that particular copper.

[176] Mr. Justice TREVELYAN was of opinion for the reasons given by him in the case of *Jumna Doss* v. *Srinath Roy* * decided on

---

*PRESENT:

MR. JUSTICE TREVELYAN.

Jumna Doss *versus* Srinath Roy.

THIS was a suit, amongst other things, brought to recover monies due under certain share transactions which the plaintiff alleged † to have been lent to the defendant, on the pledge of shares, between April and September 1883; further alleging that the defendant, between October 1883 and March 1884, made certain payments to him, and that, on the 5th March, it was agreed between them that the plaintiff should take over at the market rate of the day all the shares belonging to the defendant which he held; this was done, and the plaintiff sued for the balance due to him. The defendant denied that there was any loan, contending that there was an out-and-out sale, there being, however, at the time of such sale, a contract by bought-and-sold notes under which the plaintiff agreed to re-sell to the defendants their shares, at a future date, at an enhanced price. Evidence was tendered to show the nature of the contract between the parties but was objected to on the ground that the contract being reduced into writing, no evidence other than the bought-and-sold notes was admissible.

On this question TREVELYAN, J., decided as follows:—

The question raised as to the admissibility of the evidence tendered by Mr. Apcar seemed to me to be worthy of careful consideration. Mr. Pugh and Mr. Allen for the defendant contended that, under s. 91 of the Evidence Act, I was bound to exclude all evidence of the contract between the parties other than the bought-and-sold notes, in which, they contended, the parties had reduced into writing the terms of the contract made between them.

Mr. Apcar in answer urged, in the first place, that the bought-and-sold notes did not constitute the contract; and, secondly, that, even if they did so, he was, under the authority of the case of *Baksu Lakshman* v. *Govinda Kanji* (I. L. R., 1 Bom., 594) and of the Calcutta cases bearing on the same question, entitled to show that the real transaction was a pledge and not a sale out-and-out. Mr. Apcar first relied on the case of *Eckford* v. *Jumna Dass* (I. L. R., 9 Cal., 1).

On consideration I do not think that that case is any authority on the present question. In *Eckford's case* (I. L. R., 9 Cal., 1) this question was neither raised nor suggested by

† It transpired later on in the hearing of the case that this contract was not in writing, the only contract which was so being that witnessed by the bought-and-sold notes agreeing for a *re-sale*.

[177] the 18th May 1886, that bought-and-sold notes did not necessarily constitute the whole contract between contracting parties; and (having reserved during the hearing the question of the [178] admissibility of the oral evidence varying the contract) decided that such evidence was admissible under s. 92 of the Evidence Act; and, after holding that the contract set up by the defendants had been proved and fulfilled, namely, that the real contract entered into by the defendants was one to deliver one-fourth of such copper as arrived at Ralli Brothers' godowns, dismissed the suit with costs.

The plaintiffs appealed.

Mr. *Bonnerjee* and Mr. *T. A. Apcar* for the Appellants.

Mr. *M. P. Gasper* and Mr. *Roberts* for the Respondents.

Mr. *Bonnerjee* contended that the evidence varying and explaining the bought-and-sold notes ought not to have been received, and that the evidence given by the defendants did not establish the case set up by them, and the finding by the learned Judge, that the contract was one for the delivery of one-fourth of such copper as arrived in Ralli's godowns, was therefore wrong.

[The Court, after stopping Mr. *Bonnerjee*, called upon the other side.]

Counsel or Court, as far as I know or can find out, at any stage of the case, and therefore no precedent can be said to have been established by that case.

Mr. *Apcar* also relied upon the Bombay case I have mentioned and on some Calcutta cases.

Those cases show that, where there has been an absolute sale of property, evidence may be given of a contemporaneous oral agreement that the property would be reconveyed on repayment of the purchase-money. I do not think it necessary for me to consider whether or not those cases apply to the present case. Section 91, which merely expresses the law as it existed at the time of the passing of the Evidence Act, runs as follows:—" When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The first question then is, whether the terms of the contract have been reduced to the form of a document?

If the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible, but if they intended only to reduce into writing a portion of the terms of the contract, then I think they are entitled to give parol evidence of the terms which they did not intend to reduce into writing.

Now when bought-and sold notes are exchanged, is it usually intended that these notes should constitute the whole of the contract? I think not. Mr. Benjamin, in his work on the law of " Sales " lays down as the result of the authorities that the bought-and-sold notes do not constitute the contract.

I think that this proposition is clearly borne out by the case of *Sievewright* v. *Archibald* (20 L. J., Q. B., 529; 17 Q. B., 115) [see especially the decision of Mr. Justice ERLE in that case], and also by the case of *Parton* v. *Crofts* (33 L. J., C. P., 189). In both these cases the distinction between making a contract and a memorandum showing that the contract has been made is pointed out.

The result of those cases is that brokers' notes as a memorandum may satisfy the Statute of Frauds, but not exclude parol evidence.

In *Clarton* v. *Shaw* (9 B.L.R., 252) Sir RICHARD COUCH, C.J., and MARKBY, J., treated the bought-and-sold notes, not as the contract, but as information sent by the broker to his principals. Of course bought-and-sold notes unobjected to may be evidence of the contract, but they do not necessarily constitute the whole contract. Although they differ, *Clarton* v. *Shaw* (9 B. L. R., 252) shows that parol evidence of the contract may be given.

The defendant has much relied upon the case of *Jugger Nath Sew Bux* v. *Ramdyal* (I. L. R., 9 Cal., 791), but I do not think that that case applies. It does not appear from the report that there were any bought-and-sold notes in that case, and the whole case proceeds on the assumption that the document mentioned in the case was the contract. All that the High Court held in that case was that, under s. 92 of the Evidence Act, no evidence could

Mr. *Gasper*.—The evidence of the broker and the defendants, which I submit should be admitted, is in respect of a collateral matter about which the contract is silent, and which is in no way [179] inconsistent with the terms of the contract. It is a stipulation as to the mode of delivery, *Morgan* v. *Griffin* (L. R., 6. Exch., 70), it may be that the collateral agreement in some of its consequences may not be consistent with some of the results of the contract itself, but that is not what is meant by "inconsistency," and the inconsistency must be on the face of the contract. I rely on *Jumna Doss* v. *Srinath Roy* (*Ante* p. 176 *note*) as to the bought-and-sold notes not being necessarily the whole contract.

Mr. *Roberts* on the same side. -Mr. Benjamin, in his work on "Sales," at p. 268, deals with the question of the operation of bought-and sold notes, and it is to be gathered therefrom, that they do not necessarily constitute the contract. Bought-and-sold notes, when they correspond and contain all the terms of the bargain, then form the contract; here the bought-and-sold notes, although agreeing, do not contain the whole contract, and that has been supplied by oral evidence in no way inconsistent with the contract, and such evidence is therefore admissible. In *Cutts* v. *Brown* (I. L. R, 6 Cal, 308), it has been held by GARTH, C.J., that the rule laid down in s. 92 of the Evidence Act applies only to cases where, upon the face of it, the written instrument appears to contain the whole contract.

The following **Judgments** were delivered by the Court (PETHERAM, C.J., and PIGOT, J.):

Petheram, C.J. This is an action to recover damages for the breach of a contract to deliver a quantity of Furrakawa copper, and it is admitted that, if the plaintiffs are entitled to recover at all, the amount of damages is Rs. 3,831-2-6, what the plaintiffs claim in the plaint.

The facts of the case are as follows: On the 23rd of July 1887, the defendants bought of Messrs. Ralli Brothers' 100 tons, more or less. Japan copper, Furrakawa, for July shipment, at Rs 21-2 per maund They afterwards instructed one Madun Chand, a broker, to make re-sales of the copper on their behalf; and it was stated by the witnesses for the defendants that, when the defendants gave the broker his instructions, they, after [180] the rates had been fixed, told him that the buyers would get delivery of the copper as often as the defendants got delivery from Ralli Brothers. If the defendants got delivery all at once, they would give delivery all at once, if the defendants got delivery by two instalments, they were to get delivery by two instalments, and so on. And that the defendants were selling copper which was to arrive: if only half the quantity arrived, the buyers will get half; if only a quarter arrives, they will get a quarter. The broker said that upon these instructions he saw the plaintiffs, and negotiated a sale of a portion of the copper to them. Upon such negotiation, he said that he informed the plaintiffs that Ralli Brothers were to deliver the copper to the defendants, and out of that copper the defendants were to deliver again to the plaintiffs, and that the actual delivery was to be taken from Ralli Brothers' godowns. The broker

be given for the purpose of varying or contradicting the express terms of contract. I do not think that s. 92 of the Evidence Act applies to this case I think it applies only to cases where the whole of the terms of the contract have been intended to be reduced into writing. I think this is shown by the words "adding to" which appear in that section. If it were not for those words, I should have been inclined to hold that s. 92 only excluded evidence contradicting, varying, adding or subtracting from such of the terms of a contract as had been reduced into writing.

The question which has given rise to this argument is, in my opinion, admissible.

said this : He told them that if the defendants got delivery of only half from Ralli's, they would deliver only half to the plaintiffs ; if they got the whole, they would deliver the whole.

The plaintiffs agreed to purchase 750 maunds of the copper at Rs. 21-5, and the broker prepared and signed, on behalf of both seller and buyer, the usual bought-and-sold notes in the following terms :—

"To Jadu Raiji, Ramgopal Raiji, this is written by Dhunsook Madun Chand with salutations. Further, we have bought for you Furrakawa copper, 750 maunds, as *amdani* (to arrive) of (or from) Mudusudan Nundy, Ramprosunno Nundy, and Bhubotaran Nundy, at the rate of Rs. 21-5, the goods of the house (firm) of Ralli, *Parbhars*. Time limited (for delivery) four months. Interest at the rate of Rs. 10, *Kothi* (Factory) weight (in) Company's Rupees, you will give (pay). The conditions as to weighment (delivery) to be 45 days after the goods shall have come into the *ghur* (house and godown, &c.). You are to deduct interest (discount) at the rate of Rs. 8. Sumbat 1944, dated the 9th day of the dark side of Bhadro.

Signature of Jadu Rai, Ramgopal Rai,
By the pen of GRIDHARI LALL."

[181] (On back)

"In Bengali year 1294, the 29th Srabun.

JADU RAI.
RAMGOPAL RAI.

"To Jadu Rai, Ramgopal Rai, this is written by Dhunsook Madun Chand with salutations. Further, we have bought for you Furrakawa copper, 750 maunds, as *amdani* (to arrive) of (or from) Mudusudan Nundy, Ramprosunno Nundy, and Bhubotaran Nundy, at the rate of Rs. 21-5, the goods of the house of Ralli, *Parbhars*. Time limited four months. Interest at the rate of Rs. 10, *Kothi* (Factory) weight (in) Company's Rupees, you will give. The conditions to weighment to be 45 days after the goods shall have come into the *ghur*. You are to deduct interest (discount) at the rate of Rs. 8. Sumbat 1944, dated the 9th day of the dark side of Bhadro.

Signature of Jadu Rai, Ramgopal Rai,
By the pen of GRIDHARI LALL."

(On back)

"In Bengali year 1294, the 29th Srabun.

JADULAL RAMGOPAL."

Prior to the 21st of October 1887, some portion of the copper mentioned in the defendants' contract with Messrs. Ralli Brothers arrived at their godowns, and another portion arrived early in November, in all about 1,500 maunds and the defendants gave to the plaintiffs a delivery order for 375 maunds and 6 chittacks of copper in the following form : —

(209-88)
C.N.G.
24-1-89 22-10-87

নং ৪ ৭৮-০০

1545.

Calcutta, 22nd October 1887.

No. 1501.
Godown-keeper,

Deliver to Mudusudan Ramprosunno Bhubotaran Nundy :

[182] The following goods sold per contract No. 209-375. Japan Copper Furrakawa.

I. M.

Deliver (87) eighty-seven only. N.N.B. 31-10-87. Deliver (100) one hundred only. N.N.B. 3-11-87.	Ralli Brothers.	Deliver (188) one hundred eighty-eight only. N.N.B. 8-11-87.	Cash in full.	Rs. 21-2 checked.

Broker, Dun Wingsang.

(On back)

31st October 1887-214 Ingots maunds.	... ...	87 0 6
3rd November 246 ,, ,,	... ...	100 11 0
8th ,, 162 ,, ,,	... ...	187 29 0
Maunds.	...	375 0 6

[Three hundred and seventy-five maunds and six chittacks only Japan copper, Furrakawa.]"

Plaintiffs presented the order to Messrs. Ralli Brothers and received from them 375 maunds and 6 chittacks of copper, and paid them the sum of Rs. 7,800. The defendants afterwards returned to the plaintiffs the sum of Rs. 149-8-9, being the difference between the sum of Rs. 7,800 and the price of the copper delivered to the plaintiffs.

At the time of such delivery there was, in Messrs. Ralli Brothers' hands, the whole of the 1,500 maunds, or much more than a sufficient quantity of copper to satisfy the plaintiffs' entire contract, and it was contended before us that it should be assumed that the defendants were aware of this fact. There is no evidence to support any such assumption, and I do not see why we should make it, though, in my opinion, it is wholly immaterial whether they knew the fact or not. Messrs. Ralli afterwards delivered the remainder of the 1,500 maunds to other purchasers from the defendants, some of whom purchased before its arrival, and some after.

No more copper ever arrived in Calcutta within the terms of the defendants' contract with Messrs. Ralli Brothers, nor did any other copper of the kind mentioned in their contract with the plaintiffs arrive in Calcutta for the defendants during the time for delivery mentioned in their contract.

[183] Some time after the delivery of the 375 maunds of copper to the plaintiffs, the defendants agreed with Messrs. Ralli Brothers to cancel their contract with them, and afterwards, on December 29th, 1887, Messrs. Ralli Brothers paid them the sum of Rs 12,500 in consideration of their so doing.

The defendants have refused to deliver any further copper to the plaintiffs, and before action repudiated all liability to do so.

Upon these facts it was contended for the defendants that the bought-and-sold notes did not contain the *whole* contract between the parties, but that the contract was partly verbal and partly in writing; and that, taking the evidence of the broker with the notes, the contract proved was a contract to deliver one-fourth of each delivery made by Messrs. Ralli Brothers to the defendants until the plaintiffs had received 750 maunds, and that as the plaintiffs have received one-fourth of all such copper as arrived, they were not entitled to demand anything more. It was further contended that the plaintiffs were aware, when they took delivery of the 375 maunds, that there was sufficient copper in the godowns to satisfy their entire contract, and that as

they did not insist on its delivery to them, they waived all claim to that particular copper, and as no more copper afterwards arrived, they were prevented from making any claim by the condition of the contract.

It was contended on behalf of the plaintiffs that the evidence of the conversation was not admissible at all, as the bought-and-sold notes must be taken to be the final expression of the agreement come to between the parties, and that no evidence was admissible to add to or vary the terms of the notes.

The learned Judge in the Court below has accepted the view put forward by the defendants, has admitted the evidence, and has come to the conclusion that the contract between the parties was not that which appears on the bought-and-sold notes, but was such a contract as is alleged in paragraph 3 of the written statement, which is a contract to deliver one-fourth of such copper as arrived at Messrs. Ralli Brothers' godowns, and as the defendants have delivered 375 maunds, or a quarter of 1,500 [184] maunds, which is the whole amount of copper which did in fact arrive, there is no further liability on their part, and he has dismissed the suit.

I am unable to agree with the learned Judge in this view of the matter. The evidence as to what passed between the defendants and the broker before the negotiation with the plaintiffs commenced, was not, I think, admissible at all; because, apart from anything else, it does not appear that the conversation was ever communicated to the plaintiffs, or that the broker was in any sense their agent at that time, and the question is then reduced to the effect of the evidence given by the broker of the conversation between himself and the plaintiffs which resulted in the sale, and the signature by him of the notes.

After a good deal of pleading by the defendants' counsel, he said: "There was no arrangement as to delivery, it was understood delivery was to be taken from Ralli Brothers. Ralli Brothers were to deliver the copper to the defendants, and out of that copper the defendants were to deliver again to the plaintiffs. As many times as Ralli Brothers delivered goods to the defendants, so many times would the defendants deliver to the plaintiffs. If the defendants got delivery of only half from Ralli Brothers, they would deliver only half to the plaintiffs; if they got the whole, they would deliver the whole."

The broker further said: "All that was arranged I put down in the contract. By the contract I mean the bought-and-sold notes;" and that he reported what had passed to the defendants and said to them: "The Baboo consents to those provisions, you had better sign the contract;" and that he then, by the instruction of the defendants, signed the bought-and-sold notes on their behalf, and as constituting the contract.

The argument for the defendants turns on the portion of the broker's evidence which deals with the delivery of half only. It is said that the meaning of that sentence is that the plaintiffs were only entitled to half of what arrived, and the meaning of the words "only half from Ralli Brothers," is only half of what Ralli Brothers had contracted to deliver. The learned Judge has found that at the time when the contract was made, an [185] agreement was come to between the parties, such as is set out in paragraph 3, which amounts to an agreement that the defendants should sell and deliver to the plaintiffs 750 maunds of copper, to arrive by instalments of one-fouth of each instalment of copper of which they would receive delivery from Messrs. Ralli Brothers.

I can find no evidence of any such agreement. It appears by the bought-and-sold notes, which the broker says constituted the contract, that the defendants were to deliver 750 maunds if they arrived; and when he says if only half arrived, the defendants would only get half, but that all the terms were

put down in the contract, the plain meaning of his words is, I think, that if the defendants only got half of 750, they would only give what they got to the plaintiffs.

I also think that, if the evidence of the broker bears the meaning sought to be put upon it by the defendants, it is excluded by s. 92 of the Evidence Act, it not being within proviso 2 to that section.

The bought-and-sold notes disclose a contract for the purchase and sale of 750 maunds, if 750 maunds, arrived.

If the evidence of the broker means what the defendants say it does, the "separate oral agreement" was an agreement to deliver 750 maunds if a much larger quantity arrived. Such an agreement would be, in my opinion, inconsistent with the terms of the notes, and as the notes were signed after the conversation, and are proved by the defendants' witness to be the contract, I do not think evidence of such an oral agreement, to vary the terms of the contract as disclosed by the notes, would be admissible, or that, if admissble, it would be reliable or of any value in any way, and, for my own part, I should not believe it.

The case of *Sievewright* v. *Archibald* (20 L. J., Q. B., 529; 17 Q. B. 115) was relied on by the learned Judge in the Court below; but that case does not, in my opinion, affect the present question. In that case, the bought-and-sold notes did not agree, and there being no other written memorandum of the contract, it was held that there was no sufficient proof within the Statute of Frauds. The learned Judges say that bought-and-sold notes may not be either the con- **[186]** tract or a memorandum of it, but merely notes sent by brokers to their employers to give them information, and that in such a case the contract may be proved by any other legal means.

In the present case the broker, who was called by the defendants, said that the bought-and-sold notes were the contract, and it is apparent from the evidence that they were accepted by both parties as such, and this is in accordance with what was proved to be the custom of merchants in Calcutta in the case of *Cowie* v. *Remfrey* (3 Moore's I. A., 448) where this was proved. I am of opinion that parol evidence was not admissible to vary or add to the terms of the contract which had been reduced into writing. If any authority is required for this proposition, it will be found in the case of *Young* v. *Austin* (L R., 4 C. P., 553).

The only other contention which was urged before us on behalf of the defendants was that of waiver. As to that I think it enough to say that, as the defendants had the whole of four months to deliver in, the plaintiffs could not claim anything at all at the time when they received the delivery order for 375 maunds, and so could not demand a delivery at that time of anything more than the defendants thought fit to give them; and as they had no claim which they could enforce, they could not waive it by not asserting it.

On the whole, I am of opinion that the facts proved disclose no defence to the action, and that the appeal must be allowed and judgment given for the plaintiffs for the agreed amount of damages. The plaintiffs will get the costs in both Courts.

I should add that, although in the view I take of the case, it is not necessary to decide the point, it must not be understood that I am of opinion that the plaintiffs would have had no claim against the defendants by reason of their having cancelled their contract with Messrs. Ralli, and so put it out of their own power to fulfil their contract with the plaintiffs.

I would further add, that I think the practice of admitting evidence and reserving the question of its admissibility for further consideration, is unwise and much to be regretted. If the evidence is once admitted, it is impossible to

say what its effect may be on the mind of the person who hears it; and I think it most [187] desirable that the question of admissibility should be finally decided when the objection to questions is taken.

Pigot, J.—The plaintiffs sue for damages for the breach of a contract for the delivery of 750 maunds of copper; 375 maunds were delivered, and the breach alleged is the refusal to deliver 375 maunds, the remainder of what the plaintiffs say they were entitled to under the contract. The amount of the damages is admitted if defendants' liability be established.

The plaint in the first paragraph says; "Previously to the 13th day of August 1887 the defendants purchased from Messrs. Ralli Brothers, Merchants of Calcutta, a quantity of copper, and on the 'said 13th day' of August the defendants contracted to sell to the plaintiffs 750 maunds of the said copper (delivery on arrival) at the rate of Rs. 21-5 per maund Factory weight, with discount for four months at the rate of Rs. 10 per cent. per annum, with a further discount at the rate of 8 per cent. per annum, for 45 days from the date of delivery.

The defendants in the first and second paragraphs of the written statement say as follows:--

1st.—"On the 23rd day of July 1887 they agreed to purchase from Messrs. Ralli Brothers of Calcutta, 100 tons or 3,000 maunds more or less of Japan copper, Furrakawa, to arrive, by shipments in the month of July, on the term and conditions set out in Exhibit A (hereunto annexed). which the defendants crave leave to refer to as part of this their written statement."

2nd. —"On the 13th day of August 1887 the plaintiffs agreed to purchase 750 maunds out of the said 3,000 maunds of copper so agreed to be purchased by the defendants from the said Messsrs Ralli Brothers under a contract, dated the 9th day of the dark side of the moon in Bhadro, in Sumbat 1944, corresponding with the 13th day of August 1887, the terms whereof translated into English are as follows": —

[Here followed the bought-and-sold notes which His Lordship read and continued] :—

There is no dispute as to the bought-and-sold notes, which agree: nor as to the authority of the broker through whom the contract contained in them was made. And it is to be observed that the written statement in the paragraph just set out states that the plaintiffs agreed to purchase the 750 maunds under a [188] contract, that is, that contained in the bought-and sold notes dated the 9th Bhadro (dark side) 1294, or 13th August 1887: and then sets out the terms of it as contained in them. That, as I understand the effect of this language, makes it part of the defendants' case; that as to anything provided for in the bought-and-sold notes, they constitute the contract between the parties.

The third paragraph of the written statement contains the defence set up in this suit: -

3rd.—"At the time when this last-mentioned contract was entered into, it was distinctly agreed between the plaintiffs and the defendants that the defendants would sell and deliver to the plaintiffs the said 750 maunds of copper by instalments of one fourth of each shipment of copper of which they would receive delivery from the said Messrs. Ralli Brothers."

At the hearing the learned Judge allowed evidence to be given by the defendants, which evidence, as I understand, was tendered in support of the defence set up in the third paragraph of the written statement. He did not, when allowing that evidence (which was objected to) to be given, decide the question raised as to its admissibility, but reserved that question for decision by his judgment in the case. In his judgment he held the evidence to be admissible

and finding that it established the agreement set up in the third paragraph of the written statement, and that, under the circumstances, the defendants became entitled by the terms of that agreement to refuse delivery of more than the 375 maunds delivered by them, he dismissed the suit.

What tookplace after the contract was, as proved or admitted, as follows — On the 25th Bhadro (August 29th) the defendants sold to one Amritolall 200 maunds copper, to arrive. On the 27th Bhadro (August 31st) they sold to Tarachand and Ram Chunder, 100 maunds, and Madub Chunder and Prankristo 150 maunds, to arrive. They made no further sales than these of copper, to arrive.

About October 19th or 20th, 1,061 maunds of Ralli's copper arrived, and about the 31st October, 436 maunds, that is, 1,497 maunds in all. No more copper than this arrived under the defendants' contract with Ralli Brothers. Of the copper which so arrived the plaintiffs got delivery of maunds 375-0-6 that is, [189] maunds 87-0-6 on October 22nd, maunds 100-11-0 on October 31st, and maunds 187-29-0 on November 8th. These quantities appear to have been delivered to them under a delivery order, from Ralli Brothers to the defendants for 375 maunds, dated October 22nd. It may be noticed in passing that these deliveries certainly do not seem to have been made in accordance with the alleged agreement in the third paragraph of the written statement.

To the other persons, to whom the defendants had sold copper, to arrive, they delivered 225 maunds out of the 450 maunds sold by them.

The rest of the 3,000 maunds of copper, to arrive, which defendants had contracted for with Messrs. Ralli Brothers, did not arrive at all, nor did any copper arrive of the description stated in the bought-and-sold notes. The defendants made an arrangement with Messrs. Ralli as that part of the contract: at what exact date that does not appear, though from Nilmoney's evidence it would seem to have been before the 18th November. In December 1881 they received from Messrs. Ralli Rs. 12,500 in consideration of their having done so.

The defendants themselves took delivery from Ralli Brothers of the rest of the 1,497 maunds of copper, over and above the 375 maunds delivered to the plaintiffs, and 225 maunds to other persons. That would amount to about 897 maunds: to this they sold to different persons by ready sales, in the market, at prices higher than those agreed on with the plaintiffs.

In their written statement the defendants say that the rest of the 3,000 maunds did not arrive, and the defendants therefore could not, and in fact did not, deliver the remainder of the 750 maunds of copper to the plaintiffs, and they submit that no further deliveries became due from them to the plaintiffs.

It may be worth while to set out the letter of December 11th from the defendants, in answer to a demand then made by the plaintiff on the defendants for delivery of the remaining 375 maunds, to which the defendants replied on December 11th:—

"We sold you 750 maunds (Furrakawa) copper, to arrive, from Messrs. Ralli Brothers & Co., with condition to deliver you the same as it will arrive at the said office. I delivered you 375 maunds, which had arrived, and the remaining shall be given to [190] you when it will arrive at the said office." The arrangement with Ralli Brothers is not there disclosed; and the writer would seem not to have had the "verbal agreement" present to his mind.

The defence was that, although an amount of copper did arrive, more than enough to enable defendants to deliver the 750 maunds sold by the contract contained in the bought-and-sold notes, still as the defendants were not, by reason of the contemporaneous verbal agreement alleged in the third paragraph

of the written statement, bound to deliver more than one-fourth of what, *by each shipment*, did arrive, and as they did deliver one-fourth of what did arrive, they are not liable for breach of contract. There is no dispute as to their liability, unless they are excused by some such defence as this.

The plaintiffs contended that it was not competent for the defendants to set up the verbal agreement alleged; and they contend before us that even if it was, the defendants have wholly failed to prove it.

These are the substantial points raised before us. There was another, argued before us for the defendants, but not noticed in the judgment, namely, that the plaintiffs by accepting the 375 maunds had waived performance of the contract alleged by them. There really is nothing in the case to warrant such a contention, nor could it lie in defendants' mouth to suggest a waiver, in face of their letter of December 11th, untruthful as it was. The learned Judge in the Original Court held that evidence was admissible to prove the contract set up in the third paragraph of the written statement. I shall presently state why I think that evidence was not admissible: at present I have to deal with the finding of the learned Judge. He found that the evidence established the contract to set up. Unfortunately, he did not state his reasons for this finding, or refer to the parts of the evidence which led him to that conclusion.

The evidence upon the point is that of the broker and of the defendant, Nilmony; and it appears to me not merely to fail to establish, but to be quite inconsistent with, the case made in the third paragraph of the written statement. Madun Chand, the broker, says: "There was no arrangement as to delivery. It was understood delivery was to be taken from Ralli Brothers, Ralli Brothers [191] were to deliver the copper to the defendants, and, out of that copper, the defendants were to deliver again to the plaintiffs." Later on (combining a question and answer) he says: "There was no arrangement as to what quantity of copper was to be taken delivery of at a time." Then he is asked: "Was anything said as to the proportion of delivery?" *A.*—If the Nundy defendants got delivery of only half from Ralli Brothers, they would deliver only half to the plaintiffs; if they got the whole, they would deliver the whole. I said to the Mooneen gomashta of plaintiffs, you will have to take delivery in the same way as the defendants get delivery from the Rallis. In the contract it was written. 'This contract is Ralli Brothers' contract-ka-durrun on account of'—and that means that the word *durrun* means on account of." He ends by saying "all that was arranged has been put down in the contract. By the contract I mean the bought-and-sold notes."

There is not a word in his evidence as to delivery of "instalments of one-fourth of each shipment of copper of which defendants would receive delivery from Ralli Brothers." Then Nilmony says, "When the rates were fixed the broker was told that the plaintiffs will get delivery of the copper as often as we get it from Ralli's. If we get delivery all at once, we will give delivery all at once; if we got delivery by two instalments, they were to get delivery by two instalments, and so on." Later on, "I said to the broker, I am selling copper which is to arrive: if only one-half quantity arrived, you will get half; if only one-fourth, one-fourth. The broker consented and agreed to that and went to get the consent of the Baboo. He came back afterwards to me and then made the contract."

He was cross-examined as to his intention when making the contract. He says: "I had nothing particular in my mind. I intended to give a proportionate quantity only, proportionate to what I received. If I got the whole hundred tons, I would have given them the whole quantity they purchased." Later,

"When I sold the goods as Ralli Brothers', I would have given delivery as I received from Ralli's, and I would have given a *pro rata* distribution amongst those persons to whom I sold the copper." This is manifestly quite idle and worthless testimony. He had not then **[192]** made any sales save to plaintiffs, nor did he for more than a fortnight afterwards. However, this is what he says.

Of the contract set up in the third paragraph of the written statement not a word is said in the evidence of either of those witnesses. It is to me quite clear that this evidence is fashioned so as to fit in with what did happen; namely, that the plaintiffs got one-half of their 750 maunds and that Ralli Brothers (by an agreement with the defendants which they did not disclose) delivered only half of the 3,000 maunds sold to defendants. A verbal contract is accordingly set up, though not that set up in the written statement, by which plaintiffs were only to get the same proportion of their 750 maunds as Ralli should deliver of his 3,000 maunds; and so what is supposed to be a defence to the action is supplied.

I think this evidence does not warrant the finding of the learned Judge "that the contract pleaded in the written statement at any rate so far as what is stated in the third paragraph of the written statement is concerned has been proved." I think he ought to have found on this question in the negative, and that his judgment and decree should be set aside on that ground and on that ground alone.

It is unnecessary to consider whether the contract substituted in the evidence, could have been held proved. It has not been held proved, and if necessary I should express complete disbelief of the evidence in support of it. Apart however from the question whether the evidence warrants the finding of the learned Judge, which must be answered in the negative, I agree that the evidence tendered in support of the third paragraph of the written statement was not admissible.

It was expressly admitted in the written statement that the contract contained in the bought-and-sold notes (which agree) was entered into between the plaintiffs and the defendants.

It was a contract for 750 maunds of copper of Ralli Brothers, to arrive. Time, four months. The learned Judge has held that this term of the contract "to arrive" was a condition. I agree with that. The contract, therefore, bound the defendants to deliver 750 maunds if such a quantity arrived (as it did) within the four months. But the contract in the third paragraph of the written statement substitutes for that obligation a very different one, **[193]** namely, the obligation to deliver 750 maunds, if one-fourth of each of the successive arrivals should in the aggregate amount to 750 maunds, otherwise not. No doubt the written statement only says that it was agreed that defendants should deliver instalments of one-fourth of each shipment. But if this does not mean that they were not to be bound to deliver more than such one-fourth, there is no meaning in setting it up as a defence: and it is in truth the defence raised in the latter part of the written statement, to the effect that the plaintiffs got one-fourth of what did arrive, and that as the 1,500 maunds residue of Ralli's contract did not arrive, they were not entitled to more.

The learned Judge holds that the contract set up in the third paragraph is not inconsistent with that contained in the bought-and-sold notes. I am unable to agree with him. I think the two are inconsistent in this: the first makes the plaintiffs' right to receive 750 maunds of Ralli Brothers' shipments of Japan copper, conditional on arrival within four months of that quantity. The second, in effect makes it conditional on the arrival of the whole 3,000 maunds, which the plaintiffs[*sic*]had, as a fact, agreed to buy from Ralli Brothers

but no condition referring to the amount of Ralli's contract, or making the arrival of the whole of it any part of the bargain between the plaintiffs and the defendants, is hinted at in the bought-and-sold notes.

The bought-and-sold notes provide: "The conditions to weighment to be 45 days after the goods shall have come into the godown."

The learned Judge holds that it was competent for the defendants to show that "goods" in this place meant, not the goods the subject of the contract, but the goods mentioned in the plaintiffs' contract with Ralli Brothers, which contract is not referred to in it at all. He holds that this was the meaning of the word "goods" according to the view of the broker and the defendant; and that, that being so (although he says counsel did not so put it, nor any witness say it), evidence of the matters in the third paragraph of the written statement was admissible.

I am unable to agree with the opinion that evidence as to this very special meaning of the word "goods" was admissible. There seems to me to be no ambiguity in the words of the [194] instrument such as to render it admissible. The words "goods of the firm of Ralli Brothers" in the early part of the document seem to me clearly descriptive of the copper agreed to be bought, and the word "goods," in the proviso as to weighment to relate clearly to the copper, the subject-matter of the contract between plaintiffs and defendants, or at any rate copper answering that description. Were this meaning to be attributed to the word "goods" as suggested, I do not see how it would make evidence of the contract in the third paragraph of the written statement admissible; and I am unable to agree with the learned Judge, either that evidence of the meaning of the word "goods" was admissible, or that, if admitted, it furnished ground for further admitting evidence of the verbal agreement.

As a result the contract in the third paragraph being inconsistent with the written contract admitted both in the pleadings and in the evidence to have been entered into between the plaintiffs and the defendants, no evidence of it was admissible and the finding upon that evidence, even if it were warranted by it, cannot be sustained. Another ground is stated by the learned Judge for holding the evidence of the matters alleged in the third paragraph of the written statement admissible. That is that, as held by him in a former case, bought-and-sold notes do not necessarily constitute the contract: in his former judgment, quoted by him, he refers to *Sievewright* v. *Archibald* (20 L. J., Q. B., 529; 17 Q. B., 115), and the observations of Mr. Benjamin on this subject in which that decision is discussed.

In *Sievewright* v. *Archibald* (20 L. J., Q. B., 529; 17 Q. B., 115) the bought-and-sold notes were inconsistent with one another: it seems to have been the opinion of the Court that the contract between the parties might well have been proved in some other way, if there was one; and if it could be proved so as to satisfy the Statute of Frauds. This, and the other cases on this subject, go no further than to show that there may be cases in which bought-and-sold notes have been made, but in which they do not, nevertheless, constitute the contract. But as a general rule when they agree, they do. Lord CAMPBELL in *Sievewright* v. *Archibald* (20 L. J., Q. B., 529; 17 Q. B., 115), says that where [195] the bought-and-sold notes agree, it has been held that they constitute the contract. It may perhaps be a question, looking at the case of *Cowie* v. *Remfrey* (3 Moore's I. A., 448), which governs this Court, whether in Calcutta bought-and-sold notes do not by custom presumably constitute the contract unless this be disproved, once the authority of the broker is established.

At any rate, where the authority of the broker to act for both sides is clear, where the bought-and-sold notes agree and have been entirely acquiesced in, there can be no doubt that, at least so far as their contents go, they do constitute the contract.

In this case the matter even went further, for the defendants admitted that the bought-and-sold notes contained the contract between them and the plaintiffs, though setting up a distinct verbal one, and the broker deposed that the contract in the bought-and-sold notes did contain everything agreed between the parties. I think the bought-and-sold notes were the contract in this case, and could not be varied by parol evidence.

For these reasons I think the judgment and decree of the Court below should be set aside, and a decree be made for the plaintiffs, and that they recover damages, being the amount ascertained to be due, if damages should be found to be recoverable.

It is unnecessary to determine the question raised in the memorandum of appeal as to the defendants arrangement with Ralli Brothers, and the profit made by him out of that arrangement; it is enough to say that I quite agree with what has been said by the Chief Justice on that subject.

I may add also that I quite agree with what has been said by the Chief Justice as to the admission of evidence subject to decision of the question whether it is admissible or not.

Appeal allowed.

Attorney for the Appellants: Mr. *H. E. Chick.*

Attorney for the Respondents: Baboo *G. C. Chunder.*

T. A. P.

NOTES.

[As regards 'bought and sold notes' see also (1904) 8 C W.N., 489; as regards judges' duty to decide on admissibility of evidence, see also (1897) 25 Cal., 401.]

[196] APPELLATE CIVIL.

The 3rd September, 1888.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE RAMPINI.

Debiruddi and others............Defendants

versus

Abdur Rahim and others......... ..Plaintiffs.*

Landlord and Tenant—Forfeiture—Denial by tenant of title of landlord—Bengal Tenancy Act (VIII of 1885), s. 178—Forfeiture completed before passing of Act.

The plaintiffs, purchasers of a *Mokurari jama*, sued to eject the defendants, on the ground that they had in their written statement in a former suit for rent, which had been decided in the plaintiffs' favour, denied the plaintiffs' title, and had thereby forfeited their

* Appeal from Appellate Decree No 736 of 1888, against the decree of Baboo Madhub Chunder Chuckerbutty, Subordinate Judge of Burdwan, dated the 20th of January 1888, reversing the decree of Baboo Koylash Chunder Mozumdar, Munsif of Cutwa, dated the 25th of May 1887.

tenures. The denial took place in March 1885, before the Bengal Tenancy Act came into operation: *Held*, that the forfeiture being complete before the passing of the Act, the case was not affected by s. 178 of that Act, and must be governed by the old law.

Under the decided cases before the Bengal Tenancy Act such a denial by a tenant of his landlord's title created a forfeiture. *Satyabhama Dassee* v. *Krishna Chunder Chatterjee* (I. L. R., 6 Cal., 55) and *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt* (I. L. R., 10 Cal., 41) referred to. But *semble*:—Since the passing of that Act, in any case to which it applies there cannot be any eviction on the ground of forfeiture incurred by denying the title of the landlord, that not being a ground enumerated in the Act, and therefore expressly excluded by s. 178.

THIS was a suit for ejectment and for khas possession of certain lands.

The plaintiffs were the purchasers of certain *mokurari jamas* from the defendants Nos. 8, 9 and 10, called the *pro forma* defendants. The purchase was made on the 25th Assar 1291 (8th July 1884), at which time and previously they alleged that the principal defendants (defendants Nos. 1 to 7) held the land from which it was sought to eject them as *karfa* tenants. On this allegation the plaintiffs, in the early part of 1885, brought a suit against those defendants for arrears of rent. In that suit the defendants denied the alleged relation of landlord **[197]** and tenant, and denied also the plaintiffs' *mokurari jamai* title; and they set up their own title as *lakhirajdars*. That suit was, on 31st December 1885, decided in favour of the plaintiffs, who sought in the present suit to eject the defendants on the ground (among others not material to this report) that they had forfeited their tenure by reason of their denial of their landlords' title in the former suit.

The Subordinate Judge (reversing on this point the decision of the Munsif) held that the plaintiff was entitled to eject the defendants, and gave him a decree for possession.

From this decision the principal defendants appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey* for the Appellants.

Dr. *Gurudas Banerjee* and Munshi *Seraj-ul-Islam* for the Respondents.

The **Judgment** of the Court (WILSON and RAMPINI, JJ.) was delivered by

Wilson, J.—The present suit was brought by persons who claimed to be the landlords of the defendants, and they claimed to eject the defendants from the land in question on several grounds of which it is only necessary to notice the first.

The first ground was that in a former suit between the same parties, in which the plaintiffs sued to recover rent, the defendants in their written statement had denied that the relation of landlord and tenant existed at all between the plaintiffs and themselves, and set up an adverse title claiming the land as their own *lakhiraj*. That was decided against the defendants, it being established that the relation of landlord and tenant did exist; and a decree for rent was given accordingly. In the present suit for ejectment the plaintiffs based their title in the first place upon the forfeiture of the defendants' interest, which they (the plaintiffs) say arose from the fact of the defendants having absolutely denied their landlords' title in the rent-suit. Under the law as laid down in this Court before the passing of the Bengal Tenancy Act, it must be taken, we think, that the plaintiffs' contention is correct, and that such **[198]** a denial in the written statement of the landlords' title did work a forfeiture. The cases are many, and have not all been uniform, but the latter cases are, we think, all one way in favour of the plaintiffs' view. It is not necessary to do more than refer to two of those cases: one, *Satyabhama Dassee* v. *Krishna Chunder Chatterjee* (I. L. R., 6 Cal., 55), and the other, *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt* (I. L. R., 10 Cal., 41).

The denial in the rent-suit took place sometime in March 1885. In the same year the Bengal Tenancy Act was passed and came into operation on the 1st of November of that year. That Act has obviously made a material change in the law in this respect. The mode in which it has dealt with the subject of eviction of tenants from their tenures or holdings is to enumerate the things which shall be grounds for a suit for eviction, and, in express terms, to exclude every other ground. Various classes of tenants are dealt with in their order.

Section 10 deals with permanent tenure-holders, and it declares that "a holder of a permanent tenure shall not be ejected by his landlord except on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected. Provided that where the contract is made after the commencement of this Act, the condition is consistent with the provisions of this Act." Section 18 deals with the case of a ryot holding at a fixed rent in perpetuity, and it says that he "shall not be ejected by his landlord except on the ground that he has broken a condition consistent with this Act, and on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected." The case of the occupancy ryot is dealt with in s. 25, which says: "An occupancy ryot shall not be ejected by his landlord from his holding, except in execution of a decree for ejectment passed on the ground; (a) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy; or (b) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected." The next case, [199] that of a non-occupancy ryot, is dealt with in s. 44, which says: "A non-occupancy ryot shall, subject to the provisions of this Act, be liable to ejectment on one or more of the following grounds, and not otherwise, namely: (a) on the ground that he has failed to pay an arrear of rent; (b) on the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or that he has broken a condition consistent with this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected; (c) where he has been admitted to occupation of the land under a registered lease, on the ground that the term of the lease has expired; (d) on the ground that he has refused to agree to pay a fair and equitable rent determined under s. 46, or that the term for which he is entitled to hold at such a rent has expired." The remaining class of tenants, under-ryots, are provided for in s. 49, which says: "An under-ryot shall not be liable to be ejected by his landlord except (a) on the expiration of the term of a written lease; (b) when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which notice to quit is served upon him by his landlord." Then s. 89 provides that no tenant shall be evicted from his tenure or holding except in execution of a decree, so that a landlord, even in case where eviction is allowed, cannot evict without obtaining a decree of a Court for that purpose. And s. 178 strengthens the matter, because it provides that "nothing in any contract between a landlord and tenant made before or after the passing of this Act . . . . shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act." Thus it seems clear that under the present Rent Law in all the cases to which it applies there can no longer be any eviction on the ground of forfeiture incurred by denying the title of the landlord.

If the present case is governed then by the law in force prior to the Bengal Tenancy Act, the plaintiff is entitled to reply on the forfeiture; if it is governed by the Bengal Tenancy Act, he is not. The general principle of construction applicable to such matters is that an Act is not to be held to take away vested

right of property unless such an intention is expressed or appears by [200] necessary implication. In the Tenancy Act we can find no indication of an intention that it shall take away from a landlord any vested right derived from a forfeiture which occurred before the Act came into operation. Section 178 is specifically made retrospective in one respect, for it says, that "nothing in any contract between a landlord and a tenant *made before or after the passing of this Act* (c) shall entitle a landlord to eject a tenant otherwise that in accordance with the provisions of this Act." But the present case does not depend on contract, and, if it did, there is a great difference between a forfeiture under a contract made before the Act, and a forfeiture actually completed before the Act.

For these reasons, we think that the old law governs this case. The appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[As regards the applicability of the Bengal Tenancy Act 1885 to relieve forfeiture incurred by denial of landlord's title, see also (1890) 20 Cal., 101 ; (1892) 20 Cal., 590 ; (1898) 2 C.W.N., 755 ; (1899) 4 C.W.N., 42 ; (1900) 28 Cal., 135 ; (1905) 2 C.L.J., 389 ; (1905) 3 C.L.J., 201 ; (1908) 12 C.W.N., 525.

As regards the general case, it has been held that disclaimer for the first time in the pleadings does not entail forfeiture : —28 Cal., 135 ; 33 Cal., 339 ; 34 Cal., 57 ; 31 Mad., 403 ; 15 Bom. 407 ; 18 Bom., 110 ; 17 All., 45 ; 9 A.L.J., 794.]

[17 Cal. 200]

APPELLATE CIVIL.

The 17th April, 1889.

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

O. R. Coley... ....Defendant

versus

V. A. Dacosta............Plaintiff.

Arbitration—Long and unreasonable delay in the conduct of the proceedings —Revocation— Civil Procedure Code (Act XIV of 1882), s. 523—Appointment of arbitrator by the Court.

A submission to arbitration can only be revoked on good grounds.

The claimant in a reference to arbitration is the person on whom, *ceteris paribus*, it is incumbent to promote the conduct of the proceedings ; and when, therefore, there is a long and unreasonable delay unexplained by any act of the other party either conducing to it or consenting to it or waiving it, the latter is, *prima facie*, entitled to decline to go on with the reference and to revoke the agreement for submission.

* Appeal from Original Decree No. 105 of 1888, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Bhagulpore, dated the 20th of July 1887, and amended on the 9th of February, 1888.

Where an agreement to refer has been duly revoked, the Court is incompetent to order it to be filed under s. 523* of the Code of Civil Procedure.

***Semble:*—Where no arbitrator has been named in an agreement, and the aid of the Court in the appointment of an arbitrator is invoked, the parties ought to have an opportunity of being heard upon the selection to be made.**

***Pestonjee Nussurwanjee* v. *Manockjee* (12 Moore's I. A., 112) referred to.**

THIS was an appeal from a decree in terms of an arbitration award passed by the Subordinate Judge of Bhagulpore.

[201] The appellant, Osbourne Richard Coley, and the respondent, Victoria Anne DaCosta, entered into an agreement, dated the 31st March 1886, by which they agreed that all matters in dispute between them should be referred to the arbitration of Baboo *Shib Chunder Banerji*, Rai Bahadoor, Government Pleader, and Baboo *Shoshi Bhusan Mookerjee*, Pleader, whose joint-decision on each point should be final; and that in the event of any difference of opinion between the said arbitrators upon any point, such point should be referred to the decision of Mr. T. C. Curtis, of Colgong, as umpire, whose decision should be final. The agreement did not fix any date on which the award should be delivered, nor was any provision made for the appointment of other arbitrators in case any of the arbitrators thereby appointed should refuse or become incapable to act. This agreement was registered by the appellant on the 1st April.

There was no evidence to show that anything had been done by the arbitrators beyond a statement that two or three meetings had been held. But soon after the submission, Baboo Shoshi Bhusan Mookerjee, the arbitrator appointed by the respondent, went to Darjeeling for the benefit of his health, and the proceedings, if any had taken place, were suspended. On the 11th June 1886 the respondent wrote to Mr. Curtis, suggesting that Baboo Soorji Narain Singh should be appointed arbitrator in the place of Baboo Shoshi Bhusan Mookerjee: to this the appellant agreed by his letter to Mr. Curtis of the 15th June. This fact does not appear to have been proved before the Subordinate Judge, though it was admitted on appeal before the High Court. The suggestion of appointing a fresh arbitrator in the place of Baboo Shoshi Bhusan was not carried out. Nothing was done from the time when the suggestion was made, nor was any attempt made to re-open or continue the proceedings until after the 8th December 1886, on which date the appellant sent a letter to Baboo Shoshi Bhusan Mookerjee, withdrawing from the arbitration, and requesting the return of all books, papers, letters, and documents filed by him.

---

*[Sec. 523 :—

Agreement to refer to arbitration may be filed in Court.

When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

Application to be numbered and registered.

The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

Notice to show cause against filing.

On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator, when he is not named therein and the parties cannot agree as to the nomination.]

In consequence, the respondent filed a petition, dated the 21st December 1886, in the Court of the Subordinate Judge of Bhagulpore, to have the agreement for submission, dated the [202] 31st March 1886, filed under s. 523 of the Civil Procedure Code. .Notice was given to the appellant to show cause why the agreement should not be filed, and cause was shown by him.

On the 28th February 1887, the Subordinate Judge ordered the appellant to file the agreement within nine days from the date of the order, and that both the appellant and respondent should file the points of difference between them by that time. The reasons for this decision were that the delay on the part of the arbitrators, of which the appellant complained, was due chiefly to the illness of one of them; that there was no evidence that the appellant had been put to any inconvenience or annoyance in consequence of such delay; that there was no provision in the agreement that it should be void unless the award was filed within a fixed time; that, as the appellant had registered the agreement, he was the proper person to have taken it out of the Registry Office and to have filed it; and that, therefore, the cause shown by the appellant was neither sufficient nor satisfactory.

On the 29th March 1887, the Subordinate Judge appointed Baboo Shoshi Bhusan Mookerjee and Shib Chunder Banerji, arbitrators, and Mr. Curtis, umpire. On the 2nd April, Baboo Shib Chunder Banerji declined to act, and on the 12th April, Mr. Curtis sent a notice to the same effect. In consequence of the refusal of Baboo Shib Chunder Banerji and Mr. Curtis to act, the Subordinate Judge, by his order of the 19th April appointed Baboo Kirti Chunder Chatterji, arbitrator, and Baboo Sankata Churn Mitter, umpire, in their places. This order was made without any notice to the appellant.

Notice of the first meeting, which was fixed for the 1st June, was sent to the appellant under registered cover, but he did not attend it, nor any of the subsequent meetings. The arbitrators heard the matter *ex parte*, and delivered their award on the 18th June 1887.

On the 28th July 1887, the appellant filed his petition of objections, in which he objected to the award on the following grounds:—

(*a*) That there has not been a legal award in the case within the meaning of the Civil Procedure Code.

[203] (*b*) That the nomination of, and reference to, the arbitrators were not made in the manner required by law, and as such, all proceedings subsequent to the reference were illegal and without jurisdiction.

(*c*) That some of the arbitrators were appointed without the knowledge and consent of the appellant.

(*d*) That the arbitration could not proceed inasmuch as it had been revoked by the appellant by his letter of 8th December 1886.

(*e*) That the arbitrators have no power to go on with the case *ex parte* *i.e.*, in the absence of the appellant.

(*f*) That the entire proceedings were *ultra vires* and without jurisdiction.

On the 20th July 1887, the Subordinate Judge overruled all these objections and made a decree in terms of the award.

From this decree an appeal was filed in the High Court.

Mr. *Phillips*, Mr. *R. E. Twidale*, and Baboo *Umakali Mookerjee*, for the Appellant.

Mr. *C. Gregory* and Mr. *H. E. Mendes* for the Respondent.

Mr. *Phillips*.—The appellant was perfectly right in withdrawing from the arbitration. Section 523 contemplates that the application for filing an agreement should be made, while the matter is *res integra*, that is, not while the arbitration is going on, and before anything happens to put an end to the agreement.

There is no provision in the Code for an arbitration which is partly conducted out of Court.

[PIGOT, J., referred to the case of *Pestonjee Nussurwanjee* v. *Manockjee* (12 Moore's I. A., 112.)]

Mr. *Phillips*.—The question in that case was as to the filing of an award.—See pages 126, 127. The entire proceedings here are more in the nature of an abuse of the sections. There was nothing done almost from the beginning. There is no necessity to resort to the Court in the case of a pending arbitration as the award can be filed after it has been made. Either there is a power to revoke, or there is none. If none, then the arbitration [204] must go on, and objections must be taken when the award comes to be filed.

[PIGOT, J., referred to the case of *Brooke* v. *Surdyal* (12 B. L. R., App. 13).]

Mr. *Phillips*.—The order appointing arbitrators is bad, because it directs them to proceed *de novo*. The provisions as to the incapacity of an arbitrator do not apply to agreements to refer. The sections of Chapter 37 are to apply so far as they are not inconsistent with the agreement to refer.—See s. 524.* The question is whether the Court has power to substitute arbitrators for those appointed by the parties. When parties come to an agreement to refer to certain persons, it would be a perversion of their intention to refer it to others. In the case of a reference by the Court, the Court can substitute others; and, in the case where no arbitrators have been appointed, it can appoint arbitrators or supersede the arbitration.—See s. 510 † To refer to unknown persons, in whom there can be no confidence, is inconsistent with s. 523, by which the Court cannot supersede, as there is no case pending before it The arbitrators were not duly appointed. There was no notice served upon the appellant of anything done in Court, or of the appointment of the arbitrators. The Court had no power to appoint any persons arbitrators besides those named in the agreement.

[PIGOT, J., referred to *Barracho* v. *D'Souza* (7 Mad. H. C. Rep., 72).

Mr. *Phillips*.—In that case there was a reference of a matter in Court and by the Court. Section 316 of Act VIII of 1859 and s. 507 of the present Code are similar. The Judge has misapplied s. 508.

[PIGOT, J.—The words "order of reference," in s. 524 refers to what the Court does under s. 523. The term is not appropriate.]

Mr. *Phillips*.—Appointments by the Court cannot be made without notice. The Courts are most reluctant to enforce such agreements. The agreement here was rescinded, and therefore there was no agreement to file. The obsevations of their [205] Lordships of the Privy Council in the case of *Pestonjee Nussurwanjee* v. *Manockjee* (12 Moore's I. A., 112) if anything, are rather an authority in my favour on the question here.

In the case of *Barracho* v. *D'Souza* (7 Mad. H.C. Rep., 72) there was a special stipulation for the appointment of an umpire He also referred to *Burla Ranga Reddi* v. *Kalapalli Sithaya* (I. L. R., 6 Mad. 368) and *Muhammad Abid* v.

* Sec. 524:—The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under section 523, and to the award of arbitration and to the enforcement of the decree founded thereupon.]

Provisions of chapter applicable to proceedings under order of reference.

† Sec. 510:—If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may in its discretion either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving British India or make an order superseding the arbitration, and in such case shall proceed with the suit.]

Death, incapacity, etc., of arbitrators or umpire.

Muhammad Asghar (I. L. R., 8 All., 64). The entire proceedings were illegal and consequently the award is bad.

Mr. *Gregory.*—The revocation was not good; the arbitrators were duly appointed and the award made in the regular way.

I rely upon the cases of *Pestonjee Nussurwanjee* v. *Manockjee* (12 Moore's I. A., 112), *Barracho* v. *D'Souza* (7 Mad. H. C. Rep., 72), and *Muhammad Abid* v. *Muhammad Asghar* (I. L. R., 8 All., 64), as to the appointments by the Court. In the absence of any authority, there is nothing in the Code that would vitiate the appointment and the award. Section 510 speaks of no notice, but leaves it in the discretion of the Court to appoint arbitrators. I therefore submit that notice was not imperative, and there is no authority which would make an appointment a nullity for want of notice, and consequently the award a nullity.

Mr. *Mendes* followed on the same side.

Mr. *Phillips* replied.

The **Judgment** of the High Court (PIGOT and BEVERLEY, JJ.) was as follows:—

The award in this case is impeached in appeal on two main grounds; one, that the submission to arbitration was duly revoked before the order of the Court was made under which the agreement for reference was ordered to be filed under s. 523; and the other, that the proceedings had in the Court of the Subordinate Judge were irregular, and such that the arbitrators who made the award, upon which the decree is based, were not a properly-constituted body of arbitrators at all, and that the award for that reason is bad. The first question is as to the right of the appellant to revoke the submission to arbitration which, it is clear, can only be on good grounds.

[206] The submission was in March 1886. We have nothing before us to enable us to determine whether anything was done by the arbitrators, though it is stated that two or three meetings were held. But, after the submission, the arbitrator appointed by the respondent went to Darjeeling for the benefit of his health, and the proceedings, if any had taken place, were suspended. A suggestion was made on the part of the respondent in June, that a fresh arbitrator should be appointed in his place: this was assented to by the appellant. This was admitted before us; it does not appear to have been proved before the Subordinate Judge. Nothing, however, was done from that time until the following December, and there is no evidence that, until after the letter of December 8th revoking his submission was sent by the appellant, any attempt to re-open or continue the proceedings was made. In answer to a question by us, the respondent's pleader stated to us that he was instructed that a meeting, or an attempt to hold a meeting, did take place in December, shortly before the appellant sent his letter of revocation. This is denied by the appellant; and as there is no proof of it, it cannot, of course, be taken into consideration. It is most probably incorrect: there is nothing said of such a meeting in the respondent's petition of December 21st. As the case stands, therefore, we have only these facts: (1) a submission to arbitration in March; (2) a suspension of the arbitration soon after, by reason of the incapacity of the arbitrator nominated by the respondent; (3) a proposal by the respondent for the substitution of another person in his place, assented to by the appellant in June, but not carried out; (4) the lapse of six months, during which nothing is done; (5) the fact that the respondent, being the claimant as against the appellant, was the person on whom, *cæteris paribus*, it was incumbent to promote the conduct of the proceedings.

It appears to us that, under these circumstances, unexplained by any act of the appellant either conducing to this long delay, or consenting to or waiving it, the appellant was, *primâ facie*, entitled to decline to go on with the reference.

Had the Subordinate Judge thought fit to enquire into the circumstances, it is possible, of course, that facts might have been [207] proved, which would have shown that the appellant was not entitled to revoke. But we have only to deal with what is before us; and must assume, for the purposes of our decision, that there was nothing more in the case than appears.

It is true that the appellant did not verify his written statement. But the delay mentioned in it was an admitted fact before the Subordinate Judge as before us.

We think that, on these facts, there appears such an unreasonable neglect in the prosecution of the arbitration as entitled the appellant to put an end to it. In the case of *Pestonjee Nussurwanjee* v. *Manockjee* (12 Moore's I. A., 112) the subject was considered as to whether or not the appellant was justified in revoking in that case; and we think that the circumstances of the present case are not wholly dissimilar to those which, in the case supposed by their Lordships in the decision of that case that page 131, would have justified, or might have justified, the appellant in that case in declining to proceed; no doubt, as we pointed out during the argument yesterday, the period in that case between the submission to arbitration and the attempt to revoke was longer than that in the present case. But here we have a period of nine months elapsing during which, so far as the case before us shows, nothing was done to make any change in the state of things between the appellant and the respondent. In the case of *Pestonjee Nussurwanjee* v. *Manockjee* (12 Moore's I. A., 112) almost immediately after the reference the partnership was dissolved, and the appointment of the person, who was to have the business in future, had been, as their Lordships point out, speedily determined, and, subsequently to that, several important decisions in the arbitration had been arrived at. We agree with the argument of the learned counsel for the appellant that, if anything, the observations of their Lordships are rather an authority in his favour on the question at issue here. The powers conferred by the Code upon arbitrators are very great; and we think that a party has a right, if he chooses, to insist upon it that, once an arbitration is decided upon, it shall be proceeded with reasonable speed. There is no doubt in the present case the delay that took place was in itself unreasonable, and, being unexplained and not [208] justified by any acts of the appellant, we hold that he had good cause under the circumstances for revoking this agreement. That being so, it was no longer competent to the Court to order the agreement to be filed under s. 523, and the proceedings were therefore invalid.

Having determined the appeal on this point, it is not necessary to go into the question elaborately argued before us as to the character of the proceedings taken by the Subordinate Judge; but we may say that, under no circumstances, could we have allowed the award arrived at, as it was, to stand. A proper opportunity ought, we think, to have been given to the appellant to come in before the appointment of the arbitrator in place of Baboo Shib Chunder, whose letter, declining to continue as arbitrator, was received apparently by the Subordinate Judge on the 4th April; and, on that day, on his receiving that intimation, he appointed a fresh arbitrator. We think that the Court ought to have allowed the parties an opportunity of being heard as to the selection of an arbitrator. It is not necessary, however, for us to base our decision upon this ground, and the less so, because, were we to determine

the case with reference to the validity of the proceedings taken, and apart from the question of the power of the appellant to revoke on the 8th of December, we should be obliged to send back the case again for the appointment of fresh arbitrators. But inasmuch as, in our judgment, the submission had been on that date validly revoked, that order was inoperative, and the proceedings had under it were likewise inoperative.

We, therefore, allow the appeal, reverse the order of the Subordinate Judge made under s. 523 directing that the reference be filed, and set aside his decree on the award, with costs throughout.

C. D. P. *Appeal allowed.*

NOTES.

[*See* also (1902) 20 Cal., 278.]

[209] ORIGINAL CIVIL.

The 23rd August, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND Mr. JUSTICE PIGOT.

In the Matter of Rash Behari Roy and another, Insolvents.

Rash Behari Roy and another............Appellants

versus

Bhugwan Chunder Roy and others............Respondents.*

Insolvent Act (11 & 12 Vic., Chap. 21,) s. 50—Imprisonment of insolvent on Criminal side—False entries in books—Fraudulent preference—Fraudulent transfers—Warrant, Illegality of—Concealment of property.

Section 50 of the Insolvent Act provides a punishment by way of penalty, and before an insolvent can be punished under that section, he must be shown by legal evidence to have committed, on some specific occasion, one or other of the offences enumerated in that section.

A law of this kind, the intention of which is to punish, should be administered as the Criminal law is administered, that is to say, specific offences should be charged, not technically specific in the sense of a specific form of indictment, but the Court and the insolvent and all concerned should know what offence the insolvent is being tried for; and the evidence should be directed to the proof of that offence, so that the accused may be in a position to produce evidence to rebut the charge of that offence; and the Judge should specifically find what offence the insolvent has been guilty of; and in his judgment and order and in the warrant it should appear what the insolvent has done.

A warrant committing an insolvent to jail for offences under s. 50 of the Insolvent Act, including, amongst the offences for which he is committed, an offence not contained in that section, is invalid.

APPEAL from an order of Mr. Justice TREVELYAN, made under s. 50 of the Insolvent Act.

* Original Civil Appeal No. 18 of 1889, against the order of Mr. Justice TREVELYAN, dated the 13th of April 1889.

Rash Behari Roy and Jollodhur Roy, traders, were adjudicated insolvents on the 21st April 1886, and, on coming up for their personal discharge, were opposed on the following grounds: (1) that they had been guilty of fraudulent concealment of account-books and papers; that they had not produced any account-books prior to 1291, 1292 and 1293, nor any title deeds or zemindary papers or any papers or books relating to their business in the "North-West" and in "Rangoon;" (2) that the account-books produced to the [210] Official Assignee for the years 1291, 1292 and 1293, were not original books and contained fictitious entries, namely, entries made after the balances for the day had been made up; (3) that certain mortgages in favour of Nilmadhub Roy and Debendronath Roy, and a putni lease granted to Grija Sundary Chowdhrany and Protima Sundary Chowdhrany and an instrument of gift to Dayamoyee Dabee, and a certain conveyance to Kessublall Shaw and Hurilall Shaw were all fraudulent documents, and that a certain mortgage to one Josodalall Roy was given for a smaller sum than that stated in the document; (4) that the insolvents had vexatiously and frivolously defended four several suits brought against them by their creditors in the High Court, which suits were eventually decreed against them in full; (5) that the insolvents had been guilty of concealment of property. The remaining grounds were intimately connected with the foregoing, and were treated with them.

It appeared in evidence against the insolvents, from an affidavit used by them for the purpose of obtaining further time to file their written statement in one of the above-mentioned suits which was for a large sum of money, that the summons in the suit was served on the 20th July 1886, and that twelve days after the service of this summons both the insolvents executed the putni above referred to in favour of their wives, the putni in question being of a very considerable portion of their property. It also appeared that, on the 26th July 1886, they took out a summons for two months' time to file further written statements basing their application on an affidavit, which declared that there was a good and substantial defence to the suit, filing their written statement on the 20th August 1886; and that, on the 3rd August 1886, they executed the mortgage to Debendronath Roy. The written statement above referred to on inspection raised no substantial defence, but merely alleged, without denying the amount sued for, that they were ready and willing to have an account taken, and that they believed that, on the taking of that account, a much smaller sum than that sued for would be found to be due to the plaintiff.

The insolvents were tendered for cross-examination, and it was not until their cross-examination had been concluded that their books were produced.

[211] Mr. *T. A. Apcar* appeared for the Insolvents.

Mr. *Hill* and Mr. *M. P. Gasper* for the Opposing Creditors.

TREVELYAN, J. found, as to the first ground, that the books were not produced in order to prevent the opposing creditors from examining the insolvents upon them. As to the second ground, that the insolvents had falsified their books, by making fictitious entries after the balances had been made up. As to the third ground, the mortgages, the deed of gift, and the putni leases and the kabuliats were all fraudulent documents, but that it was only necessary for him to refer to the mortgage of Debendronath and to the putnis; that as to the mortgage, that the consideration for the mortgage to Debendronath Roy was Rs. 30,000; that it alleged a previous debt of Rs. 3,500 which was taken as part of the consideration-money, as well as other payments, which had been traced to persons, some of whom were not creditors; and that, if the money was taken from Debendronath, if it had left the insolvent's hands, and if it had been paid to the alleged creditors, then such payments were made for

the benefit of the insolvents and for the purpose of defrauding the creditors who had brought suits against the insolvents. That, in considering whether the putnis were real transactions or not, it was necessary to remember the pending suits, and that, on the evidence before the Court (that taken before Mr. Justice MACPHERSON, the Commissioner before whom the case had first come up, not being put in), the putni had not been proved ; that it was abundantly clear that the putni had been executed in consequence of the service of summons in the suits brought against the insolvents, and not from pressure put upon the insolvents by the ladies. That as regards the fourth ground, there was no doubt but that the object of defending these suits, brought against the insolvents by creditors, was to get time to make away with their property. As to the fifth ground, that there was no doubt if the entries were fictitious, if the putni was fictitious, and if the money had not been distributed, then there had been concealment of property.

His Lordship then continued as follows :—" I find, as a fact, that there have been fraudulent transfers of property ; that the defences to the suits have been vexatious and frivolous ; also that the [212] insolvents have falsified their books : although it appears in certain cases there have been entries after the balances were made up and carried over, entries made by mistake, yet there are a large number of cases in which payments have been made after the balances have been made up, and have not been carried over ; an examination of those payments shows that they are fictitious. Then comes the question, What ought I to do? I have considered this question with great anxiety. This is certainly the most fraudulent commercial case I have seen since I have been sitting as Commissioner of this Court. These people have made away with large sums of money. They have brought in their books after long delay. In the interests of commercial morality, I must deal severely with the case * * * I have no doubt much money would have been available for distribution among creditors, but for the fraudulent acts of the insolvents. I direct that the two insolvents be imprisoned for one year each and decline them their discharge at the end of such year. The Sheriff's officer will take charge of them. Following the Bombay cases [In re *Manikji Shapurji Kaka*, 5 Bom. H. C. O. C 61 ; and In re *Cawasji Ookerji*, I L R., 13 Bom., 115], I direct that they be imprisoned on the Criminal side of the jail."

The important portions of the order drawn up on this judgment were as follows :—" It appearing to the Court that the said insolvents have fraudulently, with intent to defeat the objects of 11 & 12 Vic., Chapter 21, made false entries in their books of account, and have fraudulently, with intent of diminishing the sum to be divided among their creditors, transferred or made away with and mortgaged their properties, and have put their creditors (naming them) to unnecessary expense and delay by making vexatious and frivolous defences to suits brought by the said creditors * * * against the insolvents. This Court doth hereby adjudge and order that the said insolvents do stand committed to the custody of the Sheriff of the Town of Calcutta, and the Superintendent of the Presidency Jail, Calcutta, for a period of twelve calendar months * *

The insolvents appealed.

M. *Evans* and Mr. *T. A. Apcar* for the insolvents.

Mr. *Hill* and Mr. *M. P. Gasper* for the opposing creditors.

[213] Mr. *Evans*.—The question, whether the transactions have been fraudulent or not, cannot be ascertained by the Insolvent Court, as between the insolvents, the assignee, and third persons ; but the question is one for a Civil Court. The withholding of books in this case by the insolvents is not such an

offence as is intended by the Act; there must be more than mere delay or difficulty in producing books. The only way of dealing summary punishment under the Act is on conviction on a proper prosecution. Punishment under s. 50 is not a conviction, as s. 70 deals with prosecutions Section 50 has no exact parallel in the present English Act or in the old Indian Insolvent Acts. In one of the old English Acts it is declared that insolvents are to be committed to the debtors' jail; and in this country two insolvents, Abdaw, and Ramdhone Mullick, have been sent to the Civil Jail. I submit it is not justifiable to treat the men as criminals under s 51. If the order is a criminal one, I cannot find any similar section in the old English Acts, but there are some very like it, and these do not treat the matter as criminal, and I think the reason is that the Acts were for the relief of insolvent debtors, and if it were not so, they would be imprisoned for ever and therefore the putting in prison on account of malpractices, differs from doing so on conviction. If the imprisonment is meant to be criminal, similar to that given to persons in due course of law, then you ought to be able to plead this in case you are charged again: but you cannot, under the Act, plead a previous conviction. Section 70, which provides for criminal punishment, points to a trial. I submit that the order of commitment is bad on the face of it, as it does not specify the false entries [Mr. *Hill.*—In the grounds of opposition, which are not to contain specific allegations as is the case with a plaint, there is an allegation that the books contain fictitious entries. PIGOT, J.—Has the learned Judge found that the insolvents were connected with the fictitious entries?]. And it is bad as being in the alternative; and I say further that my clients have been convicted under s. 50 of an offence which falls under s. 51; and I am unable to say how much of the conviction is due to the insolvents having dealt with vexatious defences. Further the warrant contains an insertion which is bad on the face of it. There is an [214] illegal detention, as the warrant is informal. There is no evidence to connect the younger insolvent with the books. Next, 'the withholding' under s. 51 must, as I have said, be a complete withholding; here the books were brought in before the insolvency proceedings were over; and moreover four khatta books of 1290, which were said by the learned Commissioner to have contained entries made with a view to insolvency, were (it is now discovered) sent direct to the Insolvent Court from the Dacca Court, in which latter Court they had been filed since 1884, and out of the seven alleged fictitious entries, there are only four which are not contained in the books sent down by the Dacca Court. With regard to the findings of the Commissioner, 'I find as a fact, &c.,' these are all findings on suspicion and not on evidence. As to the younger insolvent, there is no suggestion that he is connected with the false entries, and although he may have been implicated in the putnis, yet it is impossible to say how much of the punishment is due to the false entries, and now much to the putnis. The cases on the point, that persons informally connected must be brought up under *habeas corpus*, to be found in Archibald's Bankruptcy, edition 1856, p. 385, are to the effect that where the warrant contains words not according to the Act, then the warrant is bad. The words in the warrant must have direct relation to the offence, and where there is a statutory commitment, the commitment must be in compliance with the Act; this is not so in the warrant under which the insolvents have been committed, and the warrant is therefore illegal, and the custody also. Next, as to undue preference, there must be a concurrence of three circumstances which are explained in *Bourne* v. *Graham* (2 Jur., N. S., 1225). The action must be voluntary to be an undue preference under s. 24.—See the notes to Millett and Clarke's Insolvency, *Ex-parte Craven*, in re *Craven & Marshall* (L. R., 10 Eq., 648). As to voluntary payments see *Strachan* v. *Barton* (11 Exch., 647). If the preference does not

amount to fraudulent preference, it cannot amount to a crime under s. 50. As to findings on suspicion, see *Ex parte Strickland* (32 L. J. Bank, 12), where, after a finding of fraud, a prosecution was directed. This is not a case for an order for prosecution at [215] all; it is a question whether the Court can convict without a prosecution and on suspicion. In the case last cited, it is clear it could not have been done. As to whether the imprisonment should have been on the criminal side of the jail, the Act makes no distinction as to which imprisonment it should be. The word "imprisonment" in s. 53 is used in connection with civil debt. Either this is a proceeding in which the Commissioner was of opinion that the insolvent should be prosecuted, or it is a criminal proceeding, and, if the latter, then the opposing creditors would have had no *locus standi*, as only the Crown could have appeared. I submit the insolvents have been illegally confined, the warrant being itself an illegal one, and they would have been entitled to be brought up on *habeas corpus*. Moreover, the warrant does not direct that they should be imprisoned on the criminal side.

[PETHERAM, C. J.—If the Judge had a right to send the insolvents to prison at all, had he not a right to send them to whichever side of the jail he thought fit?]

Mr. *Hill* for the opposing creditors.—The powers under s. 50 are somewhat analogous to the power given in s. 51. The practice in Bombay has been that it is in the discretion of the Court as to which side of the jail an insolvent should be sent to. —See *In re Cowasji Ookerji* (I. L. R., 13 Bom., 114). In the case of a poor insolvent, charity would suggest that he should be imprisoned on the criminal side of the jail, as under s. 50 no maintenance is allowed. This case is not being dealt with under *habeas corpus*, or any analogous proceeding thereto, but it comes up as an appeal from an order. The learned counsel then went into the evidence in support of the different charges.

The **Judgments** of the Court (PETHERAM, C.J., and PIGOT, J.) as were follows:—

Petheram, C.J.—This is an appeal from an order of Mr. Justice TREVELYAN while sitting as Commissioner in Insolvency, and by which he committed two persons, who were insolvents and within the jurisdiction of the Court, to be imprisoned on the criminal side of the jail for a period of one year. That order was made by the learned Judge under the provisions of s. 50 of the Insolvent [216] Act, and it is necessary to examine, for the purpose of what I have to say, the provisions of that section rather closely. That section provides "and be it enacted that in case it shall appear to any Court for the relief of insolvent debtors that any such insolvent has fraudulently, with the intent to conceal the state of his affairs, or to defeat the objects of this Act, destroyed or otherwise wilfully prevented or purposely withheld the production of any book, paper or writing relating to such of his affairs as are subject to investigation under this Act, or kept or caused to be kept false books, or made false entries in, or withheld entries from, or wilfully altered or falsified any such book, paper, or writing, or that such insolvent has fraudulently, with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to any of the said creditors, discharged or concealed any debt due to or from the said insolvent, or made away with, changed, mortgaged, or concealed any part of his property, of what kind soever, such Court shall have power to adjudge that the insolvent shall be imprisoned for a period or periods not exceeding two years in the whole, as such Court shall direct, and to declare him entitled to his discharge as aforesaid at the expiration of the term of imprisonment to which he shall be sentenced, and by warrant under the seal of the Court to order him to be arrested and committed to prison and there to be

detained accordingly." Now the matter came before Mr. Justice TREVELYAN in this way: The appellants, the insolvents, were persons who had carried on a considerable trade for some years (they were brothers), and in August 1886 they were adjudicated insolvents on the petition of some of their creditors. The creditors, upon whose petition they were adjudicated insolvents, were not the opposing creditors at that time, but when they came up to be examined before the Commissioner of Insolvency, they were opposed by certain other creditors, and it was upon that opposition that this order was made. Prior to that order the books of these persons had been examined, they themselves had been examined and cross-examined, and certain witnessess had also been examined and cross-examined, and upon that the Commissioner came to certain conclusions and made an order in this form. As I said just now that order was made under the section of the Act which I have just read, and the first question we [217] must consider here is what must have been made to appear to the Court, and in what way it must have been made to appear before he had power to make an order under this section.

It is clear on the face of the section that it provides a punishment by way of penalty for the commission of certain offences, which punishment is to be administered by the Commissioner of Insolvency if it is made to appear before him that these particular offences have been committed. Speaking for myself, and I think for my brother PIGOT also, I am clearly of opinion that the words "in case it shall appear" in this section must mean, in case it shall appear by legal evidence that the person to be punished has committed the specific crime he is said to have committed, and that before any person can be punished under that section, he must be shown by legal evidence to have committed one or other of the offences which are enumerated in the section, and that it is not enough for the Commissioner, upon the matter coming before him, to be satisfied that this is a very suspicious commercial case, or to be satisfied generally that there has been dishonesty on the part of the insolvents in the matter of the bankruptcy, but as I said just now, he must be satisfied that they have been guilty on some specific occasion of some one or other of the offences which are mentioned in the section.

It follows from that, that in my opinion, before a Commissioner can commit under this section, he must convict the person to be punished of something or other that he has done. Having said that, the next thing it is desirable I should do is to see what the Judge has done in this case. His judgment is one of considerable length, but the whole of it I need not read In his judgment he says: "I must hold that the putnis executed in favour of these ladies are not proved to my satisfaction. The *hatchittas* produced are not such as to enable me to place any reliance on them; making ordinary inferences, which I must necessarily make, I think it quite clear the putnis were executed in consequence of the service of the summons and not from the pressure put on the insolvents by the ladies; it was in consequence of the pressure of this suit in which a right to a large sum of money was depending." So that, with reference to this putni, the view which the Judge appears to take, and the finding at which he [218] has arrived is, that he cannot say whether there is consideration for the putni or not, but that the putni was executed in fact for the purpose of giving these ladies the preference over certain persons who had obtained a decree against them, and for the purpose of preventing those persons from executing that decree. Now, is that or is that not an offence within the meaning of this Act? The Act provides, as I said just now, that "in case it shall appear to any Court that any such insolvent has kept or caused to be kept false books or made false entries in or withheld entries from or wilfully altered

or falsified any such book, paper, or writing, or that such insolvent has fraudulently, with intent of diminishing the sum to be divided amongst his creditors, or of giving an undue preference to any of the said creditors, discharged or concealed any debt due to or from the said insolvent or made away with, changed, mortgaged, or concealed any part of his property, shall be imprisoned &c." The learned Judge finds, as a fact, that the object of this particular putni was, not to diminish the amount divisible amongst, or to give the ladies an undue preference over, the general body of creditors, but to prevent one particular decree-holder getting possession of the property and so to give the ladies an advantage over *him*. If this is the meaning of the finding of the Judge, it does not seem to me to constitute any offence within s. 50 of the Act at all, but having considered the evidence with reference to that which has been laid before us by Mr. Hill on behalf of the opposing creditors, it seems to me that in finding that the learned Judge has found as much against the insolvents within the meaning of the section as it was possible for him to do on the evidence, so that with reference to that charge, supposing it to be specifically found by the Judge with reference to that transaction we think that his finding is not sufficient to sustain his order.

Then comes the other terms of his judgment. He passes over one matter and then proceeds to deal with the mortgage transaction. He says: "Next as to the mortgage, there has been a good deal of cross-examination with regard to it. The amount of consideration was Rs. 30,000. It alleged a previous debt of Rs. 3,500 which was taken as part of the consideration, and then other payments were alleged, but these have been traced to a [219] number of persons, some of whom are not creditors at all. They are persons whose names are entered in the books in a manner so suspicious that I think they are not creditors at all. It is not at all unlikely that this was done to get over paying their debts. I do not believe it the least likely they would be in the least anxious to pay their supposed creditors off and not to anything to get rid of the debts of the creditors. On the evidence before me I must find that if this money was taken from Debendronath Roy, if it has left the insolvents' hands, and if it has been paid to this alleged creditor, it was for the benefit of the insolvents and for the purpose of defrauding the creditors who had brought suits." That is the finding with reference to the mortgage. Is that a finding of any offence within the meaning of this section? The first and most obvious objection to that finding of the Judge is this: He does not find what the insolvents have done. The charge against them is one of two things; either that this mortgage is a sham transaction altogether, and so is a mortgaging the property for the purpose of diminishing the assets; or else, if the transaction was a real one, that the money has been secreted by them in such a way as that it is still available for their purposes and cannot be found for the creditors. The learned Judge does not find either of these two states of facts. He says it must be one or the other of the offences. He says: "I believe it must be one or other," as to that we have examined the evidence which has been laid before us, and we think that upon that evidence that was quite as much as the Judge could do. The evidence as to this is to some extent affected by the entries in the books, and as these entries have to do with the next charge as well, I will deal with the two altogether. He says; "The seventh ground of opposition refers to the same matter. The sixth I have dealt with; it is putting the matter in the same form. The fifth is concealment of property. No doubt if the entries are fictitious, if the pottah is fictitious, and if the money has not been distributed, there has been concealment of property."

"I find, as a fact, that there have been fraudulent transfers of property; that the defence to the suits has been vexatious and frivolous; also that the

insolvents have falsified their books. Although it appears in certain cases there have been entries [220] after the balances were made up and carried over, entries made by mistake, yet there are a large number of cases in which payments have been made after the balances have been made up and have not been carried over. An examination of these payments shows that they are fictitious."

Now a large portion of this charge, which is found in this way by the Judge, rests upon these entries; and the conclusion as to this charge at which the learned Judge arrives rests upon the supposition that the entries were made by these insolvents early in 1886, at a time when they were in insolvent circumstances, and therefore had reason to suppose that proceedings in insolvency would be taken against them. But the fact, which bears upon the proceedings and which is uncontradicted, is that these books were not in the possession of the insolvents at all. They had been since December 1884 lodged in the Subordinate Judge's Court at Dacca, and there they had remained down to the time when they were produced in this Court under a request from this Court to produce them. That request being dated the 8th September 1888, and having been made under the petition of the insolvents of that very date, it seems to us that this does away with the whole of the reasoning of the learned Judge as to the fictitiousness of those entries, because he assumes, and it must be assumed, and that is the argument before us, that these entries were not made before 1884 when they professed to be made, but in the middle of 1886, and with the view to this insolvency and with a view to conceal the property of the insolvents. And as soon as it appears that the books had not been in their possession at all since the autumn of 1884, and were not produced by them but upon their petition by the Court, it seems to us that that objection and the effect of those entries falls entirely to the ground. Then it seems to me to come to this, that this case shows, as clearly as anything can show, how necessary it is that a law of this kind, the intention of which is to punish people, should be administered as the Criminal law is administered; that is to say, specific offences should be charged against people, not technically specific in the sense of a specific form of indictment, but that the Judge and the insolvent and every one else should know what offence the man is being [221] tried for, and that the evidence should be directed to the proof of that offence, so that the accused person may be in a position to produce the evidence, if he has got any, to rebut the charge of that offence, and that the Judge, who has to try the case, should specifically find what offence the insolvent has been guilty of, and in his judgment, and in his order, and in the warrant, it should appear what the man has done. In this particular case the judgment shows that the Judge was not convicting the insolvents of any specific offence, but the latter portion of his judgment shews, to my mind, pretty clearly what his view of the case was. What he says is: "Then comes the question: What I ought to do? I have considered this question with great anxiety. This is certainly the most fraudulent commercial case I have seen since I have been sitting as Commissioner of this Court. These people have made away with large sums of money. They have brought in their books after long delay. In the interests of commercial morality I must deal severely with the case." That shews to my mind, as clearly as anything can show, that the Judge was dealing with this case upon general grounds: on the ground that he considered it a fraudulent commercial case, and the insolvents had made away with large sums of money; but not on the ground that he had convicted them on any legal evidence of either of the offences specified.

For these reasons I am of opinion that the order committing these persons to jail was wrong, and that order must be quashed and the two insolvents must be released at once.

Pigot, J.—I am of the same opinion. I wish to observe, in addition to what has fallen from the Chief Justice, that the conviction, so to call it, and the warrant under which the insolvents have been committed, includes, amongst the offences for which they have been committed, an offence not contained in s. 50 at all, but contained in s 51, the sanction of which is of a totally different kind to that prescribed in the penal section 50. The offence is that the insolvents vexatiously and frivolously defended certain suits, and the order states : " And it appearing to the Court that the said insolvents have fraudulently, with intent to defeat the objects of 11 and 12 Vic., chap. 21, made false entries in their books of account and have fraudulently, with intent of diminishing [222] the sum to be divided among their creditors, transferred or made away with and mortgaged their properties, and have put their creditors, that is to say, Bhagoban Chunder Roy, Bhoyrub Chunder Roy, Juggut Chunder Roy, Suruth Chunder Roy, Protap Chunder Roy, Harendro Coomar Roy, to unnecessary expense and delay by making vexatious and frivolous defences." Then follows the order directing that the insolvents are to be imprisoned for a year, and that offence is set out in the warrant. It was, I think, properly argued before us that that alone would invalidate the order. It is impossible upon the face of that to say what portion of the punishment was awarded in respect of the vexatious and frivolous defence of four suits, which is treated as one of the offences for which the insolvents are committed. I would further notice that the order of the 13th April thus states the second offence : " And have fraudulently, with the intent of diminishing the sum to be divided among their creditors, transferred *or* made away with and mortgaged their properties." That is not a definite finding of a definite offence under the Act. It is a compendious finding, and in such a compendious finding there is danger: it does not find which of the alternative offences contemplated has been committed. I refer to it, following up the observations of the Chief Justice. It illustrates the justice of what has fallen from him : that each specific offence should be charged, and a specific finding made with respect to it. I concur in the order which has been made.

Appeal allowed.

Attorney for the Appellant : Baboo *N. C. Bose.*

Attorney for the Respondent. Baboo *U. C. Dutt.*

T. A. P.

NOTES.

[This was followed in (1892) 19 Cal., 605.]

[223] PRIVY COUNCIL.

The 11th and 12th April and 14th May, 1889

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Gregson............Plaintiff

versus

Udoy Aditya Deb............Defendant.

[On appeal from the High Court at Calcutta.]

Specific performance—Contract—Disability to contract—Temporary disability of zemindar to contract, his estate being subject to the provisions of Act VI of 1876 (Chutia Nagpur Encumbered Estates Act), amended by Act V of 1884—Effect of continuance of transactions after the release of his estate from management under that Act.

It is competent to a person, who has been, but he is no longer, in a state of disability, to take up and carry on transactions commenced while he was under disability, in such a way as to bind himself as to the whole. He may be bound by a contract of which the terms are to be ascertained by what passed whilst he was disabled from contracting.

The defendant's ancestral zemindari was placed under management by an order made under s. 2 of Act VI of 1876, and he became incapable of contracting in reference to it. He, however, agreed with the plaintiff that the latter should advance money on mortgage, and take a lease of part of the estate. Afterwards by an order, whether well founded or not at all events effectively made, under s. 12 as amended by Act V of 1884, he was restored to the possession of his estate again acquiring the right to contract about it. He carried on the transaction with the plaintiff, retaining the benefit of money paid by him, but in the end not completing.

Held, that he was bound by the contract though its terms were to be ascertained by what had passed while he was disabled from contracting, and that specific performance could be decreed against him. Whether his entering into the contract was against the policy of the Act, and whether the order under s. 12 had or had not been made on good grounds, did not affect the question.

APPEAL from a decree (2nd December 1886) of the High Court, reversing a decree (20th May 1885) of the Subordinate Judge of Manbhum, and dismissing the appellant's suit with costs.

This suit was brought by the appellant against the respondent, the Zemindar of Patkum in the Manbhum District, for specific performance of an agreement, of which the general terms were that the latter was to accept from the former a loan of Rs. 40,000, paying interest at 10 per cent., and, as security for the repayment, was to execute a mortgage, also granting to Gregson an *ijara* of his zemindari lands for nineteen years, viz., from 1889 to 1903.

The question now was whether negotiations to this effect commenced between the plaintiff and the defendant in the year 1884, [224] while the zemindari was under the management of the Deputy Commissioner of Manbhum, in virtue of Act VI of 1876, the Chutia Nagpur Encumbered Estates Act, and intended to bring about the restoration of the defendant to the possession of his estate, could be insisted upon as a contract and made the subject of a decree for specific performance. The material provisions of the Act VI of 1876, as amended by Act V of 1884, are stated in their Lordships' judgment, as well as the facts giving rise to this suit.

The plaint stated that an agreement had been entered into, and that a petition for the release of the zemindari had been presented to the Deputy Commissioner of Manbhum on 5th September 1884. It also alleged that the defendant had orally agreed with the plaintiff to make over to him the right of digging limestone and of levying dues on iron-smelting; and stated the times when payment was to be made according to the agreement. The plaintiff's demand was that a decree should direct the defendant to execute to the plaintiff an *ijara pottah*, and to execute first a mortgage deed for Rs. 15,000, and another mortgage deed for Rs. 25,000, within three months from the date of the giving and receiving the *pottah* and *kabuliat*; the decree also to award to the plaintiff possession in *ijara* right of the Patkum zemindari, excepting certain mouzas.

The defendant admitted by his written statement the fact of his having agreed to lease his zemindari to the plaintiff, but contended that he was not bound by his having done so, for, amongst others, the following reason: because, at the date of the agreement his estate was under management in accordance with Act VI of 1876, and he was "legally" disqualified thereby to make that agreement. He denied having agreed to give the plaintiff the right to dig limestone and levy dues on iron-smelters: and declared his willingness to repay to the plaintiff, with interest, the moneys paid to obtain the release of the estate, and also the amount which the plaintiff had paid for the revenue.

Issues were fixed raising the questions of the competence of the defendant to contract to grant the alleged lease; and whether or not the defendant, by his subsequent conduct, had ratified the alleged agreement: also as to the facts relating to the limestone and dues leviable.

[226] These were decided by the Subordinate Judge in favour of the plaintiff, and a decree was made as follows:—

That the suit be decreed; that the relief sought for in the plaint be granted, viz., that in consideration of an advance of Rs. 40,000 to be paid by the plaintiff in two instalments, to the defendant, the latter be and hereby is directed to execute in favour of the plaintiff a lease of the Patkum zemindari including the right to dig limestone for building purposes, and to enjoy the profits obtainable from *loharkar*, for a period of nineteen years, in compliance with the terms of the draft submitted by the defendant for the approval of the Deputy Commissioner of this district on the 5th September last, as also to execute the two mortgage bonds, as prayed in the demand of judgment, and further that immediate possession of the said zemindari, under the operation of the said lease, be given to the plaintiff, and that the defendant do pay all the costs of the suit, with interest on the plaintiff's costs at 6 per cent. per annum from the date of the decree to that of realization.

On the defendant's appeal the High Court (WILSON and O'KINEALY, JJ.) reversed that judgment and decree.

The principal grounds upon which the High Court proceeded were in substance as follows:—That there was no sufficient material before the Court to support a finding of a concluded agreement between the parties; that the defendant was, under the provisions of the Chutia Nagpur Encumbered Estates Act, incompetent to contract with reference to his estate; and that the contract was of such a character that the Court would not decree specific performance of it.

The suit was accordingly dismissed.

The plaintiff appealed to Her Majesty in Council.

Sir *Horace Davey*, Q.C., and Mr. *R.V. Doyne*, for the appellant, argued that the judgment of the High Court was wrong; because the contract to execute a mortgage and a lease of the defendant's estate, such execution to be after the release of the estate by the manager, acting under the Chutia Nagpur

Encumbered Estates Act, 1876, did not fall within the meaning of the 3rd section of that Act, specifying the disabilities imposed. If, as had been the case here, the zemindar, after the release of his estate --and it had not been contemplated that anything would be done before such relase—took up the engagement and expressed himself willing to act upon it, he ratified it, there was nothing to prevent a ratification. That having been established, there were no grounds why, in the exercise of due judicial [223] discretion, a Court of Justice should have refused to decree specific performance of the defendant's contract, upon which the plaintiff had acted in paying the money, the balance of the schedule debt, and the current instalment of revenue. These acts, added to the admissions and evidence, established the agreement to the effect stated in the plaint. But, even if the evidence might fall short of this result, the appellant was entitled to have the contract specifically performed according to what might be held to be the true terms of it.

Mr. *J. D. Mayne*, for the respondent, contended that the transactions of September 1884, between the plaintiff and defendant, on which the former relied to prove the alleged contract, and all the matters referred to in the petition of the 5th September 1884, were null and void, by operation of the Enactment VI of 1876. That which was in itself null and void, or so rendered by legislative enactment, was not susceptible of ratification; nor was there any evidence of a new agreement after the 8th of October when the estate was released. What the Act rendered void, with a view to preventing its taking place, could not be ratified, or recognized, or made to serve the purpose of founding future proceedings. This was not a case where what was done might be void under a statutory enactment as to some purposes, and valid as to others, operative as regarded some persons, and not as to others. The disabilities imposed by the Act were express, and for an express purpose, to clear the estate of liability. Pending the management there was to be no encumbering the estate afresh; yet here this was the very transaction alleged to be enforcible. He referred, by way of illustrating this part of this case, to *In re Northumberland Avenue Hotel Company* (L.R., 33 Ch. D., 16), *Hamilton* v. *Buckmaster* (L.R., 3 Eq., 323). To separate the evidence, as to what occurred before and what after the release of the estate, could not be effected so as to leave proof of any clear agreement or transaction in which the intention of the parties could be collected. The evidence, also, related to a loan by way of mortgage which might be repaid the moment it was made : a transaction of which specific performance would [227]not be decreed. Reference was made to *Rogers* v. *Challis* (27 Beav., 175), *Sichel* v. *Mosenthal* (30 Beav., 371), *Larios* v. *Bonany-y-Gurety* (L R., 5P. C., 346). For these reasons specific performance could not be decreed, and to them must be added that to decree it would be to contravene the declared policy of the law, *i.e.*, of the Chutia Nagpur Encumbered Estates Act. It could hardly be allowed that a zemindar should obtain the release of his estate by the very means which the Act, with a view to its own operation, prohibited, adding to, or at all events in no way diminishing, the burdens on his estate.

Counsel for the appellant were not called upon to reply.

Their Lordships' **Judgment** was afterwards delivered (14th May) by

Lord Hobhouse. - The plaintiff seeks specific performance of an agreement under very peculiar circumstances. The agreement, at first oral, was afterwards reduced to writing. At that time the defendant, who is the zemindar of Patkum in Chota Nagpore, was subject to the operation of Act VI of 1876, passed to relieve the owners of encumbered estates in that district. The transactions between him and the plaintiff were intended to release him from that restraint, and had the effect of doing so. When released he continued to deal

with the plaintiff on the footing of the agreement. And the question is whether he has thereby rendered himself liable to a decree for specific performance.

The defendant's estate was put under management on his own application in July 1879. He is a man in middle life and of at least average mental capacity. But during the management he was placed under legal disability, which continued until his estate was released in the year 1884. By September 1884 his debts, which in 1879 were about Rs. 26,000, were reduced to Rs. 7,639.

The material provisions of Act VI of 1876, as amended by Act V of 1884, with regard to property put under management and its owners, are as follows: The manager is to ascertain the debts and liabilities and to schedule them, and make a scheme for discharging them out of the surplus income. While the property is under management the holder is made incapable of mortgaging, charging, leasing, or alienating the same, and of entering [228] into any contract which may involve him in pecuniary liability. On payment of all the scheduled debts and liabilities, or if an arrangement is made for their satisfaction which is accepted by the creditors and approved by the Commissioner, the holder is to be restored to the possession and enjoyment of his property.

In the early part of the year 1884 the plaintiff and defendant were in negotiation for a lease of the Patkum estate, by the latter to the former, but it was not till the month of September that the defendant would offer terms acceptable to the plaintiff. On the 5th of that month the defendant presented the following petition to Mr. Clay, the Deputy Commissioner in the Encumbered Estates Department :—

"Petition of Maharaj Udoy Aditya Deb, inhabitant of Ichagurh, Pergunnah Patkum, is to the following effect.—

"For the liquidation of my debts and for the improvement of my estate, my ancestral zamindari, pergunnah Patkum, in zillah Manbhum, is under the management of the Encumbered Estates Department under Act VI of 1876. Considering that there would be a great improvement in my zamindari if I let out the same in *ijara* to Mr. C. B. Gregson, I made a proposal to grant that *ijara* settlement at a rent of Rs. 16,441-13-6, and to take a loan of Rs. 40 000 within three months from this date for the purpose of discharging my liabilities to the *mahajuns*. As the aforesaid Saheb Bahadoor agreed to these proposals, so preparing a draft of the *ijara pottah*, determining in grant the *ijara* settlement to the aforesaid Saheb for a period of nineteen years from the beginning of the present year 1291 up to the year 1309, I have been filing it along with this petition ; and I pray that receiving from the aforesaid Saheb Bahadoor the amount of my liabilities in the account of the Encumbered Estates, you will kindly pass an order for releasing the mehal from the management under Act VI. On the release of the aforesaid mehal from the Encumbered Estates management I shall properly grant the *pottah* and receive the *kabuliat* according to the draft filed along with it, and separately execute registered bonds, and receive Rs. 15,000 for the present. The money that will be deposited by the aforesafd Saheb Bahadoor in the Encumbered Estates Department shall be credited against the rent of the *ijara* mehal for the present year. If on the release of the mehal I delay the granting of the *ijara*, then the aforesaid Saheb Bahadoor shall be able to take possession of the aforesaid mehal in *ijara* right and to get the *pottah* executed according to the draft filed along with it. As the property is under the control of the Encumbered Estates Department, I am now incompetent to grant the aforesaid settlement. I therefore pray that your worship will release the aforesaid mehal from the control of the Encumbered Estates Department. The *ijara pottah* and *kabuliat* will [229] have to be executed on stamped papers, and at that time I shall enter the boundaries in the same. At present a draft only being prepared, is filed along with this petition.

MAHARAJ UDOY ADITYA DEB."

"*The 21st Bhadro 1291.*"

The draft lease filed with the petition specified a number of particulars with respect both to the loan of Rs. 40,000 and to the demised property, and to the payments by the lessee, which it is not necessary now to mention. And it contained the following stipulation:—"Except the land fit for indigo cultivation you shall not be able to take any settlement or *ijara* of any lands within the *ijara* mehal from any tenants, and especially from Birinchi Narain, and if you take it I shall not be bound by this *pottah*."

The draft lease was communicated to the plaintiff, who, on the 9th September, objected that it omitted certain stipulations relating to limestone and to iron-smelters. On this point there is dispute between the parties. It is not of any great importance, nor if it were decided against the plaintiff would it impair his right to have the rest of the agreement performed. The High Court have expressed no opinion which of the parties is right on this point. The Subordinate Judge has found in favour of the plaintiff, and no reason for disputing his opinion has been assigned.

On the 10th September the plaintiff paid into the Collectorate Treasury the sum of Rs. 7,639-5-10, and got a receipt as follows:—

"By whom brought.	On what account.	Amount. Rs. A. P.
Mr. C. B. Gregson, through Anund Chunder Roy.	On the proposal to take an *ijara* of pergunnah Patkum, according to the prayer of the Zemindar of the aforesaid pergunnah, and under the order of the Commissioner, deposited on account of (illegible) estate for the purpose of releasing the aforesaid mehal from the control of the encumbered estates ...	7,639 5 10
	Total Rs. ...	7,639 5 10

"Examined and entered.

T. CHATTERJI, *Accountant*.

"(Illegible) SINGH, *Treasurer*."

[230] On the 15th September the sub-manager reported to the Deputy Commissioner as follows:

"*Dated* PURULIA,
"SIR. *The 15th September 1884.*

I have the honour to report for your information that Mr. Gregson having deposited Rs. 7,639-5-10 for releasing the Patkum Encumbered Estate from attachment under Act VI of 1876, all the scheduled debts have been paid off, and that from the balance still at credit of the estate, the law charges and other management charges still due by that estate can be easily paid. It is therefore not necessary to apply for Commissioner's sanction to release of the estate."

The Deputy Commissioner, however, thought that it was necessary to obtain the Commissioner's sanction, and he applied for it on the same day, stating the circumstances as stated to him by the sub-manager. The formal order for release, which is not in the record, was not made until the 8th October.

It is contended by the plaintiff that on and after the 15th September the defendant was freed from the operation of the Act, and that in the whole of his subsequent action with reference to the agreement he must be taken to have been *sui juris*. So far as regards the question whether the agreement has been validated or called into action so as to bind the defendants, their Lordships think it makes little difference which of the two dates is taken

as the date of emancipation. But the personal position of the defendant bears on another portion of the case, viz., whether such an agreement as this is the proper subject of a decree for specific performance against a person so situated. The High Court have thought that it is not, and the correctness of their opinion is challenged in this appeal. Their Lordships certainly think that there is nothing in the transactions themselves to operate as a lease of the estate. The scheduled debts were not paid; they were only transferred to another creditor, and the transfer was coupled with an agreement for a fresh loan by which the defendant was loaded with debt more heavily than in 1879 when he sought the benefit of the Act. It is a matter of wonder to their Lordships that any order for release should have been made under such circumstances; but at all events they are clear that the defendant was not *sui juris* until the order was made.

[231] Returning to the narrative of transactions between the parties, we find a considerable amount of correspondence, oral and written, after the 15th September. Each deals with the other on the footing that the agreement is valid and binding. On the 3rd October the defendant wrote to the plaintiff requesting him to pay the current instalment of revenue, Rs. 633-9-8, and the plaintiff did pay that sum on the 6th. The defendant never offered to repay that sum nor the larger sum paid to meet the scheduled debts.

On the 12th November, five weeks after the formal release of the estate, the defendant wrote on the subject of Birinchi Narain. It has been seen that in the draft lease he stipulated that the plaintiff should not acquire Birinchi's interest in the property; and both the written correspondence and the oral evidence of the plaintiff show that he attached great importance to that matter. In point of fact the plaintiff had received a lease from Birinchi before the defendant presented his petition of the 5th September, and the defendant knew all about it. In his letters previous to the 8th October he recurs more than once to the requisition that Birinchi's lease to the plaintiff shall be cancelled as a condition of the defendant executing his lease to the plaintiff. On the 12th November he wrote to Anund Roy, the plaintiff's agent, thus:—

"If the Saheb has come back from Calcutta, please speak to him and get the *pottah* of Birinchi Narain Aditya Baboo returned. When this is done, I will go to Purulia, and I shall have no objection to register it. Before this, my only condition (*lit.*, objection) was that the *pottah* of Birinchi Narain Aditya Baboo should be returned, and I still hold to this condition. After these matters are settled, you will write to me in reply, and on that I will go and get it registered. Settle the matter and write to me in reply.

"*The 28th Kartick* 1291."

The plaintiff answered this on the 18th November:—

"Yesterday I came here from Calcutta. The *ijara* settlement that was made with Birinchi Narain Aditya Baboo has been cancelled. I am now sending you the palki and bearers, and hope that you will without delay come to this place and finish the execution, etc."

It is not suggested that Birinchi's lease was not cancelled as stated in this letter.

The negotiations still went on, the plaintiff urging performance of the agreement, the defendant making excuses but always treating the agreement as a subsisting one. On the 30th November **[232]** he wrote to his own agent, but for the purpose of communicating with the plaintiff, excusing himself for not having gone to Purulia to execute the lease, asking that the plaintiff would come to the defendant's residence, and adding "I will surely execute the instrument. I have no objection," with more assurances to the same effect. On the 4th December he wrote requesting an advance of the whole loan at once, "albeit it has been arranged that the Rs. 40,000 should be taken in two instalments." Not long after this plaintiff became convinced that the defendant was trifling with him, and commenced the present suit.

In support of the decree of the High Court, which reversed that of the Subordinate Judge and dismissed the suit, Mr. *Mayne* first argued that the transactions of September were wholly void as against the defendant; and then that what is wholly void cannot be validated. But the answer is that such an argument does not meet the facts of this case. It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himeself as to the whole. The present defendant has done that and more than that. Not only has he taken and, up to the time of suit and for aught that appears till now, retained the benefit of the plaintiff's payments, but he has since the 8th October 1884 exacted from the plaintiff a part of the consideration which was to move from him. At the defendant's instance the plaintiff has given up the lease that he had obtained from Birinchi Narain, nor is it possible for the defendant to replace the plaintiff in his former position. Tho defendant therefore is clearly bound by the contract, though its terms are to be ascertained by what passed when he was disabled from contracting.

Then it is contended that, though the contract may be binding, specific performance is not the proper remedy, and that on two grounds: *First*, because it is a contract for mortgage. But it is also a contract for a lease, and the two parts are easily separable. So far as the plaintiff is concerned, he is bound, if he asks for the lease, to grant the loan. And he is willing to do that, but he is also willing to take the lease without insisting on the loan. It is true that it would be an idle thing to compel the defendant to **[233]** receive a loan which, there being no contract to the contrary, he might repay at once, or on reasonable notice. But if he wishes to be released from that part of the contract, it will not be carried into effect by the Court.

The *second* reason alleged for not awarding specific performance is that the contract is against the policy of the Encumbered Estates Act; and on this point their Lordships confess to having felt much difficulty, owing to the very peculiar circumstances of the case. But after careful consideration they think that they must not look beyond the order of the 8th October 1884. They have before intimated that the order is difficult to reconcile with the policy, or indeed with the literal terms, of the Act. But, *factum valet*, the Commissioner was acting within his jurisdiction, and his order is not under review. By it the estate was in fact released from management: and it must be taken that its owner then became as free to manage his affairs as any other man. He has used his freedom to adopt the documents of the 5th September 1884 as binding on himself, and he must now be compelled to act according to their tenor.

In their Lordships' judgment the High Court should have dismissed with costs the appeal from the Subordinate Judge; and that decree should now be made. If the plaintiff desires to have an account of the profits of the property during the time he has been kept out of possession, he has a right to that, he on his part accounting for the rents which would have been due from him. The respondent must pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Slaughter and Colgrave.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[*See* also (1905) 33 Cal., 363; (1906) 33 Cal., 1065; (1908) 7 C.L.J:, 578; (1908) 9 C.L.J. 96 at 103.]

[234] PRIVY COUNCIL.

The 8th, 9th and 14th May, 1889.

PRESENT :

LORD WATSON, SIR B. PEACOCK, AND SIR R. COUCH.

Mariam Begum and another............Defendants

versus

Mirza and another............Plaintiffs.

Wazir Begum............Defendant

versus

Mirza and another............Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Treaty, Construction of—Money settled upon members of Royal Family of Oudh, and their heirs—Perpetual pensions by payments arranged between sovereign powers—Construction of the word "issue," as used in a treaty between them, and in subsequent correspondence.

An arrangement between two sovereign powers, viz., the King of Oudh and the East India Company, whereby members of the Royal Family of Oudh had secured to them and to their issue pensions in perpetuity, although a settlement of pensions in perpetuity could not under the Muhammadan law be validly made by a private individual, took effect as a contract or treaty between the powers.

Held on the construction of a treaty made in 1838 between the King of Oudh and the East India Company, that it was the intention of the King thereby to provide pensions for certain members of the Royal Family in perpetuity; that if any of the pensioners should die without issue, his or her pension should revert to the King; that the words "heirs" and "issue" were used as convertible or equivalent terms; and that they meant persons who would be heirs according to Muhammadan law;

Held also, that the King intended in 1842 to provide for the ancestor of the plaintiffs an additional pension of the same kind as the pension which he had provided for her in 1838; and that, according to the letter written by the King in that year to the Government of India, after her death, if she should have left issue, the additional pension was to be payable to such of her issue as should be also her heirs, according to the rules of the Muhammadan Law of Inheritanae.

APPEAL from a decree (11th February 1886) of the Judicial Commissioner, reversing a decree (4th March 1885) of the District Judge of Lucknow.

The principal question which arose between the parties was whether in construing the terms of a settlement, not questioned in other respects, made in 1842 by Muhammad Ali Shah, then King of Oudh, in favour of his queen, Malka Jahan Sahiba, and her "issue," the latter word should be construed as referring to the Imamiya, or Shiah, Law of Inheritance, giving to males [235] double the share of females. For this construction the plaintiffs, now the respondents, contended. While on the other hand the case for the defendants, now the appellants, was that the word "issue" had reference to the law relating to endowments, and that its meaning depended on the intention of the founder or settlor The former law, if it was that to which the word referred

would also restrict the sharers; while the latter, if it should be applied, would include all persons tracing their parentage to Malka Jahan, and would put all descendants being in the same degree of remoteness on an equality as to their shares.

The plaintiffs, now respondents, were Nawab Sahib Mirza and Imdad Ali Khan, grandchildren, and heirs according to the Muhammadan law, of the late Nawab Malka Jahan, one of the widows of Nawab Muhammad Shah, third King of Oudh. The defendants, now appellants, Nawab Sultan Mariam Begum and Nawab Amir Jahan Begum, were also grandchildren of the same. But the defendant Nawab Wazir Begum, who appealed separately, was the daughter and only child of one Bahadur Mirza, brother to the plaintiffs respondents, who died in the life time of his grandmother Malka Jahan; so that Nawab Wazir Begum was great-grandchild of the latter. Consequently, if this case had to be governed by the ordinary Shiah Law, Nawab Wazir Begum would have been wholly excluded by her two uncles and her two aunts, parties to the other appeal, and they, while differing among themselves as to their respective rights, were all equally opposed to the claims of Nawab Wazir. Accordingly she filed her separate defence and separate appeal.

When the East India Company contracted what was known as the 6th Oudh loan, the deed of engagement, dated 22nd November 1838, declared that the King of Oudh had paid and the Governor-General of India, on the part of the East India Company, had received, in perpetuity, the sum of Lucknow sicca Rs. 12,00,000. On this, interest at 4 % was to be paid, in pensions, quarterly, to the persons named, among whom was Nawab Malka Jahan (whose stipend was Rs. 100 a month), and to their heirs in perpetuity, on their receipts under their seals. On any of the pensioners dying without issue, his or her pension was to revert to the King.

[236] The similar terms, upon which another loan was taken in 1842, appear in the King's letter of 4th January 1842, stated in their Lordship's judgment.

The promissory note for twelve lakhs of rupees issued in favour of the King was not produced, but according to the plaint it bore the enfacement, "this note is not negotiable and is to remain in deposit with the Resident at Lucknow, the interest on it is to be paid to Nawab Malka Jahan, during her life time and after her decease to her issue." Afterwards, when interest on Company's paper was reduced from five to four per cent., Malka Jahan received interest at the latter rate down to July 1881, when she died. At her death her heirs, according to the ordinary Imamiya Law, were the two present appellants, her granddaughters, and these respondents, her grandsons. Under that law the grandsons would each be entitled to a share double that of a granddaughter, and Wazir, the appellant in the second of these appeals, would be excluded; the interest upon the twelve lakhs of rupees would be divided into six shares of which these respondents would have the right to receive each two-sixths, and the present appellants each one-sixth.

Doubts existing as to the proper proportion of shares distributable under the settlement, the present suit was instituted in March 1881. The plaint asked that the rights of the parties should be declared alleging that the plaintiffs were, according to the law prevailing among Shiahs, entitled each to a one-third part of the interest of the promissory note, and adding that the defendant Wazir Begum was not under that law entitled to come in as a sharer at all. Wazir Begum filed her separate written statement claiming the same amount that her father might have had, if he had been alive. The other defendants, by their written statement, admitting that their family was governed generally by

the Shiah Law, contended that the rights of the present parties to the interest upon the loan were governed by "the Instructions of Muhammad Ali Shah, the original grantor, and not by the ordinary law of inheritance;" and that as those instructions did not specify any particular shares, the plaintiffs and the defendants were, by the law relating to endowments, entitled to equal shares, and that by the words, "*naslan bad* **[237]** *naslan*," as well as by the true construction of the rest of the King's words, Wazir was excluded.

Issues having been fixed raising these questions, the finding of the District Judge was by him expressed as follows:—

"It appears to me that these are words indicating a plain intention on the part of Muhammad Ali Shah to benefit his children. The transaction is neither a gift nor a will; it is a *wakf* or appropriation, by which the principal was tied up and the fruit given away. The rights of the parties depend on the intention of the original debtor, and are not based on inheritance."

It was the opinion of the District Judge that, in the absence of any special directions to the parties, equality of partition must take place among all the descendants of Malka Jahan without reference to sex or proximity; and he considered that there were no grounds for applying "*hajb*," or exclusion, where the law of inheritance did not apply.

The plaintiffs appealed from the District Judge's decision to the Court o the Judicial Commissioner on the ground that the ordinary Shiah Law should have been applied, and that such application would have excluded Wazir Begum, and would have reduced the shares of the present appellants to one-half of those of the plaintiffs. The present appellants filed objections, in the nature of a cross-appeal, by which they contended that the first Court should, according to the Muhammadan law governing the Shiah sect, have held that Wazir Begum was excluded.

The Judicial Commissioner allowed the plaintiffs' appeal, so far that he declared Wazir Begum disentitled, and the plaintiffs entitled each to one-third. The defendants Mariam and Amir Jahan, he held entitled each to one-sixth ot the interest in question, that being the share which the ordinary law of inheritance prevailing among Shiahs would give to each. The rest of the plaintiffs' claim he dismissed. Having set forth in his judgment the principal provisions of the Treaty of 1838, and the entire correspondence which passed in 1842, the Judicial Commissioner held that the arrangements then entered into constituted a trust as to the interest of the twelve lakhs of rupees then lent by the King to the East India Company in favour ot Malka Jahan and her issue; and that, having regard to that correspondence, **[238]** and its relation to the "deed of engagement of 1838," the words "her issue" in the documents of 1842, must be read as meaning "the heirs of her body." The material portion of his judgment was as follows:

"The transaction evidenced by the documents of 1842, which have been set out in the opening portion of this judgment, appears to me to be a contract between the Governor-General of India in Council on the one part and the King on the other, the latter agreeing to pay into the Residency Treasury twelve lakhs of rupees as a supplement to the payment acknowledged by the duplicate deed of engagement of the 22nd November 1838, and the latter agreeing to receive the money as a loan, perpetual as regards the lender (the King), but as regards the borrower (the Governor-General), capable of discharge three months after notice of such intention in the *Calcutta Gazette*, and covenanting further to pay up to the date of discharge as aforesaid the interest on the loan to Malka Jahan and her issue. The transaction would seem, therefore, to have been of the nature of a trust terminable at the option of the Government on three months' notice.

"The view that I take of the transaction of 1842 being that it constituted a trust, I have now to find what was in the mind of the King when he made, and in the mind of Governor-General when he accepted, the trust. And it seems to me impossible, after reading together the King's letter to the Governor-General, dated 4th January 1842, and the Governor-General's reply, dated the 15th February, which are after all the documents evidencing the intention of the parties; I say it seems to me impossible, after reading these documents, to doubt that the King intended to make a provision for Malka Jahan of precisely the same nature as, and as a continuation of that made by the transaction of November 1838, and that the Governor-General concurred in 'the hearty desire and wishes' of the King. Now it is plain from a perusal of articles 3, 4, 5, and 6 of the 'duplicate deed of engagement' (2 Aitchison, 141, edition 1876), that heirs' and issue are therein used as convertible terms, and in the settling article of the 'engagement, the words' used are 'heirs in perpetuity.' I think therefore that the words ' her issue,' in the documents of 1842, must be read as meaning " the heirs of her body.' The question then, if the view which I have taken of the matter be correct, narrows itself to this: What would the King have meant when referring to the 'heirs of the body,' of his wife? Would he have intended to designate such persons absolutely, or relatively to the provisions of the Muhammadan Law? It seems to me inconceivable that the King, a Mussalman of a day when the laws and institutions of the country were Muhammadan, should have intended to designate his wife's direct heirs otherwise than relatively to the provisions of the Muhammadan Law

* * * * * * * *

I think that, as regards the declaration sought by the plaint, the appeal must [239] prevail. But I find myself unable to direct the refund by the defendants to the plaintiffs of money paid to the defendants by Government Officers."

Sultan Mariam and Amir Jahan together appealed to Her Majesty in Council.

Wazir appealed separately.

Mr. *T. H. Cowie*, Q.C., and Mr. *C. W. Arathoon*, for Sultan Mariam and Amir Jahan, argued, that in adjudging to the plaintiffs each a one-third share, and to the defendants each a one-sixth share, the Judicial Commissioner had wrongly regarded the rights of the parties as regulated by the rules of the ordinary law of inheritance. He should have held that their rights depended on the intention of the settlor, as shown in the Treaty of 1838, and in the correspondence of 1842. The King probably enough had in his view the operation of the ordinary law to which he was accustomed, but nowhere had he specified that the male issue of Malka Jahan should take a greater share than the female. From this, and from the general tenor of the documents, the inference was that he regarded all her descendants as entitled to such shares as would be apportioned to them by the rules of the Muhammadan Law relating to grants or appropriations, and not to the shares into which, by the rules of inheritance, estates were divided. These interests were not inherited, but settled upon those entitled. The Judicial Commissioner had erroneously construed the words "her issue" to mean the "heirs of her body," and had erred in deciding that the King intended to designate his wife's heirs by tacit reference to the provisions of the Muhammadan Law of Inheritance. At the same time, the Judicial Commissioner had been right in holding that the defendant Wazir Begum was not entitled to any share: so far the decision was correct. The grant was specified to be "*naslan bad naslan*," and "*batu bad batu*," thus excluding the great-grand-child of Malka Jahan, who belonged to a subsequent generation and not to the generation in which came the plaintiffs. The second generation could not come in until the first should have been exhausted. Reference was made to Baillie's Muhammadan Law, Book IX, of *Wakf* or Appropriation, Vol. I, pp. 559, 571, and to Vol. II, pp. 211, 212, 217; Tagore Law Lectures, 1884, by Syed Ameer Ali, ss. ix and x, pp. 217, 397, 398, 399, 400.

[240] Sir *Horace Davey*, Q. C., and Mr. *J. D. Mayne*, for Wazir Begum, the appellant in the second appeal, argued that the corpus of the fund never having belonged to Malka Jahan, by force of the documents in question, it did not form part of her estate at her death. Consequently, the question, who should take at her death, could not be determined by reference to the law of inheritance, but must be determined by the true construction of the words of the instrument creating the interest in the fund, and by inference allotting the proportionate shares. The King in his letter of 1842 abstained from using the term "heirs," using, instead of that expression, the words "issue" and "offspring" ("*aulad*" in the original). This was owing to his desire, and showed his desire, to exclude from the construction of the settlement made by him all consideration of what the Muhammadan Law of Inheritance would apportion, and to exclude the principle of division by which the nearer heir would exclude the more remote descendants. According to the King's desire, all the offspring were to participate equally. This would bring in the great-grandchild, as well as the grandchildren; and the former on the reasonable version of the Treaty of 1838 and the letter of 1842, must be held to be entitled equally with the latter. Reference was made to Baillie's Muhammadan Law, Vol. II, Chap. "*Wakf*," pp. 211, 212, 217, 218, 219, 221.

Mr. *J. Rigby* Q. C., and Mr. *R. V. Doyne*, for Sahib Mirza and Imdad Ali Khan, respondents in both appeals, contended that the Court below was right in holding that the word "issue," used in regard to the right of succession to the interest of the fund in question, was equivalent to the words "heirs of the body," and that the relative right of such heirs to share that interest was governed by the ordinary law, that being the Muhammadan Imamiya Law of Inheritance, under which the parties lived. It was clear that the intention of the King (and it was upon his intention that the appellants also relied) was that the right to receive the interest in question should descend to her heirs according to the Muhammadan Law. That was, in this case, the law prevailing among Shiahs. As regards the passages which had been cited from Baillie's work at pp. 217, [241] 218 and 219 of Vol. II, it was submitted that they meant no more than this, viz., that where a Muhammadan founder of an endowment or settlor, expressed in his *wakfnama* a clear intention to benefit certain designated persons or classes, the latter would take, although the ordinary law of inheritance would not, of itself, have brought them in. There was nothing to be found in the books, nor was there any principle or rule in the Muhammadan Law, to prevent a Court's acting on the reasonable presumption that where a Muhammadan grantor used a general expression to indicate the order of succession which he wished to be observed, he intended that such expression should be interpreted by reference to the ordinaray law governing the family. There was no ground for supposing that it was the intention of the King, Muhammad Ali Shah, to subject the interest created by him to any rule of succession other than that given by the ordinary law. To allow the correctness of the appellant's contention would be to let in the equal rights of the children, thirteen in number, of the appellants Sultan Mariam and Amir Jahan, and of the respondents. In reference to the appeal of Wazir Begum, it would be contrary to the only probable intention of the King, that she should be declared entitled to a share equal to that of a male, and there could be little doubt that he had entire regard to the Muhammadan Law as regulating the question of heirship.

Mr. *T. H. Cowie*, Q. C., replied on behalf of the appellants, Mariam and Amir Jahan.

Mr. *J. D. Mayne* replied for Wazir.

On a subsequent day (14th May) their Lordships' **Judgment** was delivered by

Sir B. Peacock.- The facts of this case, as well as the origin and nature of the suit, are fully set forth by the Judicial Commissioner. It is sufficient for the present purpose to state that in the latter part of the year 1841 Muhammad Ali Shah, the then King of Oudh, was, under circumstances to which it is not now necessary to advert, induced by the late Sir John (then Colonel) Low, the Political Resident at Lucknow, to subscribe the sum of twelve lakhs of rupees to the 5 per cent. Government Loan [242] which was then open. The money was paid into the Resident's Treasury, and brought to the credit of the Government of India.

On the 21st January 1842 a letter from the King, dated 21st Zikad 1257 Hejira (corresponding with the 4th of January 1842) and addressed to the Governor-General, was forwarded by the Resident to the Secretary to the Government of India. The letter was, after the usual compliments, in the following terms :—

" Being fully convinced that your Lordship has always entertained a sincere friendship for me, I without any ceremony mention to your Lordship that at the time when the guarantee of the third Ramzan 1254 Hejira (corresponding with the 22nd November 1838), regarding the pension of the ladies of my royal family, children, and other relations was concluded, the trifling sum of Rs. 400 per month was assigned to Malka Jahan Hamidai Sultan Fakhruzzaman Nawab Tajunnissa Begum. Owing to the smallness and insufficiency of the amount invested, as I have always entertained a particular regard for her, and in every way endeavoured to promote her honour and comfort, I now entertain the hope from your Lordship's kindness that, instead of issuing a promissory note in the name of Malka Jahan for the sum of Rs. 12,00,000, which was totally lodged by me in the Residency Treasury, your Lordship will receive that money into the Company's Treasury as a separate loan, for which he and the future Residents will pay 5 per cent. per annum interest, or Rs. 5,000 monthly, as long as the present public 5 per cent. loan shall exist, and that, when this loan shall have been paid off, Colonel Low and the Residents for the time being will, after taking receipt in the same manner as prescribed for the allowance mentioned in the said deed, pay to her and to her issue, generation after generation and womb after womb, the interest at the rate of 5 per cent per annum, *i.e.*, Rs. 5,000 a month, so long as 5 per cent. interest may be allowed, and afterwards such reduced interest as may be paid from time to time by the British Government. My sole object in making this request is to prevent the risk that might otherwise occur of Nawab Malka Jahan or her offspring being persuaded, at some future period, by evil advisers, to sell the note and squander the money. The accomplishment of this object will be highly gratifying to me, and will demonstrate to the public your Lordship's [243] friendship and regard for me; this will prevent any new guarantee being entered into, but will merely be the payment of a larger sum in interest instead of a small one."

The Governor-General, by letter sent through the Resident and addressed to the King, assented to his request, stating that he was pleased and gratified beyond limit in concurring with the hearty desire and wishes of the King in regard to the fixing of the stipend of Malka Jahan. From that time until the time of her death, on the 9th of July 1881, the stipend was paid to her in accordance with the terms of the arrangement between the Government of India and the King. Malka Jahan at the time of her death left two grandsons, the respondents in both these appeals, two granddaughters, Sultan Mariam Begum and Nawab Amir Jahan Begum, the appellants in one of the appeals, and a

great-granddaughter, Nawab Wazir Begum, the daughter of a deceased grandson, the appellant in the other appeal, her surviving; such deceased grandson being a son of Mirza Humayun Bukht, a son of Malka Jahan, who died in his mother's lifetime.

The question in these appeals is what is the proper construction of the King's letter of 1842, read, as it ought to be, in conjunction with the deed of the 22nd November 1838, referred to therein and to be found in the second volume of Aitchison's Treaties and Engagements, edition 1876, p. 144.

By the latter of these documents it was the intention of the King to provide pensions or stipends for the ladies of his royal family, children and other relations, including, amongst others, Malka Jahan and her son Mirza Humayum Bukht, the grandfather of the appellant Nawab Wazir Begum, and father of the other appellants and of the respondents.

By the 3rd Article it was stipulated that the pensions should be paid to the several pensioners specified therein and to their heirs in perpetuity on their receipts under their seals; and by the 4th Article, that if any of the pensioners should die without issue, his or her pension should revert to the King of Oudh.

By Article 6, it was provided that the said pensioners and after them their issue who on their decease should succeed to their respective pensions should always experience the special favour and kindness of the British Government. It should be observed [244] that in that article the favour and protection of the Government is bespoken not for all the issue, but merely for the issue who should succeed to the pensions. In the deed of 1838, the words "heirs" and "issue" are used as convertible or equivalent terms, so that in that document the word "heirs" must mean heirs who are issue, and "issue" must mean issue who are heirs.

Their Lordships are of opinion that it was the intention of the King that, in the event of the death of any of the pensioners leaving issue, his or her heirs, according to the Muhammadan Law of Inheritance, should receive payment of the pension in the proportions regulated by such law of inheritance.

Their Lordships concur with the Judicial Commissioner in the opinion that the King intended in 1842 to provide an additional pension for Malka Jahan of the same nature as that which he had provided for her in the year 1838, and that, after her death, provided she should leave issue, it should be paid to such of her issue as should be her heirs according to the rules of the Muhammadan Law of Inheritance. There is nothing in the King's letter of 1842 to lead to the inference that he intended by the increase of the pension of Malka Jahan, to benefit any other persons than those who were to be benefited upon her death by the pension of 1838. It seems unreasonable to suppose that he intended that the several pensions of Malka Jahan and of her son, which were created by the deed of 1838, should, if they should die leaving issue, be paid to their respective heirs according to the Muhammadan Law of Inheritance, and that the pension of Malka Jahan, created in 1842, should be paid to her issue so as to allow a granddaughter of her son to take an equal share with his sons and daughters, ignoring altogether the policy of the Muhammadan Law of Descent. Some effect ought to be given to the last words of the King's letter of 1842, wherein he says: "This" (meaning the assent of the Governor-General to his request, or to use the King's own words, 'the accomplishment of his object') "will prevent the necessity of any new guarantee being entered into, but will merely be the payment of a larger sum in interest instead of a small one."

The guarantee of the Government in the deed of 1838 was to pay the interest to the pensioners and their heirs if they should [245] die leaving issue, and consequently a new guarantee would have been necessary if the intention

was that the interest of the new loan should be paid to the issue of Malka Jahan, whether heirs or not. This appears to be almost conclusive that the word "issue" in the letter of 1842 was used in the sense of heirs of the body, and that such of the issue of Malka Jahan as would be her heirs according to the Muhammadan rule of descent ought alone to receive payment of the pension in the proportions assigned to then by that law.

It should be remarked that, although a settlement in the terms of the King's letter of 1842 creating pensions in perpetuity could not, under the Muhammadan Law, be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers.

For the above reasons, their Lordships will humbly advise Her Majesty that the decree of the Judicial Commissioner, except so far as it relates to costs, ought to be affirmed. Considering, however, that the lower Courts differed in opinion, and that the ambiguity in the words used by the King in his letter of 1842 has led to the litigation, their Lordships will humbly advise Her Majesty to vary the decree of the Judicial Commissioner as to costs, and to order that the costs of all the parties in the lower Courts be paid out of the pension which is the subject-matter of the suit

Their Lordships order that the costs of the appellants and of the respondents of the appeals to Her Majesty in Council be paid out of the same fund.

Decree affirmed except as to costs.

Solicitors for Nawab Sultan Mariam Begum and Nawab Amir Jahan Begum, defendants-appellants :	Messrs. *T. L. Wilson & Co.*
Solicitor for Nawab Wazir Begum, defendant-appellant.	Mr. *William Battle.*
Solicitors for Nawab Saheb Mirza and Imdad Ali Khan, plaintiffs-respondents :	Messrs. *Wrentmore & Swinhoe.*

C. B.

NOTES.

As regards the construction of pensions under Mahomedan Law, see also (1890) 18 Cal.. 216; as regards interpreting one document by the construction placed on another, see also (1904) 27 All , 383.]

---

[246] PRIVY COUNCIL.

The 22nd June, 1889.

PRESENT ·

LORD WATSON, LORD HOBHOUSE, AND SIR B. PEACOCK.

Munnalal Chaodri............one of the Defendants

versus

Gajraj Singh... ....one of the Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

Decree—Construction of decree Construction of order made by Settlement Officer awarding estate to a Hindu widow—Transfer by widow, Effect of.

The plaintiffs obtained a declaratory decree that they were the reversioners and heirs apparent, expectant on the future death of a widow who at the time of suit had survived two co-widows, and that they, the plaintiffs, would be entitled to inherit at her death the

estate that had belonged to the deceased husband. All parties had proceeded, as far as to the present appeal, on the view that the surviving widow had the widow's estate only. But an order made in the course of the settlement operations in 1865 had conferred the estate of the deceased on the three widows as well as on his mother, in equal shares of one-fourth each.

***Held*, that there was nothing in this order to show an intention to give to the mother and widows anything more than an interest, such as that which a Hindu widow takes ; and that the inheritance would devolve in due course of law, an alienation which the widow had made operating only for her life-time.**

APPEAL from a decree (16th July 1886) of the Judicial Commissioner of the Central Provinces, dismissing an appeal from a decree (2nd January 1886) of the Commissioner of the Jabalpur Division, affirming a decree (7th September 1885) of the Deputy Commissioner of Mandla.

The suit out of which this appeal arose was brought by the respondent Thakur Gajraj Singh, together with his brother as co-plaintiff, on the 26th March 1885, claiming to have set aside a sale of the proprietary right in seventeen villages forming a taluka named Bamhni, in the tahsil and zillah Mandla. This sale, on 9th October 1882, had been executed by Mussammat Ganga, widow of a deceased Brahmin proprietor, Ratan Singh, to whom the taluka belonged, for the consideration of Rs. 8,000. The general question now was, whether in this suit, brought by the reversionary heirs, brothers of her late husband, against the widow and the purchaser, a decree had rightly limited the interest purchased to the widow's life.

The widow who sold was the survivor of three widows of Ratan Singh who died on 23rd October 1863, leaving a mother, [247] besides the three widows. On the 16th February 1861 the Settlement Officer, Mubarik Ali Khan, Superintendent, made the order as follows: "It is ordered that proprietary rights of mouza Bamhni Khas be conferred in equal shares of four annas each on Mussammats Khema, Nanhi and Ganga, widows and Mussammat Durga, mother of Ratan Singh; that a rubkar be issued to the Tahsildar, Mandla, for information ; that the papers be sent to the office; and that orders be issued for the information of the proprietors.

Mussammat Ganga, the first defendant, admitted the plaintiffs' reversionary right; but the purchaser, Munnalal Chaodri, the second defendant, denied it, besides alleging that the sale was for the widow's necessary expenditure. Issues on both these latter points were found against him in the first Court, which decreed for the plaintiffs; a decree which the Commissioner affirmed on appeal. A second appeal, to the Judicial Commissioner, was also dismissed.

The defendant Munnalal Chaodri on the 17th January 1887, applied for leave to appeal to Her Majesty in Council under s. 596, Civil Procedure Code. The value of the right of property involved was more than Rs. 10,000. In addition to the grounds of appeal consisting of a re-statement of the matters alleged in his defence, the defendant then, for the first time, relied upon the effect of the order made by the Settlement Officer on 16th February 1861, awarding equal shares of four annas each to the three widows and the mother.

The Judicial Commissioner gave the following reasons for granting the certificate, which he did on the 12th April 1887 :—

"No doubt these questions are raised now for the first time but there is nothing in s. 596 of the Code of Civil Procedure to show that the substantial question of law, which the appeal must involve, is to be a question which has been raised and considered in the Courts in this country. The question must be involved in the appeal, that is to say, it must be relevant. and not merely a speculative question raised for the more purpose of making the appeal admissible. It may be doubted whether the question, as to a co-widow's right to

succeed, is relevant, because, in the present case, if it were decided that the next male reversioner should succeed, it would be necessary to decide the further question whether this finding of law would affect the rights of the plaintiffs, and to decide this further question certain issues of fact would have to be determined.

"The other ground of appeal is, I think, a substantial question of law; only one witness's evidence was objected to, but possibly it might be held, if that [248] evidence is inadmissible, that the finding of the Courts on the question of the respondent's relationship to the husband of the widows is unsustainable.

"The last three grounds of appeal were not pressed in this Court when the second appeal was heard, but I do not think this would bar the appellant from putting them forward as material questions of law.

"On the whole then though with some hesitation, I consider that the appeal does involve a substantial question of law.

"The value of the property sued for is above the required amount, and I therefore grant the certificate asked for."

Mr. *F. W. Dillon* for the Appellant.—In addition to the question of the evidence, upon which the lower Courts decided, there were two points: *First*, that as regards three-fourths of the property claimed, the decrees of the lower Courts, which were of a declaratory nature, could not stand, inasmuch as the respondent, if entitled to one at all, was entitled to claim consequential relief; in other words, to claim possession of the estate (s. 42 of Act I of 1877). *Secondly*, that as regards one-half of the property claimed, that portion which consisted of the shares of Mussammats, Durga and Nanhi, who died more than twelve years before the date of this suit, the respondent's claim was barred by time. The widows of Ratan Singh, not having acquired the estate from him, but as the result of an award from the Government in the Revenue Department, held, with the mother of Ratan Singh, a separate four-anna share each in the estate. Where such an award defined the shares, it would be inconsistent with the provisions of s. 87 of the Act XVIII of 1881 (the Central Provinces Land Revenue Act) * to allow one of those persons to claim under the Hindu Law a right which would conflict with the award. The sections contemplated that [249] proprietary rights could, during the process of settlement in the area under it, only be awarded by the Executive, and that the Judicial Courts could not award them, except in so far as s. 88 might permit. It followed that the claim of the respondent, as, that of the male heir next after the deceased, should have been at one time, for possession, not merely declaration of title, of all but the one-fourth share held therein by Mussammat Ganga, the sole survivor of the four grantees. Now, however, his claim would be barred as regards the two four-anna shares which had belonged to Durga and Nanhi. The appellant had acquired by purchase a title from Ganga based on her adverse possession of these two shares, besides her own, for a period of twelve years. Upon those grounds, if not upon the defence originally urged, it was submitted that the appeal should be allowed.

The Respondent did not appear.

---

* Section 87 is as follows. "When a Settlement Officer or Settlement Court has, at any settlement made before this Act comes into force, made an award of proprietary rights in any land, all claims which, after consideration by such Officer or Court, may have been expressly decided by him or it to be invalid, or inferior to the claims of the persons in whose favour the award was made, shall be barred both as against the Government and as against the persons last-mentioned; and no suit shall lie for the enforcement of such claims in any Civil Court.

The award at any such settlement of proprietary rights in land to a widow shall be deemed to confer on her those rights only, which, in accordance with the personal law to which she is subject, she would enjoy in land inherited by her from her husband."

Their Lordships' **Judgment** was delivered by

Lord Hobhouse.—This appeal is raised on three grounds. The *first* is this: that the plaintiffs, who sue as the heirs of Ratan Singh are not his heirs, or at least that the evidence, which proved that they are his heirs, ought not to have been admitted. Their Lordships consider that no objection has been shown to the admissibility of the evidence, and the matter, therefore, is concluded by the finding of the Commissioner, from whom no appeal upon facts lay to the Judicial Commissioner, whose decree is now under appeal.

The *second* ground is that legal necessity for the sale to the appellant ought to have been inferred by the Judge, the sale being by a person purporting to have a widow's estate. Their Lordships are of opinion that that also is concluded by the judgment of the Commissioner. They cannot hold, as a matter of law, that the things on which it is alleged that the money raised by the sale was spent constituted a legal necessity for the sale; and indeed it appears to them that the judgments of the Court below have gone upon the principle of examining the items which are alleged to have been spent on matters of necessity, and finding they have no connection with the sale. That therefore is a matter of fact which is concluded by the judgment of the Commissioner.

The *third* point is raised for the first time in these proceedings on the third appeal, and the fourth hearing of the cause. [250] All the parties have proceeded hitherto on the view that the widow of Ratan Singh, who effected the sale, had the widow's estate only; and therefore that, although the sale was perfectly good for her life-time, it was not good for any period beyond her life, unless legal necessity for the sale could be shown. Acting upon that view the Courts below have given the plaintiffs a declaratory decree that they are the reversioners and heirs apparent expectant on the widow's death. But it is now said that this widow, Ganga, had something different from the widow's estate; that the effect of an order of the Settlement Officer in the month of July 1865 was not to give the three widows, who then were living, the widow's estate, but it was an order effecting a partition of the family, and giving one-fourth in absolute proprietorship to each of the three widows, and the remaining share to the mother of the deceased Ratan Singh. There may be words in this order about which there is some ambiguity, but reading the order as a whole their Lordships cannot doubt that the Settlement Officer took Ratan Singh as being the proprietor of the estate, and took the estate as having passed to his heirs upon his death. Why he attributed a fourth to the mother of Ratan Singh does not appear, but no doubt she was entitled to maintenance; and it may have been that the state of things before him at that time led him to believe that it would be a proper way of dealing with the estate to give each of the four who had claims upon it the enjoyment of one-fourth of the estate. That may be so; but their Lordships cannot find upon the face of this order any intention to give to the mother and widows between them anything more than an interest in the widow's estate.

The consequence is that Ganga, having survived the rest, takes the whole of the widows' estate in the whole of the property, and the inheritance is left to devolve as it may devolve by course of law. The present heirs apparent are the plaintiffs, and therefore they are entitled to the decree.

The result is that the appeal must be dismissed. There will be no costs. as the respondent has not put in an appearance. *Appeal dismissed.*

Solicitors for Appellant: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[*See* also (1895) 20 Bom. 699.]

---

[251] APPELLATE CIVIL.

The 8th July, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE GORDON.

Hurro Kumar Ghose and others............Defendants

versus

Kali Krishna Thakur............Plaintiff.*

Limitation— Bengal Tenancy Act (VIII of 1885), Art. 2 (b), Part I, sched. iii —Suit for arrears of rent at excess rate.

In 1865 the plaintiff sued and obtained a decree for payment of additional rent for excess land held by the defendant, and, on the 29th March 1877, instituted another suit against the defendant for *khas* possession of newly-accreted lands, or in the alternative, for an assessment of rent thereon according to the terms of the defendant's *kabuliat*. This suit was dismissed on the 29th June 1881: but, on appeal to the High Court, this decision was reversed on the 11th May 1883, and *khas* possession was given to the plaintiff. On appeal the Privy Council, on the 24th July 1886, reversed the decree for *khas* possession, and declared the plaintiff entitled to a decree fixing the extent of the excess lands, and assessing rent therefor in terms of the *kabuliat*, such rent to be payable from and after the 28th March 1878; and remitting the case for a finding as to the extent of the excess lands. The Subordinate Judge, to whom the case was remitted, gave the plaintiff a decree on the 21st March 1887 for increased rent in respect of 2 kanis 7 gundahs 2 cowries of excess land.

On the 14th July 1887, the plaintiff instituted a suit to recover excess rent for the years 1878 to 1886 and for rent at the old rate *plus* the excess rent for a portion of the year 1887.

Held, that the suit, so far as the rent for 1878 to 1883 was concerned, was barred by limitation.

THIS was a suit for arrears of rent for the years 1285 to 1293, and for the instalments of Bysack and Joishto of the year 1294. The circumstances which led to the institution of the suit were as follows:—

The plaintiff was a zemindar and putnidar of mehal pergunnah Edilpur in the District of Backergunge, and the defendants held under him by virtue of a *kabuliat*, dated the 23rd April 1850, a *howla* tenure in a chur appertaining to this mehal. The area of the tenure as given in the *kabuliat* is 13 drones [252] 6 kanis 16 gundahs, and the annual rent was Rs. 462, there being a stipulation for payment of additional rent at the rate of Rs. 2-7-7 a kani for any excess land that might accrete to the chur up to 5 drones, and at the prevailing pergunnah rate for land in excess of that quantity.

In 1865 the plaintiff brought a suit and obtained a decree against the defendants for payment of additional rent at Rs. 2-7-7 a kani in respect of 2 drones 6 kanis 13 gundahs 2 cowries 2 krants of land in excess of the original tenure of 3 drones 6 kanis 16 gundahs; and on the 29th March 1879, he instituted another suit against the defendants in an alternative form, that is, either for *khas* possession of newly-accreted land, or for an assessment of rent

---

* Appeal from Original Decree No. 63 of 1888, against the decree of Baboo Troilokya Nath Mitter, Subordinate Judge of Furridpore, dated the 31st of December 1887.

thereon, according to the terms of the *kabuliat*. This suit was dismissed on the 29th June 1881 by the Subordinate Judge who tried it but on appeal the High Court, on the 11th May 1883, reversed his decree and gave *khas* possession to the plaintiff. The defendants then appealed to the Privy Council, with the result that the decree of the High Court for *khas* possession was set aside, and it was declared that the plaintiff was entitled to a decree "fixing the extent of the excess land, and assessing the rent payable for it in terms of the *kabuliat* of 1850."

Their Lordships further directed that the pergunnah rate should be fixed at Rs. 6-4 per kani; that the rent in respect of the excess land should become payable from and after the 28th day of March 1878, the date on which the notice was served on the defendants at the instance of the plaintiff; and that the case should be remitted in order that the precise extent of excess land for which rent was payable, and also the precise amount of the increased rent, might be ascertained in the Court below, and a decree given accordingly. The case then went back to the Subordinate Judge, who, on the 21st March 1887, gave the plaintiff a decree for increased annual rent of Rs. 477-11-4 in respect of 6 drones 2 kanis 7 gundahs 2 cowries of excess land. A few months after this, viz., on the 14th July 1887, the plaintiff instituted the present suit, in which he sought to recover excess rent at the rate of Rs. 477-11-4 for the years $\frac{1285 \text{ to } 1293}{1878 \text{ to } 1886}$, and the old rent *plus* the excess rent for a portion of the ye a $\frac{1294}{1887}$.

[253] The defence set up, so far as it is material in the present appeal, was that the claim for rent for the years 1285 to 1290 was barred by the statute of limitations.

The Subordinate Judge held that the suit was not barred, it having been brought within four months of the decree declaring the plaintiff entitled to get Rs. 477-11-4 annual rent from and after the 28th March 1878. He was of opinion that the plaintiff had not slept over his rights since the accretion of the chur; and that the plaintiff was not entitled to bring his suit for recovery of rent until after the final decree was passed on the 21st March 1887, adding that by this decree of the Privy Council the relationship of landlord and tenant was finally established between the parties, and this new chur was allowed to remain in possession of the defendants as tenants by revival of the decree of the High Court: so that when they got back the chur, they got it with the liability to pay rent from the 28th March 1878, and, having sued within a reasonable time from the date of the final decree, the suit was not barred.

The defendants appealed to the High Court.

Baboo *Rash Behary Ghose*, Baboo *Amarendra Nath Chatterjee* and Baboo *Basanta Kumar Bose* for the Appellants.

Baboo *Hem Chunder Banerjee*, Baboo *Durga Mohun Das* and Baboo *Omertronath Bose* for the Respondent.

Baboo *Rash Behary Ghose* contended that the claim for rent for the years 1285 to 1290 was barred under Act VIII of 1885, Art. 2 (*b*), Part I, sch. iii, citing *Doyamoyee Chowdrainee* v. *Bholanath Ghose* [6 W. R., (Act X Rul.), 77] *Huro Pershad Roy* v. *Gopal Das Dutt* (I. L. R., 9 Cal, 255), *Sheriff* v. *Dina Nath Mookerjee* (I. L. R., 12 Cal., 258).

Baboo *Hem Chunder Banerjee* relied on the case of *Rani Swarnamoyi* v. *Shashi Mukhi Barmani* (2 B. L. R., P. C., 10), contending that, during the litigation commencing in 1879 and terminating in 1887, the plaintiff was unable to sue for rent in respect of the excess lands, and that the right to sue accrued only on the 21st March 1887.

[254] The **Judgment** of the Court (PETHERAM, C.J., and GORDON, J.) was (omitting the facts) as follows: —

The contention before us is that the learned Judge's view of the question of limitation is wrong. Now it is clear that *primâ facie* the claim for rent for 1285 to 1290 is barred. The suit is for arrears of rent, and is therefore governed by the provisions of the Bengal Tenancy Act (Act VIII of 1885), and the period of limitation prescribed for suits for arrears of rent is given in sch. iii annexed to that Act (see s. 184). The article applicable to the present case is Art. 2 (*b*) of Part I of this schedule, in which three years is the period of limitation for a suit for the recovery of arrears of rent, and that period begins to run from "the last day of the Bengali year in which the arrears fell due, where that year prevails, and the last day of the month of Jeyt of the Amli or Fasli year in which the arrears fell due, where either of those years prevails."

Unless, therefore, there are some special circumstances in this suit which exempt it from the operation of these provisions of the law, we think the appellant's contention must prevail. Now the learned Pleader for the respondents relies on the Privy Council ruling in the case of *Rani Swarnamoyi* v. *Shashi Mukhi Barmani* (2 B. L. R., P. C., 10) as being in point, and he argues that during the litigation, which commenced in 1879 and terminated in 1887, by the declaratory decree of the Subordinate Judge, his client was unable to sue the defendants for rent in respect of the excess land; in short he substantially contends that the plaintiff's right to sue the defendants accrued on the 21st March 1887 and not on the 28th March 1878 from which date the rent was declared to be payable. We think, however, that the Privy Council ruling is not applicable to the present case In that case there were peculiar and exceptional circumstances which do not exist here. A putni taluk was brought to sale by the zemindar for arrears of rent, the purchaser obtained possession of the putni and the arrears of rent were paid to the zemindar out of the purchase money. The sale was afterwards set aside for irregularity at the instance of the putnidar, the purchase money was refunded, and the putnidar recovered possession [255] with mesne profits for the time he was ousted. The zemindar then brought a suit to recover the original arrears, and it was held by the Privy Council, reversing the judgment of this Court, that upon the setting aside of the sale and the restoration of the putnidar to possession he took the estate subject to the obligation to pay the rent, and the arrears claimed must be taken to have become due in the year in which that restoration took place, and further that until the sale had been finally set aside the zemindar was in the position of a person whose claim had been satisfied, and his claim might have been successfully met by a plea to that effect. But the facts of the present case are quite different. As far as we can see there is nothing in the terms of the *kabuliat* or in the law of landlord and tenant then in force, which prevented the plaintiff from suing for the excess rent after the service of the notice on the defendants in March 1878. Instead, however, of adopting this course the plaintiff chose to bring a suit in an alternative form asking either for *khas* possession of the excess land, or for a declaratory decree assessing the rent thereon in the terms of the *kabuliat*. He ultimately failed in his prayer for direct possession, but succeeded in getting a declaratory decree, and he now seeks to use this decree as if it gave him a cause of action in respect of the arrears he claims. We think that this is not so; and that the plaintiff's right to sue accrued when the rent for the excess land fell due after the service of notice on the 21st March 1878, from and after which date the Privy Council declared this rent to be payable, and therefore time began to run in respect of each year's rent on the last day of the Bengali year (the last day of Choitro) in which that rent fell due, and

that being so, the claim for rent for the years 1285 to 1290 is barred by limitation. In the view we take we think we are supported by the authority of several cases which the learned pleader for the appellants has placed before us, viz., the cases of *Doyamoyee Chowdrainee* v. *Bholanath Ghose* [6 W.R., (Act X Rul.), 77], *Huro Pershad Roy* v. *Gopal Das Dutt* (I.L.R., 9 Cal., 255) and *Sheriff* v. *Dina Nath Mookerjee* (I.L.R., 12 Cal., 258).

[236] The result is that this appeal, as regards the rent of the years 1285 to 1290 inclusive, must be decreed, and the plaintiff's claim for the rent of those years be dismissed with costs of both Courts.

T. A. P. *Appeal allowed in part.*

[17 Cal. 256]

APPELLATE CIVIL

The 16th July, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Purmeshur Chowdhry and others............Plaintiffs

versus

Brijo Lall Chowdhry and others... ....Defendants.*

Possession, Suit for—Previous possession—Dispossession—Specific Relief Act (I of 1887), s. 9.

Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under s. 9 of the Specific Relief Act, 1877, which must be brought within six months from the date of dispossession.

Khajah Enaetoollah Chowdhry v. *Kishen Soondur Surma* (8 W. R., 389), *Ertaza Hossein* v. *Bany Mistry* (I. L. R., 9 Cal., 130), *Debi Churn Boido* v. *Issur Chunder Manjee* (I. L. R., 9 Cal., 39), *Kaura Manjee* v. *Khowaz Nussio* (5 C. L. R., 278), *Wise* v. *Ameerunnissa Khatoon* (L. R., 7 I. A., 73), *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (I. L. R., 8 Bom., 371), *Pemraj Bhavanirain* v. *Narayan Shivaram Khisti* (I. L. R., 6 Bom., 215), *Mohabeer Pershad* v. *Mohabeer Singh* (I. L. R, 7 Cal., 591, 9 C. L. R., 164) referred to and explained.

Case in which the High Court on Special Appeal, being of opinion that the judgment of the District Judge reversing that of the Munsif on the credibility of the witnesses did not fulfil the conditions that a judgment reversing such a decision ought to fulfil, brought up the case before itself and heard it as a Regular Appeal.

IN this suit the plaintiffs sought to recover possession of three small plots of land about 4½ cottahs in area, adjoining their homestead, alleging that the lands belonged to them and had been in their possession for a long time, and that they had been forcibly **[257]** dispossessed therefrom by the defendants.

* Appeal from Original Decree No. 135 of 1889, converted from appeal from Appellate Decree No. 1560 of 1888, by an order of the High Court, dated the 21st of May 1889, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 11th of July 1888, reversing the decree of Baboo Shoshi Bhusan Chowdhry, Munsif of Mozufferpore, dated the 27th of June 1887.

The plaintiffs prayed for a declaration that the lands had been in their possession for a long time, and that the defendants had no concern with them. They also prayed for possession and *wasilut*. The defendants denied the plaintiffs' title and possession and claimed the land as their own by right of inheritance.

The suit was instituted more than six months after the dispossession by the defendants.

Believing the oral evidence of the plaintiffs and their witnesses, the Munsif found that the plaintiffs had been in possession of the lands in dispute, and that they had been wrongfully dispossessed by the defendants; but did not make any finding as to the length of the plaintiffs' possession prior to their dispossession. Upon these findings the Munsif gave the plaintiffs a decree for possession and mesne profits.

This decree was reversed by the District Judge of Mozufferpore, who disbelieved the evidence of the plaintiffs and their witnesses.

The plaintiffs appealed to the High Court.

Baboo *Sreenath Banerjee* for the Appellants.

Baboo *Abinash Chunder Banerjee* for the Respondents.

On the 21st May 1889, the High Court (PIGOT and RAMPINI, JJ.) passed an order, whereby the decree of the Lower Appellate Court was set aside, the case remanded, and brought up to its own file for final disposal. In making the order their Lordships observed:—

In this case the Munsif has given a very careful judgment, and the District Judge has set it aside by a decision which, although it may be the result of much consideration, does not, as we may say, fulfil the ordinary conditions which a judgment ought to fulfil when setting aside a carefully-considered judgment of the first Court: setting it aside, that is, upon the credibility of the witnesses. It was said by Sir GEORGE JESSEL, Master of the Rolls, that a judgment which does not in the body give reasons for its conclusion is not a judgment at all; and to a considerable extent the judgment in the present case does not fulfil the proper conditions that a judgment reversing a decision ought to fulfil At the [258] same time for reasons which have been indicated by the learned pleader for the respondent, and which we need not refer to here, we think that it would perhaps not be satisfactory to remand the case, and we are reluctant to take any other course save that of hearing the case ourselves: a very unusual course which, however, in this case, we must adopt.

We, therefore, set aside the decree of the District Judge formally, remand the case to him, and call it up to this Court to be tried as a regular appeal.

The evidence and the pleadings must be translated by the appellant, and the case set down for hearing next Monday fortnight, that is, the 10th of June 1889.

On the 16th July 1889, the appeal was heard by the High Court as an appeal from Original Decree.

Baboo *Abinash Chunder Banerjee* for the Appellants.

Baboo *Sreenath Banerjee* for the Respondents.

The **Judgment** of the High Court (PIGOT and RAMPINI, JJ.) was as follows:—

This is an appeal from the decision of the Munsif of Hajipore. Under the terms of an order made by this Court it has been brought up here to be heard as a regular appeal before us.

In the suit the plaintiffs ask for a declaration that certain land was in their possession for a long time, and that the defendants have no concern with it. They ask also for a decree for possession and for *wasilut*.

The Munsif gave the plaintiffs a decree. The facts established in the opinion of the Munsif, from which we see no reason whatever to dissent so far as the findings of fact go, are that the plaintiffs were in possession of the land in question, that is, their *bari* land which skirts their house; and that they were dispossessed by the defendants of that land. The Munsif, finding these facts and without making any finding as to the length of the plaintiffs' possession prior to their dispossession, gave them a decree.

This suit was instituted much more than six months after the dispossession by the defendants. It could not, therefore, be maintained under s. 9 of the Specific Relief Act. And although there are **[259]** many cases in this Court, notably the case of *Khajah Enaetoollah Chowdhry* v. *Kishen Soondur Surma* (8 W.R., 389), which did not affirm the proposition that either s. 15 of Act XIV of 1859, or s. 9 of the Specific Relief Act, bars a suit for ejectment founded upon possession wrongfully disturbed, recent cases in this Court have laid down that mere possession will not entitle the plaintiffs to obtain a decree for recovery of possession except under the special statute which entitles him to recover possession, if the suit is brought within a certain time of the date of dispossession. That proposition we read from *Ertaza Hossein* v. *Bany Mistry* (I. L. R., 9 Cal., 130), a case before Mr. Justice TOTTENHAM and Mr Justice O'KINEALY. A similar proposition was laid down in the case of *Debi Churn Boido* v. *Issur Chunder Manjee* (I. L. R. 9 Cal., 39), where the dispossession was a forcible dispossession. These two cases adopted the view taken by Mr. Justice PRINSEP in the case of *Kawa Manjee* v. *Khowaz Nussio* (5 C. L. R., 278), and they are all founded upon a passage in the judgment of their Lordships of the Privy Council in *Wise* v. *Ameerunnissa Khatoon* (L. R., 7 I. A., 73) at pp. 80, 81 of the Report.

It is true that the Bombay High Court has taken a different view. It has held in *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (I. L. R., 8 Bom., 371), that the passage in the judgment of the Privy Council just referred to has not the effect attributed to it in this Court; and in the Full Bench judgment of the Bombay High Court in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (I. L. R., 6 Bom., 215), which judgment was delivered by Chief Justice WESTROPP, and in *Mohabeer Pershad* v. *Mohabeer Singh* (I. L. R., 7 Cal., 591; 9 C. L. R., 164), in the judgment pronounced by Sir RICHARD GARTH, the proposition was affirmed that proof of quiet possession at the time of disturbance is enough to establish a *prima facie* case against a trespasser. We think, however, that we are bound to follow the recent cases in this Court, and to hold that the plaintiffs are precluded, by the remedy under s. 9 of the Specific Relief Act conferred upon them by that enactment (and which is given to **[260]** them on condition that their suit shall be brought within six months from the date of dispossession), from asserting the rights which the earlier cases and the English law recognized to exist. That their case was founded upon possession and unjustifiable dispossession is pretty clear: and our decision is limited to the proposition that they are debarred from succeeding, because they did not bring the suit within six months from the dispossession.

For myself, I am bound to say that, but for the rule that it is undesirable to disturb recent and established cases, I should follow the opinion expressed by Mr. Justice DWARKA NATH MITTER, in the case of *Khajah Enaetoollah Chowdhry* v. *Kishen Soondur Surma* (8 W. R., 389) and by Sir RICHARD GARTH and Chief Justice WESTROPP in the cases I have referred to. But without referring the matter to a Full Bench it would be impossible to give effect to that view, and that we cannot do as we do not both dissent from the recent

cases in this Court. Therefore, agreeing with my learned colleague as to the effect of the recent cases in this Court, I am of opinion that this appeal must be allowed and the suit dismissed on the ground stated.

Under the circumstances we have determined to allow no costs. The parties will bear their own costs throughout in all the proceedings.

C. D. P. *Appeal allowed.*

NOTES.

[Similar decisions were given in (1898) 3 C.W.N. 158; (1899) 29 Cal., 579; (1900) 5 C. W.N. 234. But the decisions in the following cases are opposed to the ruling in this case:— (1891) 13 All., 537; (1893) 20 Cal., 834; (1895) 20 Bom., 270; 798; (1900) 23 Bom., 287; (1903) 5 Bom., L.R. 225; (1906) 10 Bom., L.R., 571: (1899) 23 Mad., 179; (1901) 26 Mad., 514; (1902) P.R. 78; (1905) 3 L.B.R, 27. See also (1904) 31 Cal., 647.]

[17 Cal. 260]

APPELLATE CIVIL.

The 26th November, 1889.

PRESENT

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE NORRIS.

*Khub Lal and another........... Defendants

versus

Ram Lochun Koer............Plaintiff.

Limitation Act, 1877, Sch. II., Art. 11—Civil Procedure Code (Act XIV of 1882), ss. 278, 280, 281, 282—Order disallowing claim to attached property.

The effect of an order made under s. 281 of the Civil Procedure Code disallowing a claim to attached property, is to give the auction-purchaser a title as against the claimant unless the order is set aside by a suit; and **[261]** a suit for that purpose can only be brought within a year from the date of the order.

Sardhari Lal v. *Ambika Pershad* (I.L.R., 15 Cal., 521; L. R., 15 I. A., 123) referred to.

THIS was a suit brought to recover possession of a fractional share of certain lands which the plaintiff alleged had been sold to her in 1887, but which, after she had taken possession, was attached under a decree obtained against her vendor. The plaintiff thereupon put in a claim under s. 278 of the Code of Civil Procedure, which was however rejected under s. 281 of that Code on the 6th August 1887. She thereupon, on the 7th August 1888, brought the present suit for the purposes above stated. The defendants contended that the suit was barred, it not having been brought within one year from the date on which the plaintiff's claim was rejected.

The Munsif held that the suit was barred, and dismissed the suit. The Subordinate Judge, on appeal from that order, reversed this decision, holding that the suit was one to establish the plaintiff's title, and was not affected by the order of the 6th August 1887, and that the plaintiff had therefore twelve years in which to bring her suit.

The defendant appealed to the High Court.

* Appeal from Order No. 34 of 1889, against the order of Baboo Upendra Chunder Mullick, Subordinate Judge of Trihoot, dated the 22nd of December 1888, reversing the order of Baboo Jugal Kishore Dey, Munsif of Mozufferpore, dated the 19th of September 1888.

Baboo *Saligram Singh*, for the appellant, contended that against an order passed under ss. 280, 281, or 282 of the Code, a suit must be brought within one year from the date of the order in accordance with Art. 11 of Sch. II of the Limitation Act, and that the suit, not having been brought within that period, was barred.

Baboo *Sharoda Churn Mitter*, for the respondent, contended that the suit was one to recover possession, and not one contemplated by ss. 278 to 283 of the Code, and that the limitation for an ejectment suit was applicable thereto.

The **Judgment** of the Court (PETHERAM, C.J., and NORRIS, J.) was as follows :—

This is a suit by the plaintiff to recover possession of a fractional share in mouza Bishampur Sadho, as having been sold and handed over to her by the owners on the 9th of March 1887. **[262]** The defence upon which the present question arises is, that, after the sale to the plaintiff, the share of her vendor, including the share purchased by the plaintiff, was attached under a decree against the plaintiff's vendor, and that thereupon the plaintiff preferred a claim to the share now in dispute under s. 278 of the Civil Procedure Code, and that claim was enquired into and rejected on the 6th of August 1887. The present suit was instituted on 7th August 1888, and the question which we have to determine is, whether this suit is barred by limitation.

In our opinion it is. Section 283 provides that the party against whom an order under ss. 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive. And Art. 11 of Sched. II of the Limitation Act prescribes one year as the period within which such suit may be brought.

It is contended, in the present case, that this being a suit to recover possession, it is not such a suit as is contemplated by ss. 278 to 283, and that the ordinary limitation for an action of ejectment applies. We think that this is not the case. Section 283 expressly provides that if the suit mentioned in that section is not brought, the order shall be conclusive; and it seems to us that the effect of this is, that the order gives the auction-purchaser a title as against the claimant, unless it is set aside by action, and an action for that purpose can only be brought within a year. In taking this view of the law, we are, we think, acting in the spirit of the decision of the Privy Council in the case of *Sardhari Lal* v. *Ambika Pershad* (I. L. R., 15 Cal., 521; L. R., 15 I. A., 123).

For these reasons we are of opinion that this appeal must be allowed, the decision of the Munsif restored, and the suit dismissed with costs in all the Courts.

T. A. P. *Appeal allowed.*

NOTES.

[*See* also (1897) 19 All., 253; (1897) 22 Bom., 875; (1901) P.L.R., 74 where the rulings similar.]

[263] APPELLATE CIVIL.

The 22nd July, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE

Girija Nath Roy Bahadur............Plaintiff

versus

Patani Bibee and others............Defendants.*

Limitation—Bengal Act VIII of 1869—Suit for arrears of rent—Limitation Act (XV of 1877), ss. 6 and 7.

In a suit under Bengal Act VIII of 1869 for arrears of rent, which accrued during minority, the plaintiff is not entitled to a fresh period of limitation under ss. 6 and 7 of the Limitation Act, 1877.

Dinonath Panday v. *Roghoonath Panday* (5. W. R., Act X Rul., 41), *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (I. L. R., 5 Cal., 110), *Golap Chand Nowluckha* v. *Kristo Chunder Das Biswas* (I. L. R., 5 Cal., 314), *Khoshelal Mahton* v. *Gomesh Dutt* (I. L. R., 7 Cal., 690) and *Phoolbas Koonwur* v. *Lalla Jogeshur Sahay* (L. R., 3 I. A., 7; I. L. R., 1 Cal., 226) explained. *Khetter Mohun Chuckerbutty* v. *Dinabashy Saha* (I. L. R., 10 Cal., 265) distinguished.

ON the 30th September 1885, before the Bengal Tenancy Act 1885 came into operation, the plaintiff, Maharaja Girija Nath Roy Bahadur, instituted a suit against Patani Bibee and others in the Court of the Subordinate Judge of Rajshahye for the recovery of arrears of rent and cesses for the years 1287 to 1292 (1880 to 1883). The suit, which was instituted under the old Rent Act (Bengal Act VIII of 1869), was decreed *ex parte* on the 8th February 1886. Subsequently, on the 6th December 1886, upon the application of Patani Bibee (defendant No. 1), the *ex parte* decree was set aside, and a re-hearing granted under s. 108 of the Code of Civil Procedure.

The plaintiff, it appears, had also instituted a suit on the 7th April 1884 in the Court of the Subordinate Judge of Dinagepore for the recovery of arrears of rent in respect of the years 1287 to 1290 (1880 to 1883). That suit was decreed *ex parte* on the 5th May 1884, and in execution of the decree the judgment-debtor's property was sold. This sale was, however, set aside on the 23rd January 1885. Subsequently the decree-holder (the plaintiff in the present case) applied for a certificate for the [264] execution of the decree in the District of Rajshahye, but that application was refused by the Subordinate Judge of Dinagepore on the 11th July 1885, on the ground that his Court had no jurisdiction to pass the decree, and that, therefore, the decree was invalid.

The plaintiff in the present suit alleged that he had attained his majority in Ashar 1290 (June-July 1883), and that he had *bona fide* instituted his suit for arrears of rent for the years 1287 to 1290 in the Court of the Subordinate Judge of Dinagepore, believing that the suit was cognizable by that Court: and contended that he was entitled to the benefit of the provisions of ss. 7 and 14 of the Limitation Act, 1877. The defendants pleaded *inter alia* that the suit was barred by limitation.

The Subordinate Judge found that the plaintiff had attained his majority in Ashar or Srabun 1290 (June or July 1883), and that he had prosecuted his suit and the proceedings subsequent thereto in the Court of the Subordinate Judge of Dinagepore with due diligence and good faith. He was of opinion that s. 7 of the Limitation Act, 1877, did not apply to suits for arrears of rent brought under Bengal Act VIII of 1869; because s. 29 of that Act provided a special

* Appeal from Original Decree No. 214 of 1887, against the decree of Baboo Aughore Nath Ghose, Subordinate Judge of Rajshahye, dated the 27th of June, 1887.

period of limitation for such suits, and the schedule to the Limitation Act provided no period for them. Accordingly, the Subordinate Judge held that the plaintiff was not entitled to the benefit of s. 7* of the Limitation Act.

He also held that under s. 14 of the Limitation Act the plaintiff was entitled to a deduction of the total time, during which he was prosecuting his suit and the proceedings subsequent thereto in the Court of the Subordinate Judge of Dinagepore, and that even if the plaintiff were allowed the benefit of the full period of one year three months and five days from the date of the institution of the suit to the date of the rejection of his application for certificate, his claim in respect of the rent and cesses for 1287 would still be barred. Accordingly, the Subordinate Judge gave the plaintiff a decree for rent and cesses for 1288 and the subsequent years, disallowing his claim in respect of 1287.

The plaintiff appealed to the High Court from so much of this decree as disallowed his claim for the rent and cesses for 1287.

[265] Baboo *Jasoda Nandan Pramanick* for the Appellant.

Baboo *Srinath Dass* and Baboo *Gopi Nath Mukerjee* for the Respondents.

The **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

The question raised in this appeal is whether the plaintiff, suing for arrears of rent, and having been a minor at the time when one portion of the arrears accrued due, is entitled to the benefit of s. 7 of the Limitation Act; and to bring his suit to recover those arrears after the period prescribed by the law for such suits in general.

The lower Court has held that the plaintiff is not entitled to the benefit of s. 7. The Subordinate Judge was of opinion that s. 7 of the Limitation Act was not applicable to suits for rent under Bengal Act VIII of 1869, under which this suit was brought, because that Act provides a special period of limitation for suits brought to recover arrears of rent, and the schedule to the Limitation Act provides no period for such suits. Section 7 of that Act allows a minor such further time after he has attained his majority as would otherwise have been allowed from the time prescribed for such suit in the third column of the second schedule annexed to that Act. As suits for rent do not come within that schedule, the Court held that that section was not applicable: and it appears to us that it was correct in the view which it took.

* [Sec. 7:—If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed. *(Legal disability.)*

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased as would otherwise have been allowed from the time so prescribed. *(Double and successive disabilities.)*

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply. *(Disability of representative.)*

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.]

There is one authority pointed out to us by the pleader for the appellant as being against him. That is a case of *Dinonath Panday* v. *Roghoonath Panday* [5 W. R., (Act X Rul.), 41]. On the other hand, the learned pleader relies upon later rulings of this Court, and upon a ruling of the Judicial Committee of the Privy Council, in which it was held that in certain other cases, not for arrears of rent, but still as to which special limitation was provided by other Acts, the plaintiff was entitled to the benefits conferred upon plaintiffs by ss. 5 to 25 of the present Limitation Act. He also relied upon a Privy Council case, *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (L. R., 3 I. A., 7; I. L. R. 1 Cal., 226), in regard to s. 11 of Act XIV of 1859, the former Limitation Act.

[266] The last case decided by the Privy Council was a suit brought by a minor to establish his right to property in respect of which his claim had been rejected under s. 246 of the old Code of Procedure, Act VIII of 1859. By that section one year's limitation was provided for the institution of a suit. This Court held, and the Judicial Committee affirmed the decision, that the principle of s. 11 of Act XIV, which is much the same as s. 7 of the present Act, would apply. In the cases of *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (I. L. R., 5 Cal., 110) and *Golap Chand Nowluckha* v. *Krishto Chunder Das Biswas* (I. L. R., 5 Cal., 314), cited to us, it was held that the plaintiffs, suing under special Acts providing special periods of limitation, were nevertheless entitled to the benefit of s. 5 of the Limitation Act, which provides that if the Court is closed when the period of limitation expires, a plaintiff may file his suit upon the first day the Court re-opens. And in the case of *Khoshelal Mahton* v. *Gonesh Dutt* (I. L R., 7 Cal., 690), a similar doctrine was laid down. So also in the case of *Khetter Mohun Chuckerbutty* v. *Dinabashy Saha* (I. L R, 10 Cal., 265), the late Chief Justice applied the provisions of s. 14 of the Limitation Act to a suit brought under the provisions of the Registration Act, which provide a special limitation for such suits.

These decisions may at first sight appear to conflict with the provisions of s. 6 of the Limitation Act, which provides:—"When, by any special or local law, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed." But so far as s. 5 is concerned, we think that the decisions cited do not conflict at all with s. 6, for those decisions did not extend the period of limitation. All they did was to prevent the period of limitation from being curtailed by the closing of the Court: and Mr. Justice MITTER observes in his judgment in *Khoshelal Mahton* v. *Gonesh Dutt* (I. L. R., 7 Cal., 690) that the days the Court is closed must be considered as non-existent, or what are called *dies non*, and therefore they are not counted.

As regards the case of *Khetter Mohun Chuckerbutty* v. *Dinabashy Saha* (I. L. R., 10 Cal., 265), the decision of this Court is not easily to be [267] reconciled with s. 6, for the effect of that decision was undoubtedly to alter the period prescribed by the special Limitation Act. We do not, however, consider ourselves bound by that decision, for the present case is an entirely different one. And as regards the suit to establish the right of the unsuccessful claimant under s. 246 of the old Code of Procedure, we observe that since the decision in that case, new Limitation Acts have been passed, and also a new Code of Procedure, and now the corresponding section (280) does not prescribe a period of limitation, whereas the present Limitation Act does prescribe a period of limitation for such suits in its third schedule. On the other hand the present Limitation Act does not prescribe a period of limitation for suits

brought under the old Rent Act of 1869, under which the present suit was brought. That Act still contains a special period of limitation for suits to recover arrears of rent as well as other matters.

It seems to us, therefore, that upon the strict construction of s. 7 put upon it by the lower Court, as well as upon the provisions of s. 6 of the same Act, it is right to hold that the plaintiff in this suit was not entitled to a fresh period of limitation on his attaining majority.

Another argument was addressed to us in favour of the plaintiff based on these facts: that a former *ex parte* decree was obtained when there was no bar of limitation, but which ceased to have effect, it is said, because it was found after decree that the Court had no jurisdiction to pass it; and though the sale held under that decree was set aside or not confirmed, the defendant, it was argued, recovered his property saddled with a charge for the rent covered by that decree. We are unable to recognize the cogency of this argument, or the existence of any such charge, certainly not as existing after the rent had become barred by limitation.

We therefore think that the appellant has rightly failed to recover the rent of 1287, and must be content with the decree obtained for the rent of the subsequent years.

The appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[This was followed in (1893) 18 Mad., 99; (1902) 29 Cal., 813; (1903) 30 Cal., 532; (1903) 7 C.W.N. 550; (1905) 30 Bom., 275.]

[268] APPELLATE CIVIL.

The 5th August, 1889.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Raghunandun Pershad and another............Decree-holders

versus

Bhugoo Lall ....Judgment-debtor.

Limitation Act (XV of 1877), Sched. ii, Art. 179, cl. 4—Suit to set aside order in a claim case—Execution of decree - Application in continuation of a previous application for execution—Steps in aid of execution.

Clause 4, Art. 179, Sched. ii of the Limitation Act, 1877, does not include a suit to set aside an order passed in a claim case.

R and *L* obtained a decree against *B* on the 7th March 1881, and in execution of that decree certain property belonging to *B* was attached on the 11th June 1883. Thereupon a claim was made to the attached property by third parties and a two-thirds share therein was released by the Court executing the decree. On the 22nd March 1884, *R* and *L* instituted a suit for a declaration that the entire property was liable to be sold under their decree, and obtained a decree on the 29th March 1886. This decree was reversed by the Lower Appellate Court which upheld the order releasing a two-thirds share of the property, and, on 22nd July

*Appeal from Order No. 126 of 1889, against the order of J. Crawford, Esq., Judge of Patna, dated the 18th of February 1889, reversing the order of Babu Purno Chunder Banerjee, Munsif of Patna, dated the 17th of December 1888.

1887, the High Court affirmed the decree of the Lower Appellate Court. On the 15th August 1887, *R* and *L* applied for execution of their decree in respect of the remaining one-third share. *B* objected that the application was barred.

Held, that the application of the 15th August 1888 was not a continuation of the application of the 11th June 1883.

Pyaroo Tuhovildarinee v. *Nazir Hossein* (23 W. R., 183), *Issuree Dassee* v. *Abdul Khalak* (I. L. R., 4 Cal., 415), *Chandra Prodhan* v. *Gopi Mohun Saha* (I. L. R., 14 Cal., 385) and *Paras Ram* v. *Gardner* (I. L. R., 1 All., 355), distinguished.

Held, also, that the institution of the suit on the 22nd March 1884, and the appeal to the High Court from the decree of the Lower Appellate Court, were not steps in aid of execution.

Akbar Gazee v. *Bibee Nufezun* (8 W. R., 99) distinguished.

THIS was an appeal against the order of the Lower Appellate Court, disallowing an application for the execution of a decree as being barred by limitation.

[269] On the 7th March 1881, Raghunandun Pershad and another obtained a decree on a mortgage bond against Bhugoo Lall; and, in execution of that decree, the mortgaged property was attached on the 11th June 1883. Thereupon, one Gopi Nath and others laid claim to the attached property, and the Court allowed the claim in respect of a two-thirds share of the same. The decree-holders, thereupon, on the 22nd March 1884, filed a regular suit for a declaration that the entire sixteen annas of the property was liable to be sold in execution of their decree of the 7th March 1881, and obtained a decree in the Court of First Instance on the 29th March 1886. This decree was reversed on appeal, the Lower Appellate Court upholding the order releasing a two-thirds share of the property. The decree-holders then appealed to the High Court, which affirmed the decree of the Lower Appellate Court on the 22nd July 1887.

On the 15th August 1888, the decree-holders applied for the execution of their decree of the 7th March 1881 against the remaining one-third share in the property. The judgment-debtor, Bhugoo Lall, objected that the application was barred by limitation. The Court of First Instance overruled the objection, holding, upon the authority of the cases of *Pyaroo Tuhovildarinee* v. *Nazir Hossein* (23 W. R, 183), *Paras Ram* v. *Gardner* (I. L. R., 1 All., 355), *Issuree Dassee* v. *Abdul Khalak* (I.L.R., 4 Cal., 415), that the present application was not altogether a fresh application for execution, but one in continuation of the previous application of the 11th June 1883, and having been made within three years from the 22nd July 1887, the date on which the High Court decree was passed, it was in time under art 178, sch. II of the Limitation Act, 1877.

On appeal the Lower Appellate Court allowed the objection and reversed the order of the Court of First Instance on the ground that at no time was there any bar to the decree-holders proceeding against the one-third share of the property, and that they were not entitled to claim a fresh period of limitation, under art. 178 of the Limitation Act, from the 29th March 1886.

The decree-holders appealed to the High Court.

Baboo *Saligram Sing* for the Appellants.

[270] Baboo *Lal Mohun Das* for the Respondent.

The **Judgment** of the High Court (BANERJEE and RAMPINI, JJ.) was (after stating the facts) as follows:—

It is now contended in second appeal: (1) that the application of the 15th August 1888 ought to be regarded as a continuation of the application filed on the 11th June 1883; and (2), that the suit instituted by the decree-holder on the 22nd March 1884, and the appeal presented to the High Court, ought to be regarded as being in the nature of applications to take some step in aid of the execution of the decree; and that the decree-holders ought to be allowed to reckon their time either from the 22nd July 1887, or from the 29th March 1886.

In support of the first of these contentions several cases have been cited amongst which we may mention *Pyaroo Tuhovildarinee* v. *Nazir Hossein* (23 W. R., 183), *Issuree Dassee* v. *Abdul Khalak* (I.L.R., 4 Cal., 415), *Chandra Prodhan* v. *Gopi Mohun Saha* (I. L. R., 14 Cal., 385), and *Paras Ram* v. *Gardner* (I. L. R., 1 All., 355).

We have heard the learned Vakil for the appellant at some length on the point, and we think that all that it was possible to urge in furtherance of the appeal has been urged before us; but we are unable to give effect to his contention. The cases cited are all distinguishable from the present in this respect, namely that in those cases the execution-proceedings were either interrupted by an intermediate order, which was afterwards set aside, or were rendered infructuous, so as to make a fresh application necessary, as was the case in *Issuree Dassee* v. *Abdul Khalak* (I.L.R., 14 Cal., 415), and in these cases, the second application could not have been made for a time by reason of the state of things that intervened, though in not making the second application earlier, no blame attached to the decree-holder. That this was the reason for the rule laid down in those cases will appear from the observations of MARKBY, J., in the case of *Pyaroo Tuhovildarinee* v. *Nazir Hossein* (23 W. R., 183). In that case, the learned Judge observes: "Whatever may be the form of the last application, dated the 5th December 1873, in substance it was an application to the Court for the continuation of the former proceedings on the [271] ground that the bar that was set up by reason of the adverse order under s. 246 had been removed by the decision in the subsequent regular suit." And in the case of *Paras Ram* v. *Gardner* (I.L.R., 1 All., 355), STUART, C.J., observes: "The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Ram's procedure, therefore, under his decree, must be held to have been legally continuous, and he may proceed to its execution." Now, it is clear that in the present case those considerations have no application. It is clear that the decree-holders could, notwithstanding the order in the claim case, have prosecuted their application for execution against the one-third share which was not released then quite as well as they can do so now. Their present application is for the sale of that third share of the property; there was no bar then to their enforcing the execution of the decree, and there has been no subsequent removal of that bar The reason of the decisions not applying to the present case, they cannot afford any ground for holding that the present application is a continuation of the application of the 11th June 1883.

Then, as regards the second ground, no doubt the case cited in the argument, *Akbar Gazee* v. *Bibee Nujeezun* (8 W.R., 99), lends some support to it, but that was a case under the old Limitation Law (Act XIV of 1859), the language of which was very different from that of the present law. Clause 4, art. 179 of the second schedule of the Limitation Act provides, that the three years may be reckoned from the date of applying, in accordance with law, to the proper Court for execution, or to take some steps in aid of execution of any decree or order," etc. Now, seeing that the Limitation Act XV of 1877 draws a clear distinction between suits and applications, it would be difficult to construe these words to include a suit for setting aside an order in a claim case. "Proper Court," again, as defined by Explanation II of that article, means the Court whose duty it is (whether under s. 226 or s. 227 of the Code of Civil Procedure or otherwise) to execute the decree or order." Therefore, evidently the provision of law just referred to contemplates an application made in the course [272] of execution to the Court whose duty it was to execute the decree, and cannot be taken to include a suit to have an order in a claim case set aside.

We therefore think that the Lower Appellate Court was right, and that this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[*See* also (1894) 20 Bom., 175. This case has been distinguished in the following cases :—(1896) 23 Cal., 437 ; (1901) 4 O.C., 333 ; (1906) 33 Cal., 689 ; (1893) 21 Cal., 23.]

APPELLATE CIVIL.

[17 Cal. 272]

The 21st August, 1889.

PRESENT :

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE GHOSE.

Krishna Kinkur Roy and another, Administrator to the Estate of the late Hurro Chunder Roy ....Plaintiffs

versus

Panchuram Mundul and another............Defendants.[*]

Succession Act (X of 1865), s. 187—Hindu Wills Act (XXI of 1870), s. 2—Probate and Administration Act (V of 1881), Chapters II to XII—Probate or administration to wills of Hindus executed before 1st September 1870—Limitation Act, 1877, art. 140—Adverse possession.

Section 187 of the Succession Act, which, by s 2 of the Hindu Wills Act, was made applicable to wills executed subsequent to the 1st September 1870, has not been incorporated in Act V of 1881, and although it is competent to a Court to grant probate or letters of administration in respect of wills antecedent to the 1st September 1870, still it is not obligatory upon executors or persons claiming probate or administration to obtain such probate or letters of administration before they can establish their right in respect to any property subject to such wills.

THE facts of this case were as follows: -One Hurro Chunder Roy, who was originally the owner of the properties which are the subject-matter of this suit, executed a will on the 16th Magh 1273 (February 1867), by which he bequeathed his estate to his grandsons, being the sons of his two sons, Kissory Mohun and Rai Mohun ; the sons of Kissory Mohun getting among themselves an eight-annas share, and the sons of Rai Mohun getting the other eight-annas. It was provided in this will that, until the grandsons attained the age of thirty, the properties bequeathed should remain under the management of his wife, and, on her death, of certain other persons mentioned therein ; and that during this time the legatees should be maintained out of the proceeds, and that they should be entitled to any surplus that might remain after their necessary expenses.

[273] The will, as its contents clearly indicated, had the object of disinheriting his two sons, Kissory Mohun and Rai Mohun. Hurro Mohun, the testator, died many years ago (not less than fifteen years) before the institution of this suit, and, upon his death, the properties bequeathed by the will were not taken possession of either by his wife or by any other persons named in it, on

---

[*] Appeal from Original Decree No. 58 of 1888, against the decree of Baboo Nobin Chunder Ganguly, Subordinate Judge of Moorshedabad, dated the 30th of November 1887.

behalf of his grandsons who were then minors, but by his two sons, as if they were properties which had devolved on them by right of inheritance; and they continued to be in such possession until April 1887, *i.e.*, within a month before this suit, when the plaintiffs, who are the sons of Krishna Mohun, obtained possession by virtue of letters of administration granted to them under the will of Hurro Mohun. In July 1881, when Rai Mohun (defendant No. 2) was in possession, he executed a mortgage bond in favour of defendant No. 1, hypothecating, as security, an eight-annas share of the properties in suit, describing the same as his own eight-annas share; and upon the mortgage bond the defendant No. 1 subsequently obtained a decree, and, in execution thereof, applied for the sale of the properties mortgaged; whereupon the plaintiffs intervened, but their intervention was disallowed; they then brought this suit to have their right declared in the properties in question under the letters of administration granted to them, and for the further declaration that the said properties were not liable to be sold in execution of the decree obtained by the defendant No. 1.

The Subordinate Judge dismissed the suit, upon the ground that the plaintiffs had lost their right by adverse possession on the part of the defendant No. 2 for more than twelve years. He was of opinion that the grandsons acquired a vested interest in the properties under the will of Hurro Mohun, and when neither the executor mentioned in the will, nor the grandsons, took possession upon the death of Hurro Mohun, as they ought to have done, the possession of Kissory Mohun and Rai Mohun was adverse; and that the grandsons not having sued within three years after their arrival at majority, their rights had been extinguished.

The plaintiffs appealed to the High Court, not, however, impeaching the facts as found by the Subordinate Judge.

[274] Baboo *Rashbehari Ghose*, Baboo *Sharoda Prosunno Roy*, Baboo *Saligram Singh*, and Baboo *Uma Kali Mookerjee* for the Appellants.

Baboo *Srinath Dass*, Baboo *Bhagabati Churn Ghose*, and Baboo *Jogendra Nath Bose* for the Respondents.

Baboo *Rashbehari Ghose* contended that, under s. 187 of the Succession Act, no right to sue could accrue until letters of administration had been taken out, and that such letters having been obtained within twelve years of suit, the plaintiff was entitled to the declaration asked for by him. Further, that, until letters of administration were obtained, there was no one capable of suing; also that the letters of administration must be taken to have had a retrospective effect, as though they had been granted at the time of the death of Hurro Mohun; and further, that, as the plaintiffs were not entitled to possession under the will until they attained the age of thirty, they were entitled to sue when the estate should fall into possession in accordance with Art 140 of the Limitation Act.

Baboo *Srinath Dass*, for the respondents, contended that it was not obligatory in this case to have obtained letters of administration at all, and that the executors could have sued at any time to obtain possession; and neither they nor the grandsons having done so within the time allowed, the present suit was barred.

The **Judgment** of the Court (PETHERAM, C.J., and GHOSE, J.) was (omitting the facts) as follows:—

The judgment of the Subordinate Judge, so far as the facts found by him are concerned, is not impeached before us. But what was contended for the appellants was that, in so much as, under s. 179 of the Succession Act, the plaintiff is the legal representative of Hurro Mohun, and all the property left

by him has vested in him, and because, under s. 187 of the Succession Act, he was not competent to establish his right in a Court until letters of administration were obtained, and that such letters have been obtained within twelve years before suit, the plaintiffs were entitled to have the declaration asked for. It was also argued that the letters of administration granted to the plaintiffs should be taken to have a retrospective effect, as [275] if they were granted at the time of the death of Hurro Mohun, and that, therefore, he was entitled to claim the properties in question notwithstanding the unlawful possession of the sons of Hurro Mohun for more than twelve years. It was further contended that, regard being had to the provisions in the will that the grandsons should not get possession until their arrival at the age of thirty, and also to the provisions of Art. 140 of the Limitation Act, the plaintiffs were within time. It will be observed, in the first place, that the will of Hurro Mohun bears date the 16th Magh 1273 (February 1867), that is to say, before the passing of the Hindu Wills (Act XXI of 1870), by which certain portions of the Indian Succession Act were made applicable to all wills and codicils made by any Hindu, Jain, etc., on or after the first day of September 1870; subsequently, however, by the Probate Act (V of 1881), it was provided that Chapters II to XIII of the Act which contain provisions similar to those in the Succession Act, which, by the Hindu Wills Act, were made applicable to Hindus etc., should apply to the case of every Hindu, Mahomedan etc., dying before, on, or after the first day of April 1881: so that, as it has been held by a Division Bench of this Court (Norris and GHOSE, J.J.), in *Krishna Kinkur Roy* v *Rai Mohun Roy* (I. L. R., 14 Cal. 37) an application may be made, and probate or letters of administration granted in respect of wills executed before the first day of September 1870. But then s. 187 of the Succession Act, which, by s 2 of the Hindu Wills Act, was made applicable to wills subsequent to the 1st September 1870, has not been incorporated in the Probate Act, and it follows from this, that although it is fully competent to a Court to grant probate or letters of administration in respect of wills antecedent to the 1st September 1870, still it is not obligatory upon executors or persons claiming letters of administration to obtain such probate or letter of administration before they can establish their right in respect to any property of the deceased in a Court of Justice. In regard, therefore, to the will of Hurro Mohun, there was nothing to prevent the executors named therein to sue to recover possession from the hands of the sons of Hurro Mohun; and there was nothing also to prevent the grandsons from bringing a suit for the same purpose upon their arrival at majority.

[276] It was pressed upon us that, until letters of administration were granted to the plaintiffs, there was no person in existence capable of suing, and therefore no cause of action could exist before such administration was granted. But it is quite clear that under the will of Hurro Mohun, which was executed before the Hindu Wills Act, the estate was vested in the grandsons; and that it was quite competent to the executors and the grandsons to bring a suit without any probate or letters of administration. The cause of action arose when the sons of Hurro Mohun took unlawful possesion; and the executors were bound to have sued within the statutory period from the date of the said cause of action. As to the point raised with reference to the provisions in the will, that the grandsons were not to get possession until their arrival at the age of thirty, it appears to us that it is equally untenable.

The estate fell into possession within the meaning of Art. 140 of the Limitation Act, when Hurro Mohun died. Under the terms of the will the estate vested in the grandsons with this qualification, that so long as they did

not attain the age of thirty, their manager (for the persons named in the will were nothing more than managers) was to hold it for them and for their benefit. It was incumbent upon those managers to have taken possession on behalf of the grandsons; and if they did not do so, and allowed somebody else to remain in adverse possession for more than twelve years, the right of the grandsons must be taken to have been extinguished.

But, apart from these considerations, it seems to us to be clear that the suit must fail. Under the terms of the will, an eight annas share of the property devolved upon the plaintiffs, and the other eight-annas upon the sons of Rai Mohun. The share of the property mortgaged to the defendant No. 1, is evidently not the plaintiffs' eight-annas share, but the other eight annas which devolved upon the sons of Rai Mohun, and the latter dealt with it as his own, viz., eight annas. It follows, therefore, that the plaintiffs are in no way affected by this mortgage, and indeed they have no cause of action.

The result, therefore, is that this appeal will be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[This was followed in (1896) 18 All., 260; (1898) 2 O.C., 33.]

---

[277] APPELLATE CIVIL.

The 19th November, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE NORRIS.

Deoki Singh and another..........Opposite-parties

versus

Seogobind Sahoo and others............Petitioners.*

Bengal Tenancy Act (VIII of 1885), s. 158—Standard measure of the district—Evidence taken by an Ameen under s. 158 of the Bengal Tenancy Act.

Under a proceeding under s. 158 of the Bengal Tenancy Act in which an enquiry was directed, amongst other things, as to the boundaries of certain plots held by certain ryots, the Ameen took evidence as to the standard measure of the district, and the Court decided the case on their evidence: *Held*, that, in determining the boundaries, the question as to what was the standard measure of the district arose, and that the evidence was rightly received and acted upon.

THIS was an appeal by certain ryots against an order made under s. 158 of the Bengal Tenancy Act.

The respondents, who were landlords of the appellants, had, in August 1887, obtained decrees for rent against their tenants which established the rent and the quantity of land held by the latter. Subsequently to these decrees, the

* Appeal from Order No. 183 of 1889, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 4th of April 1889, reversing the order of Baboo Promotho Nath Chatterjee, Munsif of Sitamarhi, dated the 10th of May 1888.

landlords applied to the Munsif of Sitamarhi, under s. 158 of the Bengal Tenancy Act, asking that the following particulars might be ascertained, viz.:—

(1) The quantity and boundaries of the land held by the ryots.

(2) The present rent payable.

(3) The class to which the tenants belonged.

(4) Whether the rents were liable to enhancement.

The Munsiff thereupon appointed a Commissioner or Ameen for the purpose of holding these enquiries. On making these enquiries the Ameen found that the real dispute was a question of the boundaries of the holdings: the tenants claiming to hold a certain number of plots, whilst the landlords contended that they did not hold the number of plots claimed, and that there was a further question as to the standard of measurement made use of in the district: the ryots contending that it was one of 7½ cubits, whilst [278] the landlords contended that it was one of 6¾ cubits. The Ameen proceeded to take evidence under Chap. XXV of the Code of Civil Procedure, and received evidence as to the length of the standard pole of the district; and accepted as conclusive proof of the standard of measurement, a copy of an extract of the Settlement Register of 1847 put in by the ryots, in which was written the following memorandum: "Let it be known that the measurements in this pergunnah have deen made with a rod of 7½ cubits." The landlords, however, produced a copy of some adjoining Government measurements of about the same period which were conducted with a rod of 6¾ cubits, and gave direct oral evidence of this being the standard measure made use of in the district. The Ameen reported in favour of the larger measurement, and found that the lands claimed by the ryots were within their boundaries. On the case coming up before the Munsif, he found that the standard of measurement of the district was 7½ cubits, and, on this basis, came to a finding as to the holdings of the different ryots referred to in the petition.

Against these findings the landlords appealed to the District Judge, who reversed the decision of the Munsif on the point of the standard measure, and otherwise varied the order passed by him.

The ryots appealed to the High Court on, amongst others, the ground that, under the provisions of s. 158 of the Bengal Tenancy Act, the Court had no power to determine the question of standard measurement, and that the Ameen had no power to take evidence on that point in such a proceeding as that before the Court.

Baboo *Uma Kali Mookerjee* for the Appellants.

Baboo *Akhoy Kumar Banerjee* for the Respondents.

The **Judgment** of the Court (PETHERAM, C.J., and NORRIS, J.) was delivered by

Petheram, C.J.—This is an appeal from an order of the District Judge of Mozufferpore, reversing an order of the Munsif with reference to the measurement of some land under s. 158 of the Bengal Tenancy Act, and this is an appeal by the ryots.

[279] The proceedings in this case were initiated by the landlords under that section for the purpose of having the situation, quantity and boundaries of the land held by certain ryots ascertained and determined, and these proceedings were initiated in the Court of the Munsif. The Munsif was of opinion that it was necessary that a local enquiry should take place, and accordingly, under the powers of sub-s. 2 of that section, which embodied Chap. XXV of the Code of Civil Procedure, an Ameen was appointed for the purpose of holding such an enquiry.

The Ameen went to the spot, and he found when he arrived there that the real dispute was a question of the boundaries of the tenants' holding. The tenants claimed to hold a certain number of plots as their holding ; the landlords said they did not hold all those plots, but a smaller number of plots ; and that being so, it is apparent that the question was, whether the true holding of the tenants was included within the larger boundaries alleged by them, which included the whole of the plots, or within the smaller boundaries alleged by the landlords, which included the smaller number of plots.

There was apparently no dispute as to the number of bighas which the tenants held, and that was so, because there had been prior litigation between the parties, and in that litigation these tenants had been found to be entitled to a certain number of bighas, and consequently what the parties had to do was to get these given number of bighas included in the area which was claimed to be the area of the tenancy.

The tenants said that a bigha in this part of the country is larger than a bigha in any other part of the country, and therefore includes more land than the landlords say they are entitled to.

The landlords, on the other hand, said, it is the ordinary bigha, and if you measure within the boundaries, we allege you will find the number of bighas which you are entitled to, and which you say you are entitled to ; and that was the real dispute between the parties.

The Ameen then proceeded to take evidence under Chapter XXV of the Code, and, among other evidence, he took evidence bearing on the question of what was the customary bigha in that part [280] of the country ; and the real ground of this appeal, and, in fact, the only ground of the appeal, is that, under the provisions of s. 158 of the Bengal Tenancy Act, neither the Munsif nor the Judge had any power to determine that question, and consequently the Ameen had no power to take evidence on that question, because that question did not arise in that form of proceeding. As it seems to me, to hold that this question did not arise under these circumstances, is to hold that s. 158 of the Bengal Tenancy Act has no operation, because it is clear that where the question is a question of boundary, and where the question of boundary depends to a great extent upon a known or admitted area, the whole question must depend upon what is the customary bigha which is included or which represents that area, and therefore the contention seems to me to make this section absolutely inoperative ; for whatever the question is, whether it is a question of quantity or a question of boundary, or whatever it is, it is enough for the parties objecting to say at the beginning of the enquiry, 'we say that a bigha in this part of the country is not what you say it is,' and thereupon the enquiry must come to an end, because, according to this argument, this question, however material it may be, and however much it may have been the object of s 158 that it should be enquired into, does not arise and ought not to be enquired into ; and that if it cannot be decided in this enquiry, it cannot be decided in any other. That is to reduce the question to a kind of absurdity, because it cannot be that the Legislature made an enactment of this kind leaving out one of the powers which was absolutely essential to the carrying of it out.

Under these circumstances, it seems to me that the Ameen was right in taking this evidence, and that the Munsif and the District Judge were right in taking that evidence into consideration.

The only other question is a question of fact, and the argument is, that the conclusion at which the Judge has arrived on the subject is wrong, because his reasoning is illogical. But when you come to ascertain what the real question is, it seems to me that his reasoning is highly logical ; because

when you once get at the fact that the true question was not a question of area but a question of boundary, then it is obvious that the question [231] depends to a great extent upon the reasoning which the learned Judge has used in this case.

In my opinion then this evidence was properly taken, and there is no ground for supposing that the conclusion at which the Judge arrived, upon a consideration of that evidence was wrong, and I think that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

[17 Cal. 281]

APPELLATE CIVIL.

The 26th August, 1889.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE GORDON.

Jagat Kishore Acharjea Chowdhry............Judgment-debtor

versus

Dinanath Chuckerbutty Chowdhry and others............Decree-holders.*

Court Fees Act (Act VII of 1870), s. 20, cl. 1—Rules under that section framed by the High Court in 1878—Process—Commission issued to Ameen to fix mesne profits—Evidence—Civil Procedure Code (Act XIV of 1882) s. 393.

A commission issued to an Ameen to hold a local investigation for the purpose of ascertaining the amount of mesne profits, is not a process within the meaning of cl. 1 of s. 20 of the Court Fees Act, and article 3, Part II of the rules, promulgated in 1878, framed under that section, is therefore *ultra vires*, and cannot be enforced.

IN the execution-proceedings of a certain suit in which the plaintiffs had obtained a decree, the Court deputed an Ameen to hold a local investigation for the purpose of ascertaining the amount of mesne profits payable to the decree-holders by the judgment-debtor, at the same time directing the Ameen to make his report to the Court. In accordance with this order a local investigation was duly held, and in the report made by the Ameen mesne profits were assessed at Rs. 3,496. This report was filed in Court without objection being made thereto by either party. At a subsequent stage of the proceedings, the Court directed the decree-holders to pay into a Court a further Court-fee amounting to Rs. 102, as the fee of the Ameen. The decree-holders failed to make such payment, and the Subordinate Judge thereupon refused to allow the decree-holders to make use of the Ameen's report as evidence, relying on [282] a note appended to

* Appeal from Order No. 32 of 1889, against the order of Baboo Krishna Chunder Chatterjee, Subordinate Judge of Dacca, dated the 10th of November 1888.

art. 3,* Part II of the rules relating to the service and execution of processes framed under cl. 1, s. 20, of Act VII of 1870, as amended by the Acts of 1870, 1876, 1881, 1884 and 1889, and himself proceeded to determine the amount of mesne profits on other evidence, which consisted of copies of road-cess papers filed in the Collectorate by the father of the judgment-debtor, and found on the basis of these papers that the amount of mesne profits payable by the judgment-debtor was Rs. 7,417-8.

The judgment-debter appealed against this order.

Mr. *Evans* (with him Baboo *Rash Behari Ghose* and Baboo *Grish Chunder Chowdhry*), for the appellant, contended that the Ameen's report should not have been excluded, as the Judge was bound, under s. 393 of the Code of Civil Procedure, to use this report as evidence in the suit, and that no rules made under the Court Fees Act could override that provision.

Mr. *Woodroffe*, Baboo *Amarendro Nath Chatterjee*, and Baboo *Dwarkanath Chukravarty* for the Respondents.

The **Judgment** of the Court (PETHERAM, C.J., and GORDON, J.) was as follows:—

This is an appeal by a judgment-debtor against an order passed by the Subordinate Judge of Dacca directing him to pay to the decree-holders the sum of Rs. 7,417-8 as mesne profits.

[283] It appears that a commission was issued by the Court under the provisions of the Civil Procedure Code to the Civil Court Ameen, directing him to hold a local investigation for the purpose of ascertaining the amount of mesne profits payable by the judgment-debtor, and to report thereon to the Court. The Ameen completed his investigation and submitted his report, which was filed with the record, without any objection being taken to it by either party. He assessed the mesne profits at Rs. 3,496. Subsequently, when the case came on for hearing, it was found that the decree-horders had failed as ordered by the Court to deposit the excess Court-fees, amounting to Rs. 102, payable on account of the remuneration of the Ameen, and accordingly the Subordinate Judge, relying apparently upon a note appended to Art. 3 of Part II of the rules relating to the service and execution of processes framed by this Court under cl. 1, s. 20 of the Court Fees Act of 1870, refused to allow the decree-holders' pleader to make use of the Ameen's report as evidence, and the judgment-debtor not appearing, he proceeded to determine *ex parte* the amount of mesne profits on other evidence then before him. This evidence consisted of copies of certain road-cess returns which had been filed in the Collectorate by the father of the judgment-debtor, and on the basis of these papers alone the learned Judge fixed the amount of mesne profits at Rs. 7,417-8.

*[Article 3.—Every commission to make a local investigation, or to take evidence, or for any other purpose:—

(*a*) In respect of the commission ... ... Rs. 2 0 0

(*b*) In respect of the remuneration of the Commissioner, *i.e.*, person who is to execute the commission if such person be an officer of Government specially appointed for the purpose per diem ... ,, 3 0 0

Note.—A sum sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (*a*) at the time when the commission is issued. and, if the commission is not completely executed within the period so fixed, a further sum sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to and inclusive of the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is issued.]

Mr. *Evans*, for the judgment-debtor, appellant, contends before us that the Judge has erred in law in not taking into consideration the Ameen's report. He points out that, under the provisions of s. 393 of the Civil Procedure Code, the Subordinate Judge was bound to use the Ameen's report and the evidence taken by him as evidence in the suit, and that no rules framed by the Court under the Court Fees Act can override these provisions. We think that this is a sound contention. The rule apparently referred to, and acted upon, by the Subordinate Judge, is to be found in a note appended to Art. 3 of the rules which were framed and promulgated in 1878, and which are the rules at present in force.

Article 3 of the rules provides as follows :—

[After reading article 3 and the note appended thereto (see *ante* p. 282) their Lordships continued.]

[284] It is the latter portion of this note which the Subordinate Judge apparently thinks is applicable to the present case, and under which he has refused to use the Ameen's report as evidence. In our opinion this note is *ultra vires*. It is inconsistent with s. 393 of the Civil Procedure Code. That section is as follows : -

"The Commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing, signed with his name, to the Court. The report of the Commissioner and the evidence taken by him (but not the evidence without the report), shall be evidence in the suit and shall form part of the record ;" and then follows a provision for the personal examination of the Commissioner by the Court, with which we are not now concerned. Now, in the present case, as we have already said, the Ameen completed his enquiry, and submitted his report and the evidence he had taken to the Court, and, therefore, in accordance with the terms of the section just cited, we think the Subordinate Judge was bound to treat such report and evidence as evidence in the suit. We are also of opinion that Art. 3 of the rules is itself *ultra vires*. A commission is not, in our opinion, a *process* within the meaning of s. 20 of the Court Fees Act. Process has a well understood meaning within which such a commission cannot be included. As both the rule and the note are *ultra vires*, they can not be enforced by law, and this appeal must be decreed and the case be remanded for re-trial. The Subordinate Judge will consider the report of the Ameen and the evidence taken by him as evidence in the suit, subject of course to any objections that may be taken to them by either party, along with the other evidence now on the record, and any fresh evidence bearing on the determination of the amount of mesne profits, which we give the parties liberty to adduce. We make no order as to costs.

T. A. P. *Appeal allowed.*

---

[285] ORIGINAL CIVIL.

The 2nd August, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE PIGOT.

Mahomed Medhi Galistana and others...........Appellants

versus

Zoharra Begum and another...........Respondents.*

Practice—Application in suit by persons not parties thereto—Lessors—Receiver.

Case in which persons, not parties to a suit in which a Receiver had been appointed, were permitted to apply, by motion or notice, in the suit for the purpose of establishing their rights to obtain an order directing the Receiver to make over to them certain properties of which he was holding possession after expiry of the lease under which those properties had been held by him, and which had been granted to his predecessor in title by certain persons through whom the applicants claimed as representatives.

Neate v. *Pink* (15 Sim. 450), as explained by FRY, J., in *Brocklebank* v. *East London Railway Company* (L. R., 12 Ch. D., 839), referred to.

APPEAL from an order, made in the Original Civil jurisdiction of the High Court, dated the 28th February 1889.

The suit, in which the order referred to was made, was an administration suit brought by a daughter to administer her father's estate; in such suit, in the year 1881, the Receiver of the Court was appointed Receiver, and, as such, he took possession of certain taluks and zamindaries situate in or about Purneah, more than half of which were alleged to have belonged to the father, Mahomed Tuckee whilst the remainder was formerly held by Mahomed Tuckee in the name of his son under a lease from certain Persian zamindars, which ran from the year 1865 to the year 1885. The rents of this portion of the property so held under lease were duly collected by the said Receiver, and credited to the estate, he paying to certain persons who claimed to be the heirs of the Persian zamindars the yearly rental thereof until the expiry of the said lease, at which period the original lessors or their representatives became entitled to possession of the land formerly held under lease.

In December 1887, two persons, named Mirza Mahomed Moosavee and Hadjee Mirza Mahomed Ali Savjee, produced to the said Receiver a power-of-attorney, alleged to have been execu-[286]ted in their favour by the original lessors or their representatives, authorizing the donees of the power to take over possession of the properties formerly held by the Receiver under the said lease. This power, and another similarly presented, were both found by the Receiver to be insufficient for the purpose, and subsequently, in October 1887, a further power was obtained by the two persons aforesaid, and a fresh application was made to the said Receiver for possession of the said lands. The Receiver, however, declined to make over possession until the applicants proved, to the satisfaction of the Court, the fact that the donees of the power-of-attorney were either the original lessors or their representatives in interest, and until the Court should make an order directing him so to make over possession.

Mirza Mahomed Moosavee and Hadjee Mirza Mahomed Ali Savjee (hereafter called the applicants) thereupon applied to the Court, on notice in the

* Original Civil Appeal No. 13 of 1889, against the order of Mr. Justice NORRIS, dated the 28th of February 1889.

administration suit above-mentioned, for an order that the Receiver should deliver possession to the applicants of the said lands together with all papers, etc., connected therewith, and should pay to the said applicants all rents and profits of the said lands, less collection charges, accruing since the year 1885. This application was supported by affidavit setting out the various devolutions and transfers of title from the original grantors of the said lease to the donees of the said power-of-attorney. The application, was opposed by one Nathmal Golecha, (who was the purchaser of the interests of all the parties to the suit other than those of the infant defendants,) and certain of the infant defendants who had not parted with their shares in the estate in the hands of the Receiver.

Mr. Justice NORRIS dismissed the application, on the ground that the applicants were not parties to the administration suit, and that the Court had no jurisdiction in the matter. The applicants appealed.

The Advocate-General (Sir *Charles Paul*) and Mr. *M. P. Gasper* for the Appellants.

Mr. *Bonnerjee* and Mr. *Amir Ali* for the Respondent Nathmal Golecha.

Mr. *Chuckerbutty* for the infant Respondents.

[287] The Advocate-General contended that the form of the proceedings was correct, and that the application should have been gone into, citing *Neate* v. *Pink* (15 Sim., 450), *Neate* v. *Pink* (3 M. & G., 476); and that the proper course was to direct an enquiry to ascertain who was entitled to the properties. He distinguished the present case from that of *Brocklebank* v. *East London Railway Company* (L. R., 12 Ch. D., 839).

The Court here called upon Mr. *Amir Ali* on the question of jurisdiction.

Mr *Amir Ali* contended that the case of *Neate* v. *Pink* (15 Sim., 450) did not apply, as there were special circumstances in that case, and referred to Belchambers' Practice, p. 109, as showing that persons, not parties to the suit before the Court, cannot apply to the Court in such suit: *Brocklebank* v. *East London Railway Company* (L. R, 12 Ch. D., 839), [PETHERAM, C.J. intimated that Mr. *Amir Ali* had no *locus standi*] Mr. *Amir Ali* submitted that being the purchaser of the greater portion of the estate in the hands of the Receiver from the parties to the suit, and a party to the suit, and a person on whom notice of motion was served, he was entitled to appear.

The **Order** of the Court (PETHERAM, C.J., and PIGOT, J.) was delivered by

Pigot, J. —We think the case of *Neate* v. *Pink* (15 Sim., 450) as it stands and as explained by Mr. Justice FRY in the case of *Brocklebank* v. *East London Railway Company* (L. R., 12 Ch. D., 839), shows that it is proper for, and perhaps absolutely incumbent on, this Court to make an order for an enquiry in those proceedings. It is not necessary for us to dwell upon the principle enforced in those two cases. It is clear that whatever is the least expensive course, consistent with a satisfactory enquiry, ought to be adopted, in order that the Court shall not, by its own dominant power, hold property on which the parties to the suit have no claim, and hold it in despite of the real owners. If the Court can find out who the real owners are, it should do so, and in the least expensive manner. Mr. Justice NORRIS'S order must be set aside, and in its place we order an enquiry to be held as to the rights of the applicants or such other persons as may be entitled by assignment or inheritance to the in-**[288]** terest of the lessors (naming them) under the lease under which Mahomed Tuckee had a share in the property in question. This enquiry will be held by the Judge on the Original Side himself, or by such officer as he may send it to, and in such manner as he may direct. As to costs, the burden of the appeal and of the opposition in the Original Court has been borne by

Nathmal Golecha, for whom Mr. *Amir Ali* and Mr. *Bonnerjee* appear, and who, in a disinterested manner, has come forward to defend the rights, possibly, of absent parties, and who was apparently prepared to enforce some principles of the Muhammadan Law of Succession in this matter. It may be that a successful opposition to this application might have the result of frustrating the rights of these Persian intruders, and so, if the opposition of Nathmal Golecha had been successful, the result might perhaps have been that part of the property would be *hereditas jacens*, and might accordingly fall into his hands in some way or other. We do not say that he was influenced by that hope, but casting about for a justification for his appearance, we cannot find any. However excellent his motives, we think he must pay the costs of this appeal. He must also pay his own costs of the original application. As to the appellants' costs of the original application, they are to be in the discretion of the Judge dealing with the enquiry, who will have, in the suit in which this appeal is made, complete control concerning them. We must add that the infants, who appear here and who appeared in the Court below, notwithstanding they received notice that they need not appear upon the matter, cannot have any costs, either of this appeal or of the original application. Their appearance is merely cost-making, and such a course must be discouraged. Not merely do we make this order as to their costs, but we must order that the Receiver is not to pay for them any costs in this matter.

Appeal dismissed.

Attorney for the Appellants: Baboo *Moorally Dhur Sen.*

Attorney for the Respondent Nathmal Golecha: Mr. *B. Rutter.*

Attorney for the Infant Respondents: Baboo *Nobin Chund Bural.*

T. A. P.

NOTES.

[This was followed in (1909) 36 Cal., 713.]

ORIGINAL CIVIL.

[289] *The 17th January, 1890.*

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE PIGOT.

Kabuli............Plaintiff

versus

Bhuli...........Defendant.*

Practice—Rules of Original Side, High Court—Appeal—Paper book, Delivery of—Costs.

When an appeal is filed, but no paper books are delivered by the appellant, the respondent is entitled, without taking upon himself to deliver paper books, to have the appeal dismissed with costs.

Hurroosoondery Dossee v. *Callypoddo Dutt* (14 B. L. R., App. 11) not followed.

IN this case the suit brought by the plaintiff was dismissed, on the Original Side of the High Court, with costs, on the 13th June 1889.

* Appeal No. 30 of 1887, from the decision of Mr. Justice NORRIS, dated 13th of June 1889.

The plaintiff, on the 12th August 1889, issued notice to the defendant that he had filed an appeal against the decision of the lower Court. This notice was served on the defendant on 8th January 1890. The appellant, however, filed no paper book.

Under para. 467 of the rules framed for the Original Side of the High Court (see Belchambers' Rules and Orders, p. 209), the appellant or his attorney is bound, " within six days from the presentation of the memorandum of appeal, to deliver to the Registrar, Original Jurisdiction, for the use of the Judges, two paper books containing a copy of the plaint, written statement, depositions of witnesses, and of the decree and judgment and memorandum of appeal. If the appellant fail to do so within the time limited, the respondent or his attorney *may* deliver such paper books."

The respondent being satisfied with the decree in his favour filed no paper books under this rule.

On the appeal being called on for hearing, no one appeared for the Appellant.

Mr. *Gasper*, for the Respondent, asked that the appeal might be dismissed with costs.

The Court (PETHERAM, C. J., and PIGOT, J.), after the case of *Hurroosoondery Dossee* v. *Kallypoddo Dutt* (14 B. L. R., App., 11), had been brought to their notice, dismissed the appeal with costs.

Attorney for Respondent: Baboo *Gonesh Chunder Chunder.*

T. A. P. *Appeal dismissed.*

---

[290] CIVIL REFERENCE.

The 19th November, 1889.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE BEVERLEY.

Bunwari Lal Mookerjee............Plaintiff

versus

The Secretary of State for India............Defendant.*

Small Cause Court, Mofussil, Jurisdiction of— Suit for compensation for damages against the Secretary of State—Provincial Small Cause Court Act (IX of 1887), Sched. ii, Art. 3.

A suit was brought against the Secretary of State in a Mofussil Small Cause Court for compensation for damages done to an oil mill by the officials of the Nalhati State Railway : *Held*, that the suit was not within Art. 3, sched. ii, of Act IX of 1887, and that it was cognizable by the Small Cause Court.

* Civil Reference No. 5A of 1889, made by R. H. Anderson, Esq., Judge of Moorshedabad, dated the 21st of June 1889.

THIS was a reference under s. 646-*B* of the Code of Civil Procedure by the District Judge of Moorshedabad. The reference was in these terms:—

"The plaintiff sues the Secretary of State for compensation for damages done to an oil mill while it was being carried on the Nalhati State Railway.

"The Small Cause Court Judge has returned the plaint, being of opinion that the suit is one which is excepted from the cognizance of the Small Cause Court by Article 3 of Schedule II to Act IX of 1887.

"I am prayed, under s. 646-*B* of the Civil Procedure Code, to refer the matter to the High Court. I have considerable doubt whether the article is intended to cover a case of this kind. The officials of the Nalhati State Railway are officers of the Government: but the view which the Small Cause Court Judge has taken seems to me to be practically to hold that no suit can be brought against Government in the Small Cause Court. Article 43, however, is not consistent with that view: and comparing the provisions of Act XI of 1865, s. 9, Act X of 1877, and of the present Civil Procedure Code, with those of Act IX of 1887, it appears very doubtful that it was intended to except all suits against Government from the cognizance of the Small Cause Court."

No one appeared on the reference.

[291] The **Opinion** of the High Court (MITTER and BEVERLEY, JJ.) was as follows:—

We are of opinion that the view taken by the District Judge is correct, and the present suit is not within Art. 3, Schedule II, Act IX of 1887.

The papers will be returned, so that the District Judge may remit the record with this opinion to the Small Cause Court Judge.

C. D. P.

NOTES.

[This was followed in (1912) 23 M.L.J, 732. *See* also (1894) P.R., 97; (1902) 5 O. C., 403; (1905) 1 C.L.J., 355.

As regards the liability of Government for the tortious acts of its officers, see (1913) 37 Mad., 55: 24 M.L.J, 129 which is still under appeal. (1915)]

[17 Cal. 291]

PRIVY COUNCIL.

The 23rd and 24th May and 29th June, 1889.

PRESENT

LORD WATSON, SIR B. PEACOCK, and SIR R. COUCH.

Pertap Chunder Ghose...... .....Plaintiff

versus

Mohendranath Purkait............Defendant

[On appeal from the High Court at Calcutta].

Contract—Effect of misrepresentation by a party as to part of the subject-matter of a contract—Registration Act (III of 1877), s. 17, cls. (b) and (h).—Civil Procedure Code, 1882, ss. 584 and 585.

Where one party induces another to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.

Where a tenant had executed a kabuliyat containing a stipulation which the landlord had told him would not be enforced, the tenant could not be held to have assented to it, and the kabuliyat was not the real agreement between the parties. Where by an ikrarnama tenants conjointly promised that they would sign, and have registered, kabuliyats for rents at rates mentioned : *Held* that the document did not come under cl. (*b*) of s. 17 of the Registration Act III of 1877, as operating to create or declare an interest, but came under cl. (*h*) as a document merely creating a right to obtain another document, which would when executed create or declare an interest.

The limitation to the power of the Appellate Court in hearing a second appeal under ss. 584 and 585 of the Code of Civil Procedure, 1882, must be attended to, and the appellant cannot be allowed to question the finding of the first Appellate Court on a question of fact.

APPEAL from two decrees (27th January 1887) of the High Court, reversing two decrees (30th November 1886) of the District Judge of the 24-Pergunnahs,

This appeal raised the question of the appellant's right to obtain a decree for arrears of rent at an enhanced rate against the [292] defendants as tenants of two *jots* or cultivating-tenures in village Sunkerpore, in the 24-Pergunnahs, within the appellant's zemindari of Porni.

One of these, consisting of 140 bighas, bearing a rent of Rs. 299, stood in the name of Godadhur son of Kuttur Purkait. The other, consisting of 3 bighas 15 cottahs at a rent of Rs. 8, stood in the name of his brother Abhoychurn, both of whom died before this suit was brought.

The plaintiff, who had purchased the zemindari rights in Porni in 1877 at a sale for arrears of Government revenue, had for about three years received the old rents from the respondent's family. Afterwards he obtained an ikrarnama, dated 14th Baisakh 1287 (25th April 1880), from some of the raiyats of Sunkerpore, including Abhoychurn, which purported to be an agreement, signed by the latter and sixteen others, to pay rent at the rate of Rs. 2-12 per bigha, and also to include in their kabuliyats 7½ seers of paddy for each bigha, the effect being enhancement from Rs. 307-4 to Rs. 520-13.

Afterwards, on 21st June 1881, Abhoychurn having died in April of that year, Rukkhit Chunder Purkait his nephew, son of Godadhur also deceased, signed the kabuliyat on which the present suit was brought. He was a defendant in his own right and as guardian of the minor children of Abhoychurn. Afterwards by order of Court, their mother Bhagubutti Dasi was appointed guardain of the latter under Act XL of 1858. She then in her written statement denied the authority of Rukkhit to bind the minors by signing the kabuliyat. Rukkhit himself also raised the objection that his two younger brothers, sons of Godadhur, were interested, but had not been sued, and the defence insisted that the lands were ancestral *maurasi* tenures of the family.

The issues raised the questions whether Rukkhit had signed the kabuliyat with knowledge of its terms and effect, and whether the minor defendants were bound by it.

The judgment of the Subordinate Judge was that the plaintiff's suit on the kabuliyat failed, but that he was entitled to have effect given to the ikrar signed by Abhoychurn, who was when he signed it " admittedly *kurta* of the family and father of the minors." The Subordinate Judge decreed Rs. 1,272 instead [293] of Rs. 1,610 which was demanded on the strength of the kabuliyat.

Appeals were filed in the Court of the District Judge, both by the minor defendants and by the plaintiff.

The District Judge concurred with the Subordinate Judge in holding that the kabuliyat had been executed by Rukkhit Chunder with a knowledge of the amount of rent required, and held that, though "some of the stipulations in

the kabuliyat were very hard and even flagrantly unjust," there was no reason to suppose that Rukkhit was not a free agent, or was imposed upon when he signed, and that he was therefore bound by the kabuliyat. His execution being, in the Judge's opinion, within the scope of his authority on behalf of the minors, they, for whose benefit it also was, were bound by it.

There were second appeals from all parties to the High Court under s. 584, Civil Procedure Code, the plaintiff urging that the ikrarnama which had been excluded from the evidence for want of registration should have been received.

A Division Bench (PRINSEP and BEVERLEY, JJ.) reversed the decrees of the lower Courts and dismissed the suit.

The Judges were of opinion that the kabuliyat could not be enforced. They observed:—

"It is impossible in a document of this description to state what terms the parties agreed should be enforced, and what they understood should merely be nominal. We cannot, therefore, concur in the finding of the District Judge that the agreement to pay an enhanced rent absolutely and unconditionally was ever accepted by Rukkhit. In taking a kabuliyat on the understanding deposed to by his Naib, and in attempting to enforce that agreement, the landlord has acted fraudulently. The parties therefore not being of one mind as to what was agreed upon, we think that the terms of the document cannot be enforced. It must not be supposed, however, that from our not calling attention to other portions of the District Judge's judgment we accept his finding as to undue influence or misrepresentation in this case. From the facts found it is clear that on many points he is wrong, while on others we are not satisfied that the case has been properly tried."

[294] They then went into the question of how far the respondent Ruakkhit was competent to bind his brothers and the sons of Abhoy, and after noticing the fact that the brothers of the respondent Rukkhit applied to be allowed to appear as defendants and defend the case, and that such application was refused upon the appellant's objection, they came to the conclusion that Rukkhit had no power in that behalf, and they set aside the judgments of both the lower Courts, and dismissed the appellant's suit with costs in all Courts.

Mr. *J. H. A. Branson* and Mr. *G. Cave* (with whom was Sir *H. Davey*, Q. C.) for the Appellant, contended that, as regards the kabuliyat, there were concurrent findings of the Subordinate Judge and of the District Judge that it was executed by Rukkhit with sufficient knowledge of its stipulations. The High Court had no authority to establish any other conclusion, nor was it justified in finding that the appellant had acted fraudulently on taking it; that he had exercised any undue influence, or made any misrepresentation in taking it; or that the parties, purporting to contract were not of one mind. The ikrar, at all events, ought to have been taken into consideration. It did not require registration. Reference was made to ss. 584 and 585 of the Code of Civil Procedure, 1882, and to s. 17 cls. (*b*) and (*h*) of the Registration Act III of 1877.

Mr. *R. V. Doyne*, for the Respondent, argued that the judgment of the High Court was correct, the kabuliyat not being binding for the reasons given in the judgment. It was not binding on the minor defendants, for whom Rukkhit Chunder had no authority to act, and to whose interests it was prejudicial. The suit moreover could not proceed in regard to the interests of the other sons of Abhoychurn, who had not been made parties.

Mr. *J. H. A. Branson* replied.

Afterwards (on June 29th) their Lordships' **Judgment** was delivered by

Sir R. Couch.—This suit was brought by the appellant, and the plaint stated that, on the 21st June 1881, the first defendant, Rukkhit Chunder Purkait, for himself and as guardian of three-minor defendants (two of whom are the first and second **[295]** respondents) executed a registered kabuliyat, by which he rented 177 bighas 5 cottahs and 15 chittacks of land of the plaintiff, engaging to pay an annual rental of Rs. 487-9 and 1-10-12 kahans of paddy worth Rs. 33-4, total Rs. 520-13, and was in occupation of the above tenure; and that, exclusive of payments, there was due for rent and interest on overdue instalments, and for road and public works cesses, and interest thereon, a total of Rs. 1,640-11-1, and prayed for a decree for that amount and interest during the pendency of the suit. Rukkhit Chunder, in his written statement, said that he agreed to execute a kabuliyat, and a draft was made out and read to him, and when it was subsequently engrossed on a stamp, the plaintiff said it was just the same as the draft, and the defendant, in reliance on that statement, signed the document, but the draft and the engrossment were different. The minor defendants, by their mother and guardian, said they had no knowledge of the kabuliyat, and that Rukkhit had no power to execute a kabuliyat, on their behalf. The Second Subordinate Judge of the 24-Pergunnahs, who tried the case, negatived the allegation that any deception was practised in getting the signature to the kabuliyat, but he held that all the terms of it were not binding on Rukkhit, "the bargain being very unconscionable and consideration very inadequate," and that Rukkhit, whether guardian or manager, had no power to bind the other members of the family, as the contract was not for their benefit. He however admitted in evidence an ikrar or agreement executed on the 25th April 1880 by Abhoychurn, the father of the minors and uncle of Rukkhit, who died in April or May 1881, and who was the *kurta* or manager of the family, and by other tenants, by which he said they agreed to pay Rs. 2 12 per bigha And he made a decree for rent according to the ikrar of 144 bighas 9 cottahs 7 chittacks and 15 gundahs, considering that the defendants were not proved to be bound by the area mentioned in the plaint.

From this decree there were appeals by both parties, which were heard before the Additional Judge of the 24-Pergunnahs. In his judgment, after saying that he agreed with the Subordinate Judge in the finding that Rukkhit signed the kabuliyat, he says, to quote his own words: "But he (the Judge) considers that the **[296]** terms of the kabuliyat are so extortionate and hard that he finds it difficult to believe that the defendant executed the kabuliyat with full knowledge of its terms, or after fully realizing the effect of the terms, or at all events that some extraneous motive or influence was used, such as a promise that all the terms would not be enforced. Now as to this I have to remark that the only question before us is, did the defendant knowingly execute the agreement as to the amount of rent? There are many stipulations in the kabuliyat, and some of them are very hard and even flagrantly unjust, but we have nothing to do with them just now. All we want to know is, did defendant know what he was about when he agreed to pay the rent stated in the kabuliyat? It may be, and it appears from the Naib's evidence that there are some stipulations in the kabuliyat which were not intended to be acted upon, but they need not be considered until plaintiff attempts to enforce them." The kabuliyat after the agreement to pay the rent contains these words: "If you (the plaintiff) or your heirs require the land, you and they will take *khas* possession of it. I (the tenant) and my heirs shall never have occupancy right to the said lands;" and towards the end a clause that if the rent is unpaid the tenants shall at the pleasure of the plaintiff and of his heirs be ejected from the land; and it shall be his and his heirs' *khas* property. The Subordinate Judge

said it had been proved to his satisfaction by printed dakhilas that the defendants paid rent at a uniform rate for upwards of twenty years, and were, therefore, in a position to plead the presumption arising therefrom in an enhancement suit. The evidence of the Naib, which the District Judge appears to have believed, is that the tenants objected to the condition that *khas* possession might be taken at will, and therefore they were told that that condition had been inserted because then the tenants would remain under the influence (of the zemindar), and that it was not that the plaintiff would actually eject the tenants; and that, with reference to the condition that *khas* possession would be taken if rent were not paid by the end of the year, it was said that this was a penalty clause, and that the law was to that effect, and the plaintiff made those statements. It was admitted by the Counsel for the plaintiff that the statement of the effect of the law was a misrepre- [297] sentation. Although the District Judge does not expressly find that there was a misrepresentation, their Lordships think that this is the effect of his judgment. He says: "Granting that they (the tenants) were under a mistake as to their position, and that plaintiff represented his power as an auction purchaser as greater than it really was, this would not amount to such misrepresentation as would vitiate the contract." In this he was in error. Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. If such a representation had not been made, the tenants might have refused to sign the kabuliyat. Further, if there is any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the plaintiff cannot sue upon it.

The Subordinate Judge, it has been seen, founded his decree upon the ikrar. The District Jugde held that this document was inadmissible for want of registration, as operating to create or declare an interest, and coming under cl. (*b*) of s. 17 of the Registration Act III of 1877. Their Lordships are of opinion that it does not come under that clause, but under cl. (*h*), as a document merely creating a right to obtain another document, which will when executed create or declare an interest. Its terms are that the tenants conjointly promise that they will sign and have registered kabuliyats in respect of rents at the rates mentioned for the old lands which they have and for the excess land if any be found on measurement. It clearly was not the kabuliyat described in the plaint, and the evidence of the plaintiff himself showed that it was not intended to be the final agreement. It could not be sued upon as an agreement to pay the rent claimed, which the Subordinate Judge held it to be.

The District Judge, taking the view that the only question was whether Rukkhit agreed to pay the rent stated in the kabuliyat, and finding that he had power to contract on behalf of the minors, dismissed the defendant's appeal, and in the plaintiff's appeal made a decree for the plaintiff for the amount of his claim with interest. From this the defendants appealed to the [298] High Court, the plaintiff also appealing on the ground that the ikrar ought not to have been held to be inadmissible. That Court set aside the judgments of both the lower Courts, and dismissed the plaintiff's suit with costs in all Courts, but did not in the judgment take notice of the question of the admissibility of the ikrar. Their Lordships have doubted whether the Judges of the High Court in hearing the appeals had regard to the provision in the Code of Civil Procedure (Act XIV of 1882), s. 584, as to appeals from appellate decrees, and thought they were at liberty to consider the propriety of the findings of the

District Judge upon questions of fact. Certainly there are some passages in their judgment, particularly in the latter part if not in the former, which suggest this. Their Lordships must observe that the limitations to the power of the Court by ss. 584 and 585, in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact.

For the reasons which have been stated, their Lordships are of opinion that the plaintiff's suit should be dismissed, and that the decrees of the High Court are the proper ones. They will, therefore, humbly advise Her Majesty to affirm those decrees and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for Appellant: Messrs. *Watkins & Lattey.*

Solicitors for Respondents: Messrs *T. L. Wilson & Co.*

C. B.

NOTES.

[As regards *misrepresentation*, see 8 Bom., L. R., 669; 761; 764; (1906) 30 Bom., 426; (1907) 4 A.L.J., 175.

As regards the procedure in second appeal, see also (1890) 17 Cal., 726; (1890) 18 Cal., 23; (1898) 26 Cal., 53; (1898) 2 C.W.N., 619; (1900) 25 Bom., 202; (1906) 4 C.L.J., 198; (1902) 26 Bom., 617;

As regards exclusion of oral evidence, see (1912) M.W.N., 164.]

[17 Cal. 298]

CRIMINAL MOTION.

The 28th September, 1889.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BANERJEE.

In the Matter of the Petition of Dhuronidhur Ghose.[*]

Kidnapping—Penal Code, s. 361—Taking by father of minor wife from her husband—Guardianship of wife—Summons—Practice.

The husband of a Hindu girl of fifteen is her lawful guardian, and if the father of the minor takes away the girl from her husband without the latter's consent, such taking away amounts to kidnapping from lawful guardianship, even though the father may have had no criminal intention in so doing.

[299] ONE Dhuronidhur Ghose applied to the Presidency Magistrate of the Northern Division of the Town of Calcutta for a summons against one Nityeprosad Bose, under s. 363 of the Indian Penal Code, for having kidnapped his wife, who was at the time a minor.

The facts placed before the Magistrate appeared to be as follows: –

On the 28th August 1889, the complainant's wife, who usually lived with her husband at No. 110, Shambazar Street (hereafter called the new house), went to No. 27, Boloram Ghose's Street, another house belonging to her husband (hereafter called the old house), and remained there for the night. The girl's father, Nityeprosad Bose, who had lived with the complainant in the

[*] Criminal Motion No. 389 of 1889, against the order passed by Moulvie Syud Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 3rd of September 1889.

new house for about a month, was seen to go over to the old house on the morning of the 28th, and to return in about an hour's time ; he the next day took away the girl's jewelry and clothes from the new house, saying that the girl had requested him to do so as the *Ginnie* of Futtehpore wished to see her and her baby, promising to return the jewels and clothes in half an hour. The complainant sent a maid in the evening of that day to ask his wife to come over to the new house, but the wife sent back word that as it was the Lukhee Pujah, she would not come that night but would do so early the next morning ; at that time Nityeprosad was there also. The complainant again sent the maid the next morning to the old house to enquire if his wife had returned, but it was found that she had gone off to Rungpore. The maid was then sent to Rungpore to the house of Nityeprosad, and there found the complainant's wife and asked her to return with her, but she refused to do so.

On the 3rd September the complainant through his attorney applied for a summons against Nityeprosad as above stated, intimating that he was prepared to prove the facts above stated, and that he had warned the accused not to take away his wife, he having intimated his desire so to do. The Magistrate, however, considered that the father of the girl was equally entitled with the husband to the guardianship of the complainant's wife, and declined to grant the summons asked for. The application was again renewed by Counsel on the 4th September, but the Magistrate again refused a summons.

[300] The complainant then moved the High Court (BEVERLEY and BANERJEE, JJ.), asking that the Magistrate be directed to issue a summons.

Mr. *Chakravarti* for the Complainant.—According to Hindu law, a husband is the lawful guardian of his minor wife's person. There is no criminal ruling exactly in point, but the following authorities may be referred to to establish that proposition: *Kateeram Dokanee* v *Gendhenee* (23 W. R., 178), Dr. Guru Das Banerjee's Hindu Law of Marriage and Stridhan, pp. 117 and 171. A mere 'taking' out of lawful custody is an offence under s. 361, Penal Code. The intention of the party taking has nothing to do with it. *Reg.* v. *Timmins* (8 Cox Cr. C., 403). [BEVERLEY, J.—That is an English case.] No doubt, it is a case under the English Statute. But the English law is substantially the same as the present section. *Reg.* v. *Baillie* (8 Cox Cr. C., 238). Consent of the girl is immaterial. Neither force nor fraud form necessary elements in the offence as they do under s. 362. [BEVERLEY, J.—If the girl had been taken away a few months later, she would have been sixteen and you could not have proceeded under this section.] After sixteen consent becomes a material element. The law takes into account the discretion of the girl herself. Hence the section protects parental rights *up to* the age of sixteen. That the person taking the girl away happens to be her father is immaterial. A mother may be guilty of the offence by taking away her own child against the consent of the father. *Empress* v. *Prankrishna Surma* (I. L. R., 8 Cal., 969).

The Court ordered a rule to issue returnable in the usual way.

The rule coming on for hearing, the **Order** of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows :—

This is an application to direct the Presidency Magistrate of the Northern Division of Calcutta to issue a process upon the petitioner's complaint that his wife, a minor under sixteen years of age, had been kidnapped from his lawful guardianship by her own father, the allegation being that the wife was taken from her husband's house while he was asleep by her father, and had been removed to Rungpore.

[301] The Magistrate refused to issue a process. In his letter to this Court, in showing cause against the rule, he says that there is no criminality

in the act of a father taking away his own daughter, and that during his long course of experience as a Magistrate, he has refused many such applications.

We think that the cause shown is not sufficient, inasmuch as the act of the father distinctly falls within the definition of s. 361, Penal Code. He may have had no criminal intention in taking away his own daughter, but the law provides, and the fact is undeniable, that the husband of a Hindu girl of the age of fifteen is her lawful guardian, and taking her away from him without his consent amounts, according to the definition given above, to kidnapping from lawful guardianship. We think, therefore, that the Magistrate must proceed according to law, and, if he believes the complaint, he is bound to issue a process.

Summons directed to issue.

Attorneys for Complainant: Messrs. *Remfry and Rose.*

T. A. P.

NOTES.

[For an offence under sec. 361 I.P.C., Motive is immaterial.—(1909) 31 All., 448.

The husband is the guardian of his Hindu wife and entitled to her custody and an agreement by him to the contrary was held to be unenforceable in (1901) 28 Cal., 751.]

[17 Cal. 301]

APPELLATE CIVIL.

The 5th December, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT, CHIEF JUSTICE AND MR. JUSTICE TOTTENHAM.

Tariniprosad Roy............Judgment-debtor

versus

Narayan Kumari Debi............Decree-holder.*

Execution of decree Execution of rent decree obtained against a putnidar Property other than the tenure proceeded against – Bengal Tenancy Act (VIII of 1885), s. 65—Rent decree.

Where a landlord obtains a decree for rent against his tenant, which is on the face of it a decree for a sum of money without creating a charge upon the tenure, he is at liberty in execution to bring to sale property of his judgment-debtor other than the tenure itself.

Section 65 of the Bengal Tenancy Act creates a first charge upon the tenure for its rent and puts the landlord in the position of a first mortgagee so far as the rent is concerned, but the tenant remains personally liable for the rent, so that the landlord has a charge upon the tenure for **[302]** the rent and he has a remedy against the tenant personally for the debt to him, and he has therefore a right to avail himself of either of these remedies.

THE plaintiff, having obtained a decree against his tenant for rent of a putni-taluk, attached, in execution of this decree, properties belonging to the judgment-debtor other than the putni-taluk in question.

---

* Appeal from Order No. 252 of 1889, against the Order of Baboo Hurro Gobind Mookerjee, Subordinate Judge of Dinagepore, dated the 22nd of May 1889.

The judgment-debtor put in an objection that, under the terms of the putni-kabuliyat and the provisions of the law, the decree-holder was bound to proceed, in the first instance, against the putni-tenure itself; and then against a certain sum given in deposit by the judgment-debtor.

It appeared that the putni-tenure was put up for sale in execution of this decree, but the sale was postponed at the request of the decree-holder, and was not further proceeded with.

The Subordinate Judge held that, as far as the special agreement in the putni-kabuliyat was concerned, the case was on all fours with that of *Lolit Mohun Roy* v. *Binodai Dabee* (I. L. R., 14 Cal., 14), and that as the decree made no reference to the special agreement, and was an ordinary decree for rent, he could not, therefore, go behind this decree and give effect to the terms of the kabuliyat; he further held that there was no provision of law limiting the right of the decree-holder to the sale of the putni-tenure only; and he therefore disallowed the objections.

The judgment-creditor appealed to the High Court.

Baboo *Jasodanand Pramanick*, for the Appellant, contended that the decree-holder was bound first of all to proceed against the tenure both under the Rent Law and the Transfer of Property Act.

Baboo *Nilmadhub Sen* for the Respondent.

The **judgment** of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

Petheram, C.J.—This is a suit which was brought by a landlord against a tenant to recover his rent, and the decree upon the face of it is a decree for a sum of money without charging the tenure with any lien or charge of any kind, and from that I apprehend that it was a suit brought against the tenant person- [303] ally to recover the amount which was due from him to the landlord. This decree having been obtained, the landlord, the decree-holder, makes an application to attach the property of his debtor to answer the decree. The property which he elects to attach is not the tenure, and the question which arises here is whether he was entitled to pursue his remedy against other properties before he had sold the tenure itself.

The only section which can be relied upon by the defendant, the tenant, is s. 65 of the Bengal Tenancy Act. This section provides that a tenant under these circumstances shall not be liable to ejectment for arrears, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon.

This section, so far as I can see, creates a first charge upon the tenure for the rent of it, and puts the landlord in the position of a first mortgagee, so far as the rent is concerned, but the tenant remains personally liable for the rent. So that the landlord's position is this: he has a mortgage or charge upon the tenure for the rent, and he has a remedy against the tenant personally for the debt to him. That being the case, he has a right to avail himself of either of his remedies. He may, if he chooses, bring an action in which he claims to establish his lien upon the tenure to bring that tenure to sale, notwithstanding any other charge which may have been made upon it, and that whether the tenant had any other property and whether some one else had a charge by way of contractual mortgage upon the tenure.

But if he thinks fit, he need not follow that course. He may bring an action to recover the debt the tenant owes him, in the same way as he might if he were a mortgagee in a case where there was a personal covenant in the mortgage-deed, giving the go-by to the mortgage and getting a personal decree

against the debtor for the payment of the money. Having elected that course, he appears to be in the position of an ordinary creditor able to realise his debt by the ordinary forms of attachment and sale of any property which the debtor has subject to any charge which other persons may have upon it. In this particular case the decree is, on the face of it, only a money decree for the pay- [304] ment of the money, and in my opinion may be enforced in any of the modes in which an ordinary money decree may be enforced, either against the person of the debtor or any property of his that may be found. In this view, we think that the view taken by the Subordinate Judge was right, and that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[*See* the explanation of this case in (1905) 32 Cal., 680; *see* also (1904) 8 C.W.N., 575; (1898) 26 Cal., 103.]

[17 Cal. 304]

PRIVY COUNCIL.

The 15th and 16th May and 29th June, 1889.

PRESENT:

LORD WATSON, SIR B. PEACOCK AND SIR R. COUCH.

Hemmuni Singh and others............Plaintiffs

versus

Cauty and another............Defendants.

[On appeal from the High Court at Calcutta.]

Land Registration Act (Bengal Act VII of 1876), s. 7—Delimitation of land of adjoining proprietors—Correction of entry in register.

On a claim for the correction of the entry of the names of proprietors in the general register of revenue-paying lands in a district kept in accordance with Bengal Act VII of 1876, the limits of the area of the estate had not been defined, further than by boundaries mentioned in the plaint, which were disputed by the defendants, who were the owners of land adjoining, and who had obtained from the revenue authorities an order for the entry now alleged to be incorrect. The properties were both parts of an ascertained number of bighas forming a chuckla.

The High Court, while affirming the decision of the Court below in the plaintiffs' favour, ordered a local enquiry, with a view to the accurate delimitation of their estate. This, with the subsequent decree, resulted in the area being defined therein by reference to a map made and marked by an Amin. This was not a just division; for, while it divided the chuckla so as to give the defendants their full share, it went beyond it, to make up the full area of the plaintiffs' share. Their Lordships therefore made a new order, calculated to secure the division of the whole chuckla in due proportions for the purposes of the entry in the register.

APPEAL from a decree (8th March 1882) of the High Court, varying a decree (1st July 1880) of the Subordinate Judge of Bhagalpur.

The present appeal was preferred from a decree which directed a local investigation as to boundaries, for the purpose of ascertaining the correct entry to be made, in accordance with s. 7 of Bengal Act VII of 1876 (the Land Registration Act, 1876), in **[305]** reference to an estate, as to which the names of the plaintiffs were entered in the column of proprietors.

The suit out of which this appeal arose was brought to set aside the order of the revenue authorities in the Bhagalpur district, that the names of the defendants should be entered as owners, each of a one-third share of a whole area, or chuckla, comprising a little more than 1,040 bighas, known as Pathurghati of Phagu Sirdar, and lying within or forming a dependency of a mauza called Latouna. This had formerly been part of a taluq named Thalba which belonged to a joint family estate owned in the year 1859 by five brothers. On a partition among the brothers, the chuckla Pathurghati was nominally allotted thus: viz., rather more than 503 bighas to one brother named Nundkishore, and the residue, 536 bighas and a few cottahs, to another brother named Haruckman.

The present suit had reference to the proper registration of the plaintiffs' names as proprietors of these 503 bighas, part of Pathurghati, involving their marking-off and description. The property in the 503 bighas remained in Nundkishore's possession till his death in 1872, descending to his heirs the present plaintiffs. The residue, 536 bighas, came to the defendants as purchasers from Haruckman; and their application made in 1878 to have their names registered under Bengal Act VII of 1876 as proprietors, each of a one-third share of the whole of mauza Latouna and of chuckla Pathurghati, comprising all the 1,040 bighas (instead of only the 536 bighas, which had fallen to the share of Haruckman), occasioned this suit. An order of the Collector, dated 29th March 1879, reversing that of the Deputy Collector, and confirmed on appeal by the Commissioner, directed entry of all that the defendants had applied for, which included entry of two-thirds of Pathurghati in their names.

The Subordinate Judge decreed that the names of the plaintiffs be entered in the register, in respect of that portion of Pathurghati of which portion the boundaries were given in the plaint; the names of the defendants being removed; the orders of the revenue officers being set aside as to the entry in favour of the defendants.

The High Court (PRINSEP and O'KINEALY, JJ.) in the main affirmed this decree; but found it necessary to direct the District **[306]** Judge to issue an order to an Amin to make a local inquiry and a map of the land to which the entry when made would relate. This was done. The Judges then in continuance (3rd April 1883) gave the following decision :—

"It was our intention not merely to find in favour of the plaintiffs, but to restrict the claim so that they might have only the 503 bighas odd, to which they became entitled in consequence of the partition between Nundkishore and Haruckman Singh. We certainly never intended to deprive the defendant of the 536 bighas odd to which under that partition he was also entitled.

"The local inquiry has now been held, and the Amin has submitted a map showing the area claimed by the parties. as well as the boundaries of Pathurghati fixed by the survey of 1847, that is to say, about eleven years before the partition took place. Within these boundaries the Amin has found an area of 1,040 bighas which was the area dealt with by the partition. The case therefore is practically a mere boundary dispute. The only difficulty arises from the fact that the boundary between the two properties of the parties runs almost entirely through jungle land having no defined features.

"The main objection which has been taken before us to the correctness of the Amin's proceedings relates to the northern boundary. Now it does not appear that any such objection was taken while these proceedings were being held, or at any previous stage of this case. It would seem rather as if the correctness of that delineation was accepted by the parties, since it generally accords with the boundaries which they pointed out. There is no reason to suppose that, as regards the eastern and western boundaries of the entire tola Pathurghati of Phagu Sirdar, any error has been committed; and the correctness of the entire demarcation is in some way corroborated by the fact that the area corresponds with that dealt with by the partition.

"It seems to us therefore that we should be doing justice between the parties in the present case, if we were to give the defendant the full amount of the 536 bighas to which under the partition he is entitled, leaving the remainder to the plaintiffs."

The judgment then gave a more detailed description of what the entry was to be by reference to the map; and a decree followed to the same effect.

The plaintiffs appealed to Her Majesty in Council, as to the question of the correctness of the entry of the boundaries, as decreed by the High Court.

Mr. *R. V. Doyne*, for the Appellant, argued that, as the plaintiffs sought, not to obtain possession by decree, but to have their [307] title cleared from the doubts that would be cast upon it by the mistaken entry under the erroneous orders of the Collector and of the Commissioner, it was not incumbent on the plaintiffs to have the division ascertained and delineated. All that was necessary for the plaintiffs was that the orders should be set aside, and that the parties should be restored to their former position. If anything more was required, the boundaries alleged in the plaint were capable of being laid down. The decree of the High Court would have the effect of apparently transferring to the defendants lands which, as to part, had been in the possession of the plaintiffs and of Nundkishore since 1859; and that decree prescribed an unjust division for the purposes of the register.

Mr. *C. W. Arathoon*, for the Respondents, supported the decree of the High Court.

Mr. *R. V. Doyne* replied.

Their Lordships took time to consider their **judgment**, which was afterwards (on 29th June) delivered by

Sir R. Couch.—The appellants were the plaintiffs in the suit, and the plaint stated that upon a partition between the members of a joint Hindu family of property of which a chuckla known as Pathurghati formed part, and the entire 16 annas of which chuckla was 1,040 bighas 1 cottah 2 dhoors; 503 bighas 7 cottahs 12 dhoors 12 rains of jungle-land fell to the share of Babu Nundishore Singh, the father of the first and grandfather of the second and third plaintiffs, and the remaining 536 bighas 13 cottahs 9 dhoors 8 rains of jungle-land of the chuckla went to the share of Baboo Haruckmun Singh, from whom the defendants derive their title. That upon petitions of the plaintiffs and defendants for registration of names under Bengal Act VII of 1876, an order for registration of names of the plaintiffs in respect of the 503 bighas, etc., was made by the Deputy Collector; but on appeal the Collector reversed that order, and directed the names of the first and second defendants to be recorded in regard to two-thirds of the entire chuckla, and this order was confirmed by the Commissioner, and in accordance with it the name of the second defendant was also registered in respect of one-third. The plaint prayed for an order for registration of the plaintiffs' [308] names in respect of the 503 bighas, etc., out of the 1,040 bighas etc., and for the registration of the defendants' names only in respect of the remaining 536 bighas, etc., and for other

relief giving boundaries of the 503 bighas. The written statements of the defendants said that the boundaries given in the plaint did not comprise 503 bighas of land; that the entire area of chuckla Pathurghati was not 1,040 bighas, and the boundaries given by the plaintiffs were wrong. The Subordinate Judge of Bhagalpur made a decree that the names of the plaintiffs should be registered in respect of that portion of the lands which is called Pathurghati Phagu Sirdar, the boundary of which has been given in the plaint, and that the names of the defendants in respect of that share should be expunged, and that portion of the order of the Mutation Department which is prejudicial to the interests of the plaintiffs should be set aside.

Upon an appeal to the High Court, that Court considered that the partition was made as stated; but the real difficulty in the case consisted in the indefinite character of the boundaries given in the plaint upon which the plaintiffs' case had been decreed; that those boundaries, so far as they understood them, were natural boundaries, but from the extensive area of the land in dispute, it was not improbable that these natural boundaries indicated only a small portion of the boundary lines. They therefore thought it necessary that the boundaries given in the plaint should be ascertained and clearly indicated in a map before a final order was made. The District Judge was accordingly requested to direct a competent Amin to prepare a map, after proper inquiry, showing the boundary as stated in the plaint, and having ascertained these boundaries, the Amin should proceed to measure the area falling within them, and should then submit his report for the orders of the High Court. The District Judge accordingly, by an order dated the 10th of June 1882, commanded a Civil Court Amin to make the local investigation and the map thus required.

The Amin made his report, dated 12th August 1882. In that he states that the servants of the plaintiffs and defendants had pointed out the land which they said was in the possession of their masters, and it was measured; but the lands as pointed out when added together, did not tally with the amount of land speci-
[309] fied in the partition, and was deficient by 256 bighas 2 cottahs 14 dhoors. He then says that in order to ascertain why the amount of land had decreased, as well as to know the boundary limit of chuckla Pathurghati, he summoned several persons, but they only stated that the lands appertaining to mouza Babhungaon, named in the plaint as on the west of the 503 bighas claimed, were on the western limit of chuckla Pathurghati. After this he called for a survey map made in 1847, which had been filed on behalf of the plaintiffs, and using this and taking a point on the east side where Pathurghati joined two mouzas, Doparkha and Burakurwa, which was pointed out and admitted by the agents of both parties and the servant of the proprietor of those mouzas, he fixed the boundary of Babhungaon farther to the west than the point which had been pointed out to him by the agents of the plaintiffs as on the western limits of Pathurghati, so as to include the 256 bighas which were deficient. This was done in the absence of any representative of the proprietor of Babhungaon. The Amin appears to have thought he was bound to fix the boundaries of Pathurghati so as to give an area which exactly tallied with that in the partition. But it was not his duty to do this, and the defendants had denied that the entire area of the chuckla was 1,040 bighas.

The case came again before the High Court on the 3rd April 1883, the respondents (the plaintiffs) having filed objections, in which they said that as the partition did not take place with reference to the survey map, the Amin was wrong in calling for the survey map, and in finding on the strength of it that the chuckla extended more on the west, contrary to the allegations of both parties. But the Court adopted the boundaries found by the Amin, and

decided to give to the defendants the full amount of 536 bighas to which they said they were under the partition entitled, leaving the remainder to the plaintiffs; and also that the defendants were to have the portion which lies to the extreme east, and they were to obtain the services of some competent person to delineate on the map submitted to the Court by the Amin the boundaries between the 536 bighas and the lands belonging to the plaintiffs. This was done, and the case with the map of the surveyor again came before the Court on the 6th June 1883, [310] when it was objected on behalf of the plaintiffs that the balance remaining in their possession was considerably less than 503 bighas; but the Court said they had then no concern with that matter, it was considered before the decree was settled, and ordered that the map should form part of the decree, and that out of the lands in suit the plaintiffs should receive any land outside the boundary shown by the line marked by the surveyor, and the other boundaries described in the order of 3rd April, and the defendants should get 536 bighas lying within those boundaries. The result is that the defendants would obtain possession of 536 bighas, and the plaintiffs might have to engage in a suit with the proprietors of Babhungaon before they could obtain possession of the whole of the 503 bighas. This is not a just division, and their Lordships are of opinion that in this suit the boundaries of the land to be divided should be taken to be those pointed out by the servants of the parties, and that the proper decree will be that the land within those boundaries, and which are within the line marked green on the copy of the map of the Amin to be annexed to the order of Her Majesty in Council, shall be divided, by a competent surveyor, by a line beginning on the northern boundary at a point in a straight line with the north-west corner of the tank, and going thence to the southern boundary as nearly in a direct line as will conveniently divide the whole area in the proportion of 503 to 536, and that the plaintiffs shall obtain possession of the land lying on the western and the defendants of the land lying on the eastern side of such line, and that the suit should be remitted to the High Court that the line shall be so marked, and the decree of the High Court be varied accordingly. Their Lordships will thus humbly advise Her Majesty. The parties will bear their own costs of this appeal.

Decree varied.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Barrow & Rogers.*

C. B.

---

[311] PRIVY COUNCIL.

The 17th and 18th July, 1889.

PRESENT:

LORD WATSON, SIR B. PEACOCK AND SIR R. COUCH.

Haidar Ali Khan............Plaintiff

versus

Nawab Ali Khan and (by revivor) Naushad Ali Khan............Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates Act (I of 1869), s. 3 —Effect of sanad to confer proprietary right on a talukdar, not being a trustee—Claim to under-proprietary right against talukdar distinguished, and not concluded by a decree for the former right in his favour.

Unless a talukdar, who holds such a sanad as is referred to in the Oudh Estates Act I of 1869, has agreed in some way, or has otherwise become legally bound, to hold the estate comprised in the sanad, or some part of it, in trust for another person, the principle on which *Sookeraj Koowar* v. *Government* (14 Moore's I.A., 112) and *Hardeo Baksh* v. *Jowahir Singh* (L.R., 6 I.A., 161), were decided is not applicable to make the talukdar hold subject to a charge for the benefit of such other person.

The talukdar in whom no such trust is vested is entitled to the proprietary right in the lands forming the talukdari estate comprised in the sanad.

A claim against the talukdar for the proprietary right included lands in which the claimant alleged himself to have purchased under-proprietary rights which were not claimed. A decree, maintaining the talukdar's proprietary right, was made without prejudice to a claim for the under-proprietary rights.

APPEAL from a decree (10th June 1885) of the Judicial Commissioner of Oudh, affirming a decree (14th March 1884) of the District Judge of Lucknow.

The suit out of which this appeal arose was brought by the plaintiff to obtain proprietary possession of villages in the Bara Banki district, of which the greater part were comprised in a talukdari sanad, dated 1st October 1860, granted by the Government to the plaintiff's brother, father of the defendant, who succeeded as talukdar in 1875. Part of the claim also was for villages in which the plaintiff alleged that he had purchased the under-proprietary rights. And the principal question raised by this appeal was as to the correctness of the concurrent judgments of the Courts below, which maintained the sole proprietary right of the defendant as talukdar, in virtue of the sanad confirmed as it had been by the effect of s. 3 of the Oudh Estates Act I of 1869. A further question related to the under-proprietary rights.

[312] The plaintiff was the third son of Lutf Ali Khan, who died more than fifty years before this suit, leaving four other sons. The second son, Mardan Ali, deceased on the 16th August 1875, was father of the original defendant on this record, Nawab Ali, who died after this appeal had been filed. A certificate (16th October 1888) certifying his death, and the relationship of Naushad Ali, his minor son, was sent by the Judicial Commissioner to the Registrar, and by their Lordships' order of revivor (19th February 1889), Naushad Ali was brought on to the record, being represented by the Court of Wards through the Deputy Commissioner of Bara Banki.

Nawab Ali executed the kabuliyat on the 25th November 1858, and on the 25th October 1860 he received a sanad granted by the Chief Commissioner in the form then granted to the Oudh talukdars [A similar sanad is set forth at length in *Thakur Shere Bahadur Singh* v. *Thakurain Dariao Singh* (I. L. R., 3 Cal., 649)]. This recited that, by the Proclamation of 15th March 1858, all proprietary rights in the soil of Oudh (with the exception of land lying in special localities) were confiscated and vested in the British Government, which was empowered to make transfers at its will. Wherefore the Chief Commissioner, acting under authority vested in him by the Governor-General in Council, thereby granted and conferred on Nawab Ali Khan the entire proprietary right in and possession over the estate of Maila Raeganj in Daryabad, viz., the villages entered in the kabuliyat executed by him, and to his heirs in perpetuity, subject to paying the annual revenue which might be fixed from time to time and to other terms specified.

Nawab Ali Khan had previously, on 12th July 1860, made application that "the integrity of his estate," conferred on him in proprietary right by the British Government, heritable from generation to generation, should be maintained in accordance with the practice obtaining in a raj or gaddi without its being allowed to be divided into shares. And the sanad contained the following clause:—"One of the terms of this sanad is this, that if the original proprietor or any of his successors die intestate, his whole estate shall devolve on his male issues, viz., the sons and nephews, etc., in the order of succession in accordance with the system of **[313]** raj or gaddi." Comprised in the sanad were eight villages in pergunna Bado Sarai and six in Daryabad. Nawab Ali Khan was then about eighteen years of age, and his father and uncles were all living. The taluk was afterwards included in list 2 of the lists prepared in accordance with the Oudh Estates Act I of 1869, s. 8.

The estates claimed were shown by four schedules appended to the plaint and marked A, B, C and D.

Schedule A comprised the ancestral property in three villages, of which the first, Maila Raeganj, gave its name to the taluk.

Schedule B comprised certain villages, or divisions of villages, which were acquired while the defendant was a minor and were included in the sanad. These the plaintiff alleged to have been acquired in the first instance by himself.

Schedule C comprised certain under-proprietary rights in small holdings which were said to have been acquired by the plaintiff himself, after the grant of the sanad, at dates varying from December 1874 to April 1876, from under-proprietors and village zemindars within the taluk.

Schedule D comprised sir land lying in different villages within the taluk, and alleged to belong to the plaintiff, as other sir land had belonged to Sahib Ali, the eldest of Lutf Ali's sons, and to Tassadduck Rasul, brother of the defendant, and to Inayet Ali, the third son of Lutf Ali.

The plaintiff's claim was based on statements in the plaint to this effect, viz., that with the exception of the late Raja Farzand Ali, who being talukdar of Jehangirabad did not care for assistance from the ancestral estate, all the other sons of Lutf Ali, including Mardan Ali, the defendant's father, were allowed sir land as detailed in Schedule D; and that the plaintiff had full control over all the remaining estate, which was in his proprietary possession, according to the clauses 1, 3 and 12 in the wajib-ul-arz of village Maila Raeganj. This possession continued during the lives of the Raja and of Mardan Ali, the defendant remaining satisfied with his forty-three bighas of sir land mentioned in Schedule D, but that after the deaths of his father and his uncle, Raja Farzand Ali,

which latter took place on the 30th November 1880, the defendant sought to disturb the plain-[314] tiffs previous long possession, and applied on the 8th of January 1881 to the Magistrate, who maintained the plaintiff's possession under s. 530 of the Code of Criminal Procedure; that the Magistrate's order was set aside for certain irregularities by the Judicial Commissioner on the 9th June 1881; and that the defendant ousted the plaintiff from not only his possession of the lands of the taluk (*i.e.*, from the lands of schedules A and B), including, with a small exception, the plaintiff's sir lands within the taluk, but also from his under-proprietary rights acquired by him by purchase in the lands of schedule C.

The plaintiff claimed (1) that a decree for possession of the entire area of the ancestral property entered in schedule A of the plaint be made, excepting the sir land forty-three bighas held by the sons of Mardan Ali on payment of revenue; and that it be declared that the rent-free sir land entered in schedule D was, according to old usage, a compensation for the malikana or percentage due on account of superior right to the defendant as kabuliyatdar; (2) that a decree for proprietary possession of the entire area of the acquired property entered in schedule B be made in favour of the plaintiff; in whose favour also (3) a decree for full proprietary right in the estates and interests entered in schedule C should be made.

The grounds of defence appear from the issues, which were, *first*, whether the suit was barred either by the sanad or by the Oudh Estates Act I of 1869, and how the claim was affected by the Oudh Sub-settlement Act XXVI of 1866; *secondly*, as to the land comprised in schedule A, whether or not the plaintiff was entitled to it in right of inheritance, *thirdly* whether he was entitled to the land in B and C, by reason of his having acquired it, *fourthly*, whether he was in possession till June 1881; and *fifthly*, "was defendant's name entered in the Government papers as owner, by consent of plaintiff, as *ism farzi*?"

At the hearing the plaintiff relied on clauses in the wajib-ul-arz of Maila Raeganj, the principal village in the taluk, as containing admissions of his beneficial interest. The District Judge found against him on the fifth issue; also expressing in the judgment an opinion that the wajib-ul-arz, as well as the correspondence and the evidence generally, contained nothing [315] to show that by agreement or by his conduct the talukdar had constituted himself a trustee as to any part of the estate claimed.

On the plaintiff's appeal the following judgment was given by the Additional Judicial Commissioner, Mr T. B. Tracy

"In appeal, Mr. Thomas contends that, at the regular settlement in 1870, the titular talukdar admitted in the village administration paper, or wajib-ul-arz, the possession and proprietary right of Sheikh Haidar Ali Further, that the evidence on the record proved Haidar Ali's possession of the estate, and that there was nothing to show that Haidar Ali or his son Mansab Ali were merely agents for the talukdar.

"For the defendant his pleader contended that the real owner of the estate was Mardan Ali, the father of the defendant, who caused his son to be recorded as proprietor. It was further pointed out that, under s. 10, Act I of 1869, the defendant as sanad-holder had acquired an indefeasible title to the estate that the suit was to recover possession of the taluka and not to establish that the defendant held it or any part of it in trust for the plaintiff, that the preparation of the wajib-ul-arz by the defendant was a clear indication of proprietary right; and that in this very paper, the plaintiff, as uncle of the talukdar, was recorded as holding some sir land for his maintenance.

"To this it was replied that the suit was not for the cancellation of the defendant's talukdari sanad, but for a return to the *status quo ante*, that is, for restoration to possession of the plaintiff as rightful owner of the estate; that in accordance with numerous judgments of the Privy Council the suit was not barred.

"It appears to me that the present suit is distinguishable from *Ramanund Kunwar* v. *Raghonath Kunwar* (I. L. R., 8 Cal., 769; L. R., 9 I. A., 41), and the other cases referred to in the judgment therein. In these suits the title of the talukdar as legal owner of estate was admitted, but it was sought to establish that he had, by express agreement or by his conduct, constituted himself a trustee for others as to the whole or part of the beneficial interest in the land the subject of the sanad. The present suit is practically and substantially for a declaration that no estate had in fact been conferred by Government on the talukdar, and that the entire transaction **[316]** was a mere fiction. I do not think that the confiscation restoration and subsequent grant of the estate can be viewed in this light. It must, I think, be held that the sanad gave the defendant the absolutely legal title to the estate against adverse claimants.

"It remains to be decided whether the defendant has subsequently, either by express agreement or by his conduct, constituted himself a trustee for the plaintiff.

"The District Judge has found that the wajib-ul-arz, as prepared at the settlement of 1870, 'must be taken to be a correct and genuine record of the rights of the parties, but neither in that document nor elsewhere can I find any evidence of any agreement that in the record of rights, one name should be substituted for another as a fictitious transaction by way of trust. I can nowhere find that defendant has invariably admitted plaintiff's possession as proprietor over the estate.' In this finding I concur. The passages in paras. 1, 3, and 12 of the wajib-ul-arz on which the plaintiff relies are manifestly insufficient. The passage in para. 1 is as follows:—' During the possession of the present talukdar other patties acquired by Haidar Ali uncle of the talukdar by virtue of transfer were included.' Pagargaph 3 begins as follows:—Haidar Ali the talukdar's uncle has the powers of proprietor in respect of arranging for cultivation collection of rent and abatement and enhancement thereof, and for reclaiming waste land. Paragraph 12 merely declares that, as a member of the talukdar family, Haidar Ali holds some *sir* for his maintenance in accordance with the usual custom. There is nothing in all this inconsistent with the finding of the District Judge that, as a fact, Sheikh Mardan Ali and after him his son the defendant managed the estate through Mansab Ali the son of Haidar Ali who is the prime mover in the present case, his father, the ostensible plaintiff, being an old man on the verge of imbecility.

"As to the wajib-ul-arz, I find that it contains no admission by the defendant that his title is fictitious, and that his uncle was the rightful owner of the estate. Apart from this, if, as the plaintiff alleges he was all along in proprietary possession of the estate and the defendant was merely titular talukdar what becomes of his claim to be the *cestui que trust* of the latter?

[317] "There is no good evidence that the plaintiff was ever in possession of the estate as proprietor, either before or after annexation. There is, on the other hand, ample evidence on the record that the estate was managed on behalf of Sheikh Mardan Ali and his son Nawab Ali by Mansab Ali. This is abundantly proved by the numerous letters which the Judge has found to have been written by Mansab Ali to his uncle Mardan Ali, making reports as to the management and asking for orders. The plaintiff has, in my judgment, failed to prove his case, which is from the outset improbable. It does not appear

why he should have a better title to the estate than his elder brother Mardan Ali. In the next place, supposing him to have acquired possession under native rule to the exclusion of his elder brother, what motive could he have had for making his nephew the *ism farzi* proprietor in preference to one of his own sons? Why did he not assert his claim when the summary settlements were made with Nawab Ali Khan, or when the estate was conferred on him by Government?

"The oral evidence as to the possession of the estate before 1881 is conflicting. I am however of opinion that, taking one part of the case with the other, the weight of evidence goes to prove that Haidar Ali and his son Mansab Ali managed the estate on behalf of the talukdar. As members of the family they were allowed extensive powers, and were not called to a very strict account in respect of their collections. Nawab Ali Khan was an absentee, and appears to have lived for the most part with his uncle the late Raja Farzand Ali Khan, the wealthy Talukdar of Jehangirabad. I do not think that any weight can be given to the evidence in this case of Tassadduck Rasul (Nawab Ali Khan's brother and the present Talukdar of Jehangirabad). The brothers are at enmity in consequence of the bequest by Raja Farzand Ali Khan of his estate to Tassadduck Rasul. The finding of the District Judge, though professing merely to decide the fifth issue, practically decides that Haidar Ali did not enjoy proprietary possession till 20th June 1881 (4th issue).

"I find that the plaintiff-appellant has failed to make good his claim to any part of the property in suit, and I accordingly dismiss the appeal with costs."

On the plaintiff's appeal

Mr. *R. V. Doyne* for the Appellant.—The settlement made in 1260 Fasli, corresponding to 1853 A. D., in the name of [318] Nawab Ali Khan, then aged only nine or ten years, was no recognition of his exclusive right but only the result of family arrangement. Actually at that time the son had no right, as his father Mardan Ali was then alive. The nephew's name was recorded as the ostensible proprietor, the uncle remaining in possession. The just inference was that the name was used by an arrangement common in troubled times. The question then arose, what were the rights of the relations of a talukdar, their rights not being expressed, in a sanad granted to the latter alone? It was submitted that this appellant's right to the proprietary interest in the lands forming the taluk of Raoganj, which he was admitted by the wajib-ul-arz of 1870 to have then possessed (lands of which the appellant retained possession till ousted by Nawab Ali Khan in June 1881), should have been declared. His rights were not those of a karinda or manager. It was not that the plaintiff alleged the sanad to be fictitious. What was meant was that the boy's name was used "*benami*," to which the expression "*ism farzi*" corresponded; and what was alleged was that the existence of the plaintiff's interest in and title to the family estate having been established, the defendant should have been held to be in the position of a trustee. He could be held to be in that position on the principle recognized in *Hardeo Baksh* v. *Jowahir Singh*,* *Sookraj Koowar* v. *Government* (14 Moore's I. A., 112), and [319] *The Widow of*

* L. R., 4 I. A., 178; I. L. R., 3 Cal., 522; L. R., 6 I. A., 161.—As the Indian Law Reports contain no report of the final judgment in *Hardeo Baksh* v. *Jewahir Singh*, in which the first judgment (9th June 1877) is reported (I. L. R., 3 Cal., 522), the result is here stated. On the remand, the Commissioner of Sitapur found as a fact that, during the period between Lord Canning's proclamation of confiscation in 1858 and the commencement of the disputes between the parties, there had been a joint interest in, and a common management of, the talukdari estate by the parties. Upon this the final judgment (1st March 1879) was that such an interest could not have existed unless the talukdar had consented that the

Sunkersahai v. *Raja Kashi Pershad* (L. R., 4 I. A., 198; L. R., I. A., Sup. Vol. 220). The plaintiff at all events should have been declared entitled to possession of his portion of the sir lands comprised in the taluk; and no case had been suggested for excluding the plaintiff from the under-proprietary rights detailed in schedule C of the plaint. Reference was made to *Gouri Shunker* v. *The Maharaja of Bulrampore* (I. L. R., 4 Cal., 839); *Shere Bahadur Singh* v. *Daraio Kuar* (I. L. R., 3 Cal., 645); *Ramanand Kuar* v. *Raghunath Kuar* (I. L. R., 8 Cal., 769; L. R., 9 I. A., 41).

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for the Respondent, argued that the claim of the plaintiff, being against the sanad of 25th October 1860, could not be sustained. Neither the wajib-ul-arz, nor any other evidence in the suit, established the title of the plaintiff as proprietor, and he had failed to prove his case. There was no ground for the recognition of a trust; and neither by the defendant's acts nor conduct, nor by express nor by implied agreement, had he rendered himself a trustee.

Mr. *R. V. Doyne* replied.

Their Lordships' **judgment** was delivered by

Sir B. Peacock.—Their Lordships are of opinion that the decree of the Judicial Commissioner ought to be affirmed.

There is nothing in this case to show that the defendant, by any agreement or by any arrangement or other means, became clothed with any trust as regards the lands included in the sanad. The case, therefore, does not fall within the decisions of *Sookraj Koowar* v. *Government* (14 Moore's I. A., 112), or the case of *Hardeo Baksh* (L. R., 6 I. A., 161). The defendant is therefore entitled, as proprietor, to the lands included in the sanad.

A question has been raised with regard to the lands included in schedule C. As to those the plaintiff has claimed a proprietary right. If he had claimed a sub-proprietary right, the defendant might have given evidence to show that he was not entitled to any such right. Their Lordships however think that, in affirming the decree, it ought to be without prejudice **[320]** to any claim which the plaintiff may have to under-proprietary rights in respect of the property included in schedule C.

Their Lordships will humbly advise Her Majesty to this effect, and that the appeal should be dismissed.

The appellant must pay the costs of it.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers*.

Solicitors for the Respondent: Messrs. *Watkins and Lattey*.

C. B.

property should be held as the joint estate of the family; and that there were grounds for presuming that it was the intention of the talukdar that the villages included in the summary settlement with him, and sanad granted to him, should be held by him in trust for the joint family as joint family estate, subject to the law of the Mitakshara; and the appeal being allowed, it was declared that he so held the villages in suit.—See *Pirthi Pal* v. *Jowahir Singh* (I. L. R., 14 Cal., 493 at p. 495).

[17 Cal. 320]

SMALL CAUSE COURT REFERENCE.

The 6th January 1890.

PRESENT:

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE PIGOT.

Prem Sook and another............Plaintiffs

versus

Dhurum Chand and another............Defendants.*

Contract Act (IX of 1872), s. 27—Contract in restraint of trade—Construction of contract.

A contract under which goods were purchased at a certain rate for the Cuttack market containing a stipulation that, if the goods went to Madras, a higher rate should be paid for them, is not one in restraint of trade; and where the purchasers sold the goods to a person in Calcutta, who in turn resold to another, who took them to Madras. *Held* that the original purchasers were, under the terms of the contract, liable to pay at the enhanced rate.

THIS was a suit brought in the Calcutta Court of Small Causes by the plaintiffs on the following contract:—

1¼ *Sree Gonesjee.*

"1¼. TO THE EVER-LIVING PREM SOOK RAM NARAIN,—Accept the salutation of Giridhari Lall and Dhurum Chand. Further (we) have bought from you 6 bales of twist, bearing *Gunga* label, at the rate of Rs. 9-15. We have bought these goods for the purpose of giving them to the Ooriyahs. These goods shall go to Cuttack, not to Madras. If they are taken to Madras, we shall pay at the rate of Rs. 10-15. We will raise no objection on any account.

Sumbat 1945, 12 (light side in) Joyst. (Sd.) DHURUM CHAND."

[321] The plaintiff alleged that, notwithstanding this contract, the goods were taken to Madras, and he therefore claimed the price of six bales at Rs. 10-15, less the money received from the defendants. The defendants contended that the contract was one in restraint of trade, and gave evidence, which was believed, that they themselves had not sent the goods to Madras, but that they had sold them to one Sreeram, who again sold to one Mutty Setty, and that the latter had taken the goods to Madras.

The Judge of the Small Cause Court held that, having regard to the nature of the contract and to the case of *Carlisles Nephews* v. *Ricknauth Buktcarmull* (I. L. R., 8 Cal., 809), the contract was not one in restraint of trade or against public policy, as the defendants were not prohibited from sending the goods to Madras. But although the contract was not one in restraint of trade, he considered that the defendants had not themselves committed any breach of the contract, and could not therefore be made liable. At the request of the plaintiffs, the questions, whether the contract was void as being in restraint of trade, and whether the defendants could be held liable in consequence of the sale at Madras by Mutty Setty, were referred to the High Court.

Mr. *Acworth*, for the plaintiffs, contended that, under the terms of the contract, the defendants were liable to pay at the higher rate, and was then stopped by the Court.

* Small Cause Court Reference No. 6 of 1889, made by Baboo Jodoo Nath Roy, Officiating Judge of the Court of Small Causes, Calcutta, dated the 4th of June 1889.

Mr. *Garth*, for the Defendants, contended that s. 27 was wide enough to cover a partial restraint, citing *Madhub Chunder Poramanick* v. *Rajcoomar Dass* (14 B. L. R., 76).

The **Opinion** of the Court(PETHERAM, C.J., and PIGOT, J.) was delivered by

Petheram, C. J.—This is a reference from the Small Cause Court upon which a question of law arises. The suit was a suit brought by the plaintiffs against the defendants to recover the price of six bales of twist at the rate of Rs. 10-15 a bundle.

The defendants paid into Court a sum of money calculated at the rate of Rs. 9-15 a bundle, and the question between the parties was, what was the sum which, according to the contract between **[322]** them, the defendants were to pay the plaintiffs for these goods, it being admitted that they had received them.

The goods were sold by the plaintiffs to the defendants under a written contract (here followed the contract above set out, *ante* p. 320).

After that contract had been entered into, it appears that the defendants resold these parcels of goods in the Calcutta market to some other dealer, and the person to whom the defendants sold them, I believe, though that fact is not material to the decision of this case, resold them again in Calcutta to another dealer, and that dealer sent them to Madras. Upon that the plaintiffs claimed to be paid at the higher rate, and the defendants objected to pay at that rate, because they had not themselves sent them to Madras.

The learned Judge of the Small Cause Court gave judgment for the defendants, considering that the lower rate only was payable, but at the request of the parties has referred these two questions for the opinion of the Court- -1*st*, "whether the contract is void as being in restraint of trade and being opposed to public policy ;" if not, 2*ndly*, "whether in consequence of the buyer of the defendants' vendees having sent the goods to Madras, the defendants are bound to pay the higher rate mentioned in the contract."

As to the first question, we can see no reason for supposing that this is a contract in restraint of trade in any sense whatever. The defendants are not restrained by the contract from dealing with Madras as much as they please. All that the plaintiffs say in that contract is, we will sell these goods to you at one price if you are going to send them to Cuttack, but we will charge you another price if they are sent for sale to Madras. They had a right to refuse to sell to the defendants at all this small parcel of goods, and they had a right to fix the price at which they were willing to sell them ; and they did fix the price in this way, and the defendants accepted the bargain. We can see no restraint of trade in that, because it left the defendants free to trade with the goods in any other place and in any way they thought fit.

Then comes the other question, whether, in consequence of the **[323]** buyer of the defendants, vendees having sent the goods to Madras, the defendants were bound to pay the higher rate mentioned in the contract. This is a simple question of the construction of the words of the contract These words are: " These goods shall go to Cuttack, not to Madras. If they are taken to Madras we will pay at the rate of Rs. 10-15." In our opinion the meaning of these words is, we agree to send these goods to Cuttack, and if, instead of their going to Cuttack, they go to Madras, we agree to pay the higher rate. There is not only a contract that the defendants will not send them to Madras, but the defendants agree that if they go not to Cuttack but to Madras, they will pay the higher price for them. They have gone to Madras and not to Cuttack, and therefore it seems to us that the defendants must pay the higher rate.

A great deal has been said as to there being no limit as to time, and no imit as to the way in which they get to Madras. As to that, it seems to us that this contract must be read in the light of common-sense, and that the plain meaning of it is, that the goods are to be sent to Cuttack from Calcutta for sale, and if, instead of that, they are sent from Calcutta as bundles of bales of twist of that particular mark to be sold at Madras, they shall be paid for at the higher rate. We do not see anything illegal in that or anything in restraint of trade, or that it is unreasonable or unlikely for the parties to make such a contract. We think therefore that the Judge of the Small Cause Court was wrong in the view he took of this matter, and that judgment must be entered for the plaintiff for an amount calculated at the higher rate.

Attorney for Plaintiffs: Mr. *E. J. Fink.*

Attorney for Defendants: Mr. *N. C. Bose.*

T. A. P.

NOTES.

[A similar decision was given in (1890) 13 Mad., 472, affirmed in (1891) 15 Mad., 79.]

---

[324] MATRIMONIAL JURISDICTION.

The 6th January 1890.

PRESENT:

MR. JUSTICE WILSON.

Hilliard............Petitioner

versus

Mitchell............Respondent.

Marriage—Suit for nullity of marriage—Divorce Act (IV of 1869), ss. 18, 19, (2)—Domicile of origin—Religious communion.

Where the petitioner, a member of the Church of England, came to India about the year 1867, his domicile of origin being then English, and in 1871 married the illegitimate sister (since deceased) of his second wife, whom he subsequently married in 1887, it being uncertain what his domicile was at the date of his first marriage: *Held*, in a suit for nullity of marriage that either the petitioner carried with him to India the laws as to capacity to marry by which he was originally governed, or he was governed by the law of the class to which he belonged and that in either case the marriage could not be supported.

Lopez v. *Lopez* (I. L. R., 12 Cal., 706) referred to and applied.

ROBERT WILLIAM HILLIARD, by his petition, stated that, on the 14th day of February 1871, he was lawfully married to Mary Madeline Hilliard, then Mary Madeline Ross, spinster, at St. John's Church in Council House Street, in the town of Calcutta; that the petitioner's said wife died on the 21st day of December 1883; that, on the 19th day of November 1887, the petitioner went through the ceremony of marriage with Julia Ella Mitchell at St. Thomas' Church, Free School Street, in Calcutta; and that they had lived and cohabited together, but there had been no issue from this cohabitation.

Mary Madeline Hilliard, the petitioner's first wife, was the uterine half-sister of Julia Ella Mitchell, and the petitioner prayed for a declaration that the marriage celebrated between himself and Julia Ella Mitchell was null and void on the ground that the parties thereto were within the prohibited degrees of affinity.

The case was undefended.

Mr. *L. P. Pugh*, Mr. *E. W. Ormond*, and Mr. *L. Evans Pugh*, appeared for the Petitioner.

They referred to the Indian Divorce Act (IV of 1869), ss. 18, 19 (2); *The Queen* v. *Chadwick* 11 Q. B., (A. & E.,) 205]; *Lopez* v. *Lopez* (I. L. R., 12 Cal., 706).

[326] The further facts appear from the following **judgment**:—

Wilson, J.—This is a petition by a husband for a decree of nullity of marriage, on the ground that the parties to the marriage are within the prohibited degrees of affinity. The marriage was duly proved; and it was proved that the petitioner had been formerly married to an illegitimate sister, since deceased, of the second wife.

The petitioner was born in England, of parents having an English or Irish domicile, and he is and has always been a member of the Church of England. He came to this country, he thinks, in 1867, as assistant in a shop in Calcutta. He has now no intention of ever returning to England; but what his domicile was at the date of the marriage, in 1871, is not clear, nor is it, I think, material to determine it. Upon any view, I think, the decree asked for must be made.

If the domicile of the petitioner was English, the English law of prohibited degrees was applicable to his marriage, and under that law, this was a prohibited marriage. If the petitioner's domicile was Indian, still the same result must follow. It may be that, as an Englishman born, he carried with him to India the laws as to capacity to marry by which he was originally governed, irrespective of the religious communion to which he belongs; and is therefore subject to the law of England in this matter. This is a point upon which the Full Bench in *Lopez* v. *Lopez* (I. L. R., 12 Cal., 706) at p. 720 abstained from expressing an opinion. If this view be not the true one, then the petitioner was governed by the law of the class to which he belonged, that is to say, the law of the Church of England, according to the principle applied to Christians of another class in *Lopez* v. *Lopez* (I. L. R., 12 Cal., 706).

Upon no view of the case can the marriage be supported. A decree of nullity must be made.

Decree of nullity of marriage.

Attorney for Petitioner: Mr. *C. N. Manuel.*

A. A. C.

———

NOTES.

[*See* also (1894) 16 All., 212.]

[326] APPELLATE CIVIL.

The 4th September, 1889.
PRESENT:
MR JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Lala Kirut Narain and another............Defendants
versus
Palukdhari Pandey and others............Plaintiffs.*

Appeal—Bengal Tenancy Act (VIII of 1885), s. 104, cl. 2—Special Judge—Dispute as to settlement of rent.

No appeal lies to the High Court from the decision of a Special Judge under s. 104, cl. 2, of the Bengal Tenancy Act.

CERTAIN raiyats, the respondents in this appeal, applied for a settlement of their rents under s. 104 (2) of the Bengal Tenancy Act, 1885, to Mr. Collins, the revenue officer appointed to make a survey and record of rights in the district of Mozufferpore. On the 29th April 1886, Mr. Collins made a settlement of their rents upon the footing of what he considered to be the existing rent, but the landlords, the appellants in the present appeal, being dissatisfied with Mr. Collins' settlement, appealed against his orders to Mr. A. C. Brett, the Special Judge appointed under s. 108 (1) of the Bengal Tenancy Act for the purpose of hearing appeals from his decisions. Mr. Brett confirmed the orders of Mr. Collins, and the landlords preferred a second appeal to the High Court. This appeal was heard on the 6th January 1888; but the question as to whether a second appeal did lie to the High Court against the order of the Special Judge was not raised.

The Court (MACPHERSON and GHOSE, JJ.) remanded the case to the Court of First Instance (*i. e.*, the Settlement Officer) "to determine judicially and on proper evidence what the existing rent is." When the case went back to Mozufferpore, the post of Settlement Officer had been abolished, as the cadastral survey and the preparation of the record of rights in Mozufferpore had been put a stop to by Government. Under these circumstances, Mr. Brett decided to deal with the case himself under ss. 565 and 568 of the Civil Procedure Code, and after receiving all the evidence [327] both parties had to adduce, on the 10th January 1889, again confirmed the settlement of the rents made by Mr. Collins.

The landlords appealed to the High Court.

Baboo *Umakali Mookerjee* for the Appellants.

Baboo *Taruck Nath Palit* for the Respondents.

A preliminary objection was taken on behalf of the respondents that no appeal lay to the High Court from the order of 10th January 1889 passed by Mr. Brett.

The **Judgment** of the High Court (GHOSE and RAMPINI, JJ.) after stating the facts proceeded as follows:—

The landlords now again appeal to this Court, urging (1) that Mr. Brett, as Special Judge, has under s. 108 (1) no power to do otherwise than hear appeals from the Revenue Officers' orders; that as District Judge he has no power to take any steps in the case; and that, therefore, his proceedings now

* Appeal from Appellate Decree No. 529 of 1889, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 10th of January 1889, affirming the decree of E. W. Collins, Esq., Settlement Officer of Mozufferpore, dated the 29th of April, 1886.

appealed against are *ultra vires* and without jurisdiction: (2) that ss. 565 and 568, Civil Procedure Code, have no application to the case: and (3) that he has now settled the rents of several raiyats who were not parties to the original proceedings before Mr. Collins. On the other hand, a preliminary objection is urged on behalf of the respondents to the effect that no appeal against the order of Mr. Brett passed on the 10th January last lies to this Court, inasmuch as under s. 108 (3) a second appeal lies to the High Court only against decisions passed by a Special Judge under the provisions of s. 106 of Act VIII of 1885, and that the decision of Mr. Brett now appealed against was not passed in a case under that section. We think after some consideration that this preliminary objection must prevail. It seems clear that, according to Chapter X of the Tenancy Act, a proceeding under s. 104 (2) for the settlement of rent is a different thing from a proceeding under s. 106 with regard to a dispute as to the correctness of any of the particulars required to be entered in the record of rights, and it is only when such a dispute arises, and is disposed of by a Settlement Officer, that a second appeal lies to the High Court. The words "not being an entry of a rent settled under this chapter," occurring in s. 106, read in connection with s. 108 (3), clearly indicate that this Court has no authority to entertain a second appeal in matters [328] relating to the settlement of rent; and from the proviso to s. 108, it appears that it is only when a dispute arises regarding any of the particulars entered in the record of rights, and when on second appeal the High Court has altered the decision of the Special Judge in respect thereto, that they have the power to exercise any jurisdiction as to the settlement of rent. In the present case no point is raised before us as to any of the matters mentioned in the proviso to s. 108, and it follows that no second appeal lies to this Court against the orders of the Special Judge; and we find that the same conclusion has already been arrived at by another Division Bench of this Court in the case of *Shewbarat Koer* v. *Nirpat Roy* (I. L. R., 16 Cal., 596), decided by TOTTENHAM and GORDON, JJ., on the 15th May 1889.

It remains to be considered whether we can or should interfere, as we have been asked to do, with the order of Mr. Brett, now appealed against under the powers vested in us by s. 622, Civil Procedure Code. After consideration, we think we should *not* do so, for, though it has now come to our notice that the Government Notification of November 4th, 1885, ordering a cadastral survey in part of the Mozufferpore district has been withdrawn, except with regard to certain specified villages (see Government Notification of December 14th, 1886, published in the *Calcutta Gazette* of December 15th, 1886, Part I, p. 1308), amongst which do not occur the names of the villages in which the present applicants are raiyats, yet it seems doubtful if we have authority to interfere under the provisions of s. 622 with Mr. Brett's orders. In the case above cited, it has been held that the Court of a Special Judge, when that officer makes an order regarding a settlement of rent, is not a Court subordinate to this Court. It may, however, be contended that it is a Court subject to our appellate jurisdiction within the purview of s 15 of the Charter Act, and that therefore we have authority to interfere. But be that as it may, as the present case is clearly one regarding the settlement of rent, and not one in which there is any dispute as to an entry in the record of rights (so that we could not now pass any order in it settling the applicant's rents), and seeing that no appeal lay to this Court when the order of the Special Judge was set aside [329] and the case remanded for re-trial on the 6th January 1888, it would seem to us to be one in which the interference of this Court under s. 622, Civil Procedure Code, is not desirable. We accordingly abstain from passing any orders with regard to it under the provisions of that section We think it proper to mention that when the case was remanded on the 6th January 1888,

no question as to whether a second appeal lay against the order of the Special Judge in this case was raised before this Court.

For all these reasons this appeal will be dismissed, but in the circumstances without costs.

C. D. P. *Appeal dismissed.*

NOTES.

[This was followed in (1894) 21 Cal., 776; (1906) 33 Cal., 837.]

[17 Cal. 329]

APPELLATE CIVIL.

The 1st August, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Moran and others............Plaintiffs

versus

Chairman of Motihari Municipality............Defendant.*

High Court, Powers of—Enforcement of public duties—License for a provision market—Construction of the word "may"—Bengal Municipal Act, 1884 (Bengal Act III of 1884), s. 339.

The High Court has no power to compel Municipalities beyond the local limits of its ordinary original civil jurisdiction to do their duty or to restrain them from doing that which it is not in their province to do.

There are no words which render it obligatory on a Municipality to grant a license under s. 339 of Bengal Act III of 1884

The word "may" in s. 339 of that Act is not to be construed as "shall."

THIS was a suit brought by the plaintiffs for an order directing the Municipal Commissioners of Motihari to grant a license to the plaintiffs under s. 339 of the Bengal Municipal Act 1884, and for compensation.

The facts of the case were as follows:—

The plaintiffs, who were the proprietors of an indigo concern in Motihari, carried on their business through a lawfully-constituted attorney and agent under the name and style of "The Motihari Indigo Concern." They were also the proprietors of an ancient market, called Goodri Bazar, centrally situated within the Town of Motihari and within easy access of its inhabitants. Upon the extension of Part X of the Bengal Municipal Act 1884 to the [330] Municipality of Motihàri about the end of 1885, a license under s. 340, cl. 2, of the Act for the sale of perishable articles in Goodri Bazar was granted to the plaintiffs for the remainder of the then current year ending the 31st March 1886 About this time the Municipality opened a market called Henry-ka-bazar at a short distance from the Town of Motihari. On the 1st April 1886, the plaintiffs applied for a license for their market under that Act: but their

* Appeal from Original Decree No. 139 of 1888, against the decree of Baboo Amrit Lal Chattorji, Subordinate Judge of Sarun, dated the 29th of March 1888.

application was refused on the ground that the place where the market was held was not a fit place where articles of a perishable nature could be exposed for sale, consistently with the sanitation of the town, and the convenience and comfort of its inhabitants.

On the 9th June 1886, the plaintiffs applied that an officer should be deputed to point out the defects which required rectification, and the wants which should be supplied to entitle the plaintiffs to a certificate from the Chairman under s. 340 of the Act. On the 15th June, Mr. Henry, the then Chairman of the Municipality, passed an order, in which he pointed out the defects which ought to be remedied, and the alterations which should be carried out before he would grant a certificate. The plaintiffs, having remedied the defects and carried out the alterations pointed out by the Chairman, again applied for and obtained a certificate under s. 340. The certificate was dated 25th and 28th September 1886, and was granted by Mr. C. F. Worsley, the Chairman, who thereby certified, "after inspection of the Goodri market land, the new building and drainage arrangements, that the land is fit to be used as a market for the sale of meat, fish, butter, ghee, fruits, vegetable and similar provisions.

On the 30th September 1886, the plaintiffs applied to the Commissioners of the Motihari Municipality for a license under s. 339 of the Act, and presented the certificate of the Chairman along with their application. On the 1st November 1886, at a meeting duly convened, the Commissioners refused a license on the grounds and for the reasons set forth in their resolution of that date, which was in these terms:—

"The petition of the Manager of the Motihari Indigo Concern for a license for the Goodri Bazar was put up before the Commissioners. The Chairman had no objection to grant the license [331] applied for: but it was unanimously resolved by the Municipal Commissioners that the application for license should be rejected on the grounds that, this town being a small one, there is no necessity for granting a license for the use of the land as a market for the sale of provisions mentioned in s. 337, when there is a properly-constructed and well-managed market close to it: that there is no sufficient space in the market regarding which application has been made, and the consequence would be that on the *hat* days the place would become over-crowded, and the public roads would be used by the persons who would attend the market on *hat* days and that inconvenience would be caused to the people who pass by; that the Municipal Commissioners and the Municipal servants could not exercise proper and efficient control over the market in question, and that having regard to the fact that this town has of late years been subject to recurring epidemic of cholera, and to the remarks made by the Sanitary Commissioner on the occasion of his visits to this town on the 22nd February 1884 and 2nd February 1886 respectively, it is particularly desirable that the sale of perishable articles of food should be under the sole supervision of Municipal Commissioners and Municipal servants."

The plaintiffs appealed under s. 63 of the Act to the Commissioner of Patna against the resolution of the Commissioners refusing a license for their market: and, by an order passed on the 13th January 1887, the Commissioner declined to interfere, on the grounds that the granting of a license, even after a certificate of fitness for a market had been obtained from the Chairman, was optional with the Municipal Commissioners; that there was nothing in the resolution of the Commissioners which would authorize him to interfere under s. 63 of the Municipal Act; and that, therefore, he could not suspend the execution of that resolution.

On the 15th December 1886, the plaintiffs gave the Motihari Municipality notice of cause of action under s. 363 of the Act and on the 28th January 1887, filed their plaint. The plaintiffs alleged that the refusal of the Municipal Commissioners to grant them a license was arbitrary and without good and valid reasons. They charged the Commissioners with having *mala fide* exercised **[332]** the powers conferred on them to the injury and loss of the plaintiffs. They also alleged that the loss they had suffered, and would suffer, from such wrongful refusal of a license was over Rs. 1,200 a year; and assessed their total loss at Rs. 20,000. The plaintiffs prayed (1) for an order directing the Commissioners to grant a license to the plaintiffs and to pay compensation; (2) that the Court should grant a license in the event of the Commissioners failing to do so. In the alternative the plaintiffs prayed that the Court should award them compensation in the sum of Rs. 20,000 for the illegal and wrongful acts of the Commissioners.

The defendant Chairman denied *mala fides*, and urged that the action of the Commissioners in rejecting the plaintiffs' application for a license was valid, *bona fide*, legal and fully justified, and that the Commissioners refused the license because the place was not one fit for a bazar. He denied the liability of the Commissioners to pay compensation, and questioned the correctness of the amount of the plaintiffs' income. He further contended that the Civil Courts had no jurisdiction to compel the Commissioners to grant a license; that where the statute did not give compensation, the Civil Courts had no jurisdiction to grant compensation; and that no suit like the present one would lie.

On behalf of the plaintiffs it was contended that when the Chairman of the Municipality had granted a certificate under s. 340 under his own hands, the Commissioners were bound under s. 339 of the Act to grant a license to the plaintiffs.

The Subordinate Judge held that the Municipal Commissioners had a discretion under s. 339 to refuse a license for good and valid reasons, notwithstanding the certificate of fitness granted under s. 340 by the Chairman. He was of opinion that under s 55 of the Specific Relief Act. 1877, he could not issue any mandatory order against a body corporate, and that s. 45 of the same Act was not applicable to the Mofussil Courts; and accordingly held that he had no jurisdiction to compel the Commissioners to grant a license.

The Subordinate Judge found that Goodri Bazar was an ancient market. He also found that the Commissioners in refusing a license had acted legally and in the proper exercise of their powers; **[333]** that the reasons assigned for their refusal were sufficient in law and fairly reasonable; and that there was no ground for imputing *mala fides* to them for such refusal. He also found that the plaintiffs had suffered loss of income from their market in consequence of such refusal, and was of opinion that the refusal of the license was an act done in the exercise of powers conferred by the Act within the meaning of s. 362, and that under ss. 362 and 363 the Court could award compensation. He thought that Rs. 500 a year for two years would be sufficient compensation for the plaintiffs. Accordingly, the Subordinate Judge gave the plaintiffs a decree for Rs. 1,000 with costs on that amount, dismissing the plaintiffs' claim for specific relief.

The plaintiffs appealed to the High Court.

The defendant also filed cross-objections against the decree of the Subordinate Judge.

Mr. *Evans*, Dr. *Troyluckya Nath Mitter* and Baboo *Prosunno Gopal Roy* for the Appellants.

Mr. *Phillips* and Baboo *Unnoda Prosad Banerjee* for the Respondent.

The **judgment** of the High Court (PIGOT and RAMPINI, JJ.) was as follows:—

This is an appeal from a decision of the Subordinate Judge of Champarun so far as it dismisses the suit which is brought by the plaintiffs in respect of the refusal by the Municipality of Motihari of a license for the use of certain lands in the occupation of the plaintiffs, as a market.

There is no doubt, and it has been so found, that this is an ancient market. There is no doubt that the powers possessed by the Municipality under Part X of Bengal Act III of 1884 have been so used as to put an end to that market to the profit of a market established by the Municipality under the authority of one of the sections of Part X of the Act; and the question before us is whether, under the provisions of Bengal Act III of 1884, power was conferred upon the Municipality of doing those acts destructive of the plaintiffs' property, and yet no remedy or no right was allowed by the Act to persons in the position of the plaintiffs in case of the Act being so used to the destruction of their property.

[334] The sections which relate to this matter are ss. 337 to 340 inclusive, and perhaps one or two of the later sections of Part X. Section 337 gives the Commissioners power to "order that within such limits as they may fix, no land shall be used as a market for the sale of meat, fish, butter, ghee, fruits, vegetable and similar provisions, otherwise than under a license to be granted by the Commissioners." Section 338 confers upon them the power, when they have passed such a prohibitory order as s. 337 provides, of granting such a license as is contemplated by s. 337.

Section 339 provides that the Commissioners may grant such a license year by year on the certificate of the Chairman. Section 340 provides that the Chairman shall grant such a certificate, unless the land be defective for the purposes of a market in the respects specified in the section; and the second part of this section (340), which is that upon which the appellants rely, enacts that "the owners or lessees of all lands used as markets for the sale of provisions as aforesaid at the time of the extension of this part to the Municipality shall be entitled to receive a license for the current year without the certificate required by s. 339, but in subsequent years the license shall not be renewed without such certificate."

There is no doubt the plaintiffs were the owners or lessees of land used as a market at the time of the extension of this part of the Act to the Municipality of Motihari.

What the Municipality did was to start a market of their own and then refuse the plaintiffs a license, thereby shutting up their market; and with reference to that, one of the later sections of this part may be referred to, that is, s. 344, which makes it *an offence, punishable by fine*, to permit land to be used as a market without a license under s. 338. It is contended that the later words of s. 340 may, and assuredly, if they may, they ought to be read so as to save the property of the plaintiffs from the complete confiscation with which this public body, in exercise of the powers with which they have been vested, has visited them. If they cannot obtain a remedy in damages for the refusal to grant a license, they are wholly without any remedy at all. The Legislature in its wisdom having deliberately withdrawn from the Courts **[335]** in this country that power, which is possessed by the Courts of Justice at home, to compel corporations to do their duty, and to restrain them from doing that which it is not in their province to do,—a power, which has been reserved to the High Court in its Ordinary Original Jurisdiction with respect to the presidency-town, but which has been withheld in respect of any of the Municipalities in the mofussil, the plaintiffs are wholly without remedy, unless we can

give them damages for the conduct of the Municipality: but to do that, we must be satisfied that it was the duty of the Municipality under the provisions of the Act to issue the license which they have refused: for breach of such a duty they might perhaps (at least, that is plaintiff's case), be liable in damages. There are no words in ss. 339 or 340 rendering it obligatory on the Municipality to issue a license, unless, in the words in s. 339 "and the Commissioners *may* grant such license year by year" the word "may" is to be read as "shall" or is to be read in some cases as "shall." That is the contention of the appellant; and the cases in which it is contended that "may" ought in that section to be read "shall" are cases in which land was actually being used as a market at the time of the extension of this part of the Act to the Municipalities. It is argued that as the owners of lands so used at such a time are declared entitled to receive a license for the current year without the certificate required by s. 339, but for subsequent years it is provided that the license shall not be renewed without such certificate, that that must mean that the license in subsequent years must also be renewed, provided the certificate is granted.

There are two difficulties in the way of adopting this construction. One, that the word "may" in s. 339 must, according to it, in the majority of cases be read as "may," but in exceptional cases as "shall." That is a serious difficulty: and the second difficulty is that the scope of the sentence at the close of s. 240, which it is suggested ought to be read as "provided that in subsequent years a license is to be issued in case a certificate is granted," seems not capable of bearing such a construction and not to contemplate anything of the kind. We think that the effect of it is merely to relieve persons, using land as a market at the time the Act is made applicable, from the necessity in that [336] year of obtaining a certificate; and the words "but in subsequent years the license shall not be renewed without such certificate" are merely words, as we read them, of caution to avoid the very unreasonable supposition that the one year's holding without a certificate involved the right to a license for subsequent years without a certificate. That they contemplate an enactment that such holders shall get a license for all subsequent years, if they please, without a certificate, we much regret we are unable to hold.

That being so, we must affirm the decision of the Court below and dismiss the appeal.

We think that it is most lamentable that Acts should be drawn, as they too often are, without that intelligent consideration of, or that anxious regard for, private rights, which ought to be the study of every Legislature that springs from English authority.

The cross-appeal must be allowed. As we have pointed out in our judgment in the plaintiff's appeal, the Municipality was legally entitled to refuse the renewal of the license; the Subordinate Judge, with a very natural wish to do something for the loss sustained by the plaintiffs, gave them damages for that legal refusal. It is impossible that that order of the Subordinate Judge can be sustained. We therefore set it aside.

We are very glad to hear from the learned Counsel for the respondent that a license will be granted to the plaintiffs, and that the preposterous proceeding of which we have been studying the consequences will be so far corrected. Under the circumstances we shall give no costs either in the appeal or cross-appeal.

Appeal dismissed and cross-objections allowed.

C. D. P.

NOTES.

[As regards the discretion to grant licence, see also (1893) 20 Cal., 654; (1897) 19 All., 313.]

As regards the granting of injunctions, see also (1887) 19 All., 313; (1899) 21 All., 348.]

[337] VICE-ADMIRALTY JURISDICTION.

The 16th December, 1889.

PRESENT:

MR. JUSTICE WILSON.

In the matter of the Ship "*Fannie Skolfield.*"

Vice-Admiralty jurisdiction—Procedure—Vice-Admiralty Regulations of. 1832—Practice under Code of Civil Procedure.

In Vice-Admiralty cases, the effect of appearance, the mode of objecting to the jurisdiction, and the mode of questioning the validity of a pleading, are matters governed by a settled practice under the Code of Civil Procedure. The Privy Council rules issued under 2 & 3 Will. IV, c. 51, have no operation, except in case of suits *in rem* in which no appearance has been entered and other matters to which the Procedure Code cannot be applied.

The enactments and rules affecting the Vice-Admiralty jurisdiction reviewed and examined.

In the matter of the Ship "*Champion*" (I. L. R., 17 Cal., 66) referred to.

THIS was an action by the owner of an Arab barque, the *Fez Rohoman* against the *Fannie Skolfield*, an American ship, to recover damages for injury to the former vessel occasioned by a collision at the Sandheads, which was alleged to be owing to the negligence of the *Fannie Skolfield*. The impugnant having entered an appearance set forth in his answer a plea as to the jurisdiction of the Court. The promovent thereupon applied to have the paragraph objecting to the jurisdiction of the Court expunged from the answer on the ground that the impugnant did not enter appearance "under protest."

Mr. *T. A. Apcar* for the promovent. -The present application is in the nature of a demurrer in replication, and is under Rule 5 (p. 7) of the Additional Rules for Vice-Admiralty Courts abroad of the 6th July 1859. The Vice-Admiralty practice is subject to the Rules of 1832 framed under 2 and 3 Will. IV, c. 51. The impugnant has not appeared under protest, and therefore his objection should be expunged. [Rule 11 (p. 7) of the Rules of 1832].

Mr. *Garth* for the impugnant *contra*.—It has been decided that the Court follows its own practice. *In the matter of the Ship* "*Champion*" (I. L. R., 17 Cal., 96; Letters Patent of 1865, s. 32, Belchambers' Rules and Orders, Rules 62, 63, p. 88).

[338] Mr. *Apcar* in reply. —The case of the *Champion* (I.L.R., 17 Cal., 66), is no authority upon this particular point.

The following authorities were also referred to.—*The Blakeney* (Swa., 428) *The Vivar* (L. R., 2 P. D., 29, 33), *Bardot* v. *The Augusta* (10 Bom., H.C., 110), *In re Smith* (L. R., 1. P. D. 300), Smoult and Ryan, pp. 29, 42; Charter of the Supreme Court, s. 26.

Wilson, J.—This is an application, under Rule 5 of the Additional Rules for Vice-Admiralty Courts abroad, issued by the Privy Council, in addition to the Rules of 1832, under 2 and 3 Will. IV, c. 51. The applicant, the promovent, asks to have expunged a paragraph of the answer which objects to the jurisdiction of the Court, on the ground that the defendant, having appeared,

absolutely and not under protest, is precluded from questioning the jurisdiction of the Court, and that the promovent is, under the practice of the Court as a Court of Vice-Admiralty, entitled to have the paragraph expunged. Whether he is right in this contention depends upon what system of procedure governs the matter. If the procedure embodied in the Vice Admiralty rules issued under 2 and 3 Will. IV, c. 51, applies, the promovent's contention seems to be right, otherwise not.

It is necessary, therefore, to examine the several enactments and rules affecting the question. The Act 2 and 3 Will. IV, c. 51, empowered the King in Council to make rules to govern the practice of Vice-Admiralty Courts abroad. The rules relied upon in support of the present application were issued under that Act, and no doubt became binding upon those who then exercised the Vice-Admiralty jurisdiction now vested in this Court. And I believe the usual practice in the days of the Supreme Court was to exercise the Vice-Admiralty jurisdiction conferred by the commissions from time to time issued, rather than the Admiralty jurisdiction given by the Supreme Court Charter, just as this Court has followed a similar course.

The Acts 24 and 25 Vict, c. 104, under which the High Courts were founded, after providing for the transfer of the old jurisdiction, enacted: Section 11.—That, amongst other things, Orders [339] in Council applicable to the Supreme Court or its Judges should apply to the High Court and its Judges, so far as might be consistent with the Act and the Letters Patent to be issued, and subject to the legislative powers of the Governor-General in Council. The first Charter gave to the High Court the jurisdiction, Admiralty and Vice-Admiralty, hitherto belonging to the Supreme Court or any Judge thereof. The second Charter, s. 32, continued this jurisdiction; and, in s. 37, enacted that the Court should have power by rule to regulate its procedure in Civil cases, including cases in its Admiralty and Vice-Admiralty jurisdiction, with a proviso that the Court should be guided, as far as possible, by the Code of Civil Procedure, then Act VIII of 1859, an act which did not apply *proprio vigore* to the High Court. Under this clause the Court, on the 4th April 1866, issued rules, of which several apply to Admiralty matters. Those material to the present case are two:—

"62.—The procedure in Civil cases which shall be brought before the Court in the exercise of its Admiralty, Vice-Admiralty, or Martimonial jurisdiction shall be regulated, so far as the circumstances of the case will admit, by Act VIII of 1859 and Act XXIII of 1861."

"63. In cases in the exercise of Admiralty or Vice-Admiralty jurisdiction, in which a ship, or a ship and cargo, have been or are to be proceeded against or arrested, or in which goods only have been or are to be proceeded against or arrested, either for the purpose of proceeding against the goods or the freight due thereon, or in which property shall have been or shall be arrested, and no party shall have appeared or shall appear at the return of the warrant, and in all other cases in the exercise of Admiralty or Vice-Admiralty jurisdiction in which the rules contained in Act VIII of 1859 are not applicable, the practice and procedure shall be regulated as nearly as possible by the rules and regulations made and ordained by order of his late Majesty King William the Fourth in Council in pursuance of the 2nd Will. IV, c. 51, and touching the practice to be observed in the several Courts of Vice-Admiralty in the Colonies, except so far as such rules may be inconsistent with the 24 and 25 Vict., c 104 or of the said Letters Patent."

[340] The effect of those rules seems to me to have been to put an end to the operation in this Court of the Privy Council rules, except in the cases in which they were expressly kept alive, that is to say, suits *in rem* in which there is no appearance, and other matters to which the Procedure Code cannot be applied.

The Code of 1859 has been superseded by others which do apply in most matters *proprio vigore* to the High Court.

The matters now brought before me, the effect of appearance, the mode of objecting to the jurisdiction, the mode of questioning the validity in law of a pleading, are all governed by a settled practice under the Procedure Code. The result is that, in my opinion, the defendant is not precluded by his appearance from questioning the jurisdiction of the Court, but may do so in his pleading; and that this application is not in accordance with the practice of the Court.

The case of the *Champion* (I. L. R., 17 Cal., 66), before the Court of Appeal is not a direct authority upon the point now before me, for there were circumstances in that case which do not exist in this But, so far as it goes, I think it supports the view I take. I have further made inquiries, and I find the practice actually followed hitherto has been in accordance with this view.

It is said that in the present case the defendant in appearing has followed the forms of the Privy Council Rules. If any mistake of form has been made, it cannot alter the substance of things or affect the procedure of the Court.

This application must be dismissed with costs.

Application dismissed.

Attorney for the Promovent: Mr. *Carruthers*.

Attorneys for the Impugnant: Messrs. *Sanderson and Co.*

NOTES.

[*See* also (1894) 22 Cal., 511.]

[341] APPELLATE CIVIL.

The 2nd December, 1889.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Kishore Chand Bhakat and others.........Judgment-debtors

versus

Gisborne & Co., Decree-purchasers and others............Decree-holders.*

Civil Procedure Code, 1882, s. 232 Transfer of portion of decree-Execution of decree by transferee of portion of decree.

No legislative prohibition exists to the transfer of a portion of a decree · and provided that the whole decree is executed, and the rights of all parties interested are cared for, there is no objection to the transferee being allowed to carry on the execution-proceedings.

Seetaput Roy v. *Ali Hossein* (24 W. R., 11) dissented from.

THE facts of this case were as follows:—On the 21st August 1885, Koylash Dobey and others obtained a decree against the present judgment-debtors, appellants. On the 6th of October 1885, the Dobeys assigned to the Gisbornes a twelve-anna share of the costs to which they were entitled by virtue of their decree. On the 15th September 1887, an application was made by the Gisbornes for execution of the whole decree. The Dobeys, who still retained a right to a four-anna share of the costs given by the decree of the 21st August 1885, were

* Appeal from Order No. 251 of 1889, against the order of G. W. Place, Esq., Judge of Bankura, dated the 12th of July 1889, reversing the order of Baboo Taraprosunno Ghose, Munsif of Kbatra, dated the 13th of July 1888.

parties to that application. Notice of the application was duly served in conformity with the provisions of s 232 of the Civil Procedure Code, and on the 11th November an order was made for placing the Gisbornes upon the record in the room of the Dobeys, the original judgment-creditors; and an order was also made on the same day for attachment of certain properties of the judgment-debtors, appellants. On the 3rd December a fresh order for attachment was made, the first order having become inoperative by reason of the non-payment of certain fees; and the 27th of December was fixed for settlement of the sale proclamation. On the 27th of December (apparently in the presence of all parties) the sale proclamation was settled and directed to be issued; and the 20th February 1888 was the date fixed for the sale of the attached properties. On the 13th February the judgment-debtors put in certain objections. Some **[342]** of these objections were directed against the substitution of the Gisbornes upon the record as transferees of the decree; and other objections were against the execution of the decree by the Gisbornes. The 23rd February was fixed for the hearing of these objections; they were heard on the 23rd and subsequent days; and on the 13th July the Munsif made an order disallowing the Gisbornes' application for execution of the decree upon the ground that the transfer by the original judgment-creditors to the Gisbornes was not a *bond fide* transfer. Against that order the Gisbornes appealed to the District Judge, and the District Judge held that no appeal lay to him. The Gisbornes preferred a second appeal to the High Court, and that Court held that an appeal did lie to the District Judge, and directed him to hear the case on the merits. The District Judge accordingly heard the appeal on the merits, and found that, as a matter of fact, the transfer of the decree was a *bonâ fide* transfer.

From this decision the judgment-debtors appealed. The only material ground of appeal was that the assignees having, on their own allegation, purchased only a portion of the decree, the Court below should have held that they had no right to be substituted in the place of the decree-holders, and had no right to apply for execution of the decree.

Baboo *Boiddonath Dutt* for the Appellants.

Mr. *R. E. Twidale* and Baboo *Umakali Mookerjee* for the Respondents.

The case of *Seetaput Roy* v. *Ali Hossein* (24 W. R., 11) was referred to for the appellants.

The **judgment** of the Court (NORRIS and MACPHERSON, JJ.) was as follows. (After stating the facts as above, their Lordships proceeded):

In second appeal before us two points have been urged, first, that there can be no transfer of a portion of a decree, and that the transferee of a portion of a decree is not in a position to carry on the execution-proceedings. In support of this contention we are referred to the case of *Seetaput Roy* v. *Ali Hossein* (24 W. R., 11), where Mr. Justice MITTER says at page 12 of the report: "It is doubtful whether under s. 208, Act VIII of 1859," which is the section **[343]** corresponding to s. 232 of the present Code, "they could be so added upon the record as co-decree-holders: s. 208 refers to the assignment of a whole decree not of a portion of a decree. Therefore, as I have already observed, it is doubtful whether the Court had power to place the present special appellants as co-decree-holders on the record. But be that as it may, we think that there has been no proper application for executing the decree as far as the mesne profits are concerned." We are of opinion that there exists no legislative prohibition against the transfer of a portion of a decree, and that, if that is so, there can be no

objection whatever to the transferee of a portion of a decree carrying on execution-proceedings, provided of course that the whole decree is executed, and that in the execution proceedings, if any interest in the decree is left in the original judgment-creditors, their interests are provided for. No doubt, either upon an application for the substitution of the alleged transferee upon the record, or upon the application by such transferee to be allowed to execute the decree, the judgment-debtors have a right to be heard, and they have a right to urge the existence of any equities subsisting between themselves and the judgment-creditors; and if the Court sees that allowing the transferee of a decree to execute it would place the judgment-debtors in a disadvantageous position, or would deprive them of any equities which exist between themselves and the judgment-creditors, such Court ought not to allow the transferee to execute the decree. But always supposing that the rights of all parties are cared for, there seems to us no objection to allowing execution of the decree.

The second point urged by the learned Vakil for the appellant is upon a question of fact. He contends that the District Judge has not disposed of the question whether the transfer was, as a matter of fact, a *bonâ fide* one. We think, however, as I have already said, that the judgment of the District Judge upon this point shows that he has considered the whole evidence, and the conclusion to which he has come is that the transfer was, as a matter of fact, a *bonâ fide* one. There are no materials before us upon which we can interfere with this decision upon a question of fact. Both points raised in this appeal therefore fail. The appeal must therefore be dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[*See also* (1896) 19 Mad., 306; (1888) 10 All., 570; (1904) 28 Mad., 64, and the alterations made in the C.P.C., 1908, O. 21, R., 16.]

---

[344] ORIGINAL CIVIL.

The 20th December, 1889.

PRESENT:

MR. JUSTICE WILSON.

Khadijah Khanum

versus

Abdool Kurreem Sheraji.

Evidence Act (I of 1872), s. 155 (3)—Evidence in reply impeaching the credit of a witness.

In a suit by one *K*, claiming (*inter alia*) a share in a business as heiress of *A* her father, the defendant pleading limitation, *K*, before the close of her case, put in evidence an entry in a Koran to show that she was born in 1279, and in the cross-examination of *M*, a witness for the defence, put to him a letter purporting to have been written by *A* to *M*, supporting *K*'s case. Upon *M* denying the genuineness of the Koran, and of certain words in the letter, it was proposed on behalf of *K* to give evidence in reply showing that *M* had made statements to an attorney before the case inconsistent with his evidence, both as to the Koran and the letter.

Held, that evidence might be given in reply as regards the Koran but not as regards the letter; no substantive evidence having been given as to the latter before the close of the plaintiff's case.

Semble:—The expression which is liable to be contradicted in s. 155 (3) of the Evidence Act is equivalent to "which is relevant to the issue."

ONE Aga Mirza, who was possessed (amongst other property) of a business carried on in a house called the *kôtee*, retired in his old age after having transferred the business to his eldest son, Abdool Kurreem, but survived the transfer many years; and sometimes managed the business on behalf of Abdool Kurreem during the latter's absence. A few days before his death, Aga Mirza made a will by which he gave (amongst other legacies) one of Rs. 25,000 in favour of his daughter Khadijah Khanum, the plaintiff in this suit. The will purported to deal with a sum of Rs. 1,22,840, being the residue of his property of the transfer already referred to and confirmed the said transfer.

Khadijah Khanum brought the present suit alleging that the transfer was a *benami* transaction and claimed (*inter alia*) a share in the business as an heiress of Aga Mirza under the Mahomedan Law. The claim of the plaintiff was opposed on various grounds, one of the most important being that it was barred by limitation, and the question of limitation again depended upon whether the plaintiff was born on the 4th of [345] Ramzaan Hijree 1279 (23rd February 1863 A. D.), or on the 5th of Mohurrum 1275 (15th August 1858 A.D.), as alleged by Abdool Kurreem.

In the course of the plaintiff's case she put in evidence an entry in a Koran purporting to have been made by Aga Mirza, in which there was a statement that the plaintiff was born in the year 1279.

After the plaintiff's case had been closed, and in the course of the cross-examination of the witnesses for the defence, a letter (marked P. P.) was produced by the plaintiff purporting to have been written by Aga Mirza to one Mahmood, a friend of Aga's, announcing to him that Aga's wife was with child. From the date of the letter, the child referred to must have been the plaintiff, as the case of both the parties was that the plaintiff was the youngest child of her father.

The letter was put to Abdool Kurreem who at first admitted that the whole of it was in the handwriting of Aga, but later on he said that the part referring to Aga's wife being with child was an interpolation.

In the course of the plaintiff's cross-examination of Mahmood, to whom the letter was supposed to have been written, and who denied that the part in question was in the handwriting of Aga Mirza, and who also denied that the entry in the Koran was genuine, Mr. *Bonnerjee* on behalf of the plaintiff proposed to give evidence that Mahmood had made statements to an attorney (who reduced them into writing), with regard both to the entry in the Koran and the letter from Aga Mirza to himself, inconsistent with those now made by him in the witness-box. The question, therefore, was how far the plaintiff, having then closed her case, was entitled to give rebutting evidence or evidence in reply in order to impeach Mahmood's credit as a witness.

Mr. *Bonnerjee* contended that, under s. 155 (3) of the Evidence Act, he was entitled to do so. That section should be read with s. 153.

The expression, "which is liable to be contradicted," is equivalent to "or which is relevant to the issue," *i. e.*, which goes to the merits of the case, and not merely shakes the credit of the witness. [WILSON, J.—The entry in the Koran is on a different footing. [346] The plaintiff gave substantive evidence on the point, but as to the letter no substantive evidence has been given. The

letter was only produced in the course of the cross-examination of the defendant's witnesses.] There is evidence to shew that Aga Mirza wrote those words, and I wish to shew that Mahmood's evidence is valueless. [WILSON, J.—You wish to give evidence to shew that the witness made a contradictory statement formerly with regard to the genuineness of the entry in the Koran, and the existence in the letter of the words in question.]

Mr. *Bonnerjee.* - Yes.

The Advocate-General (Sir *G. C. Paul*).—No rebutting evidence can be given after the close of the plaintiff's case. The words "liable to be contradicted" should be interpreted with reference to the position of the party at the time when he tenders the evidence, and if at that time he has already closed his case, it is then too late for him to contradict it, and therefore the evidence sought to be contradicted is not liable to be contradicted within the meaning of the section. [He referred to Taylor on Evidence, 8th Ed., s. 385.]

Mr. *Bonnerjee* in reply.

Wilson, J. (after rising to consult his colleagues) delivered the following **judgment**:—

I am inclined to think that in s. 155 (3) of the Evidence Act the words, "which is liable to be contradicted," mean "which is relevant to the issue." That being so I think the safer course is to admit the evidence tendered so far as regards the Koran, for as to that book the plaintiff has given substantive evidence to shew that the writing in it is that of Aga Mirza. The witness now to be contradicted has said it is not, and if his evidence can be impeached by showing that he has formerly made a statement inconsistent with his present one, there remains some evidence for the plaintiff relative to the issue.

But as to the letter P. P., that stands on a different footing. On this point the plaintiff has given no evidence, but has relied on what might be brought out from the defendant's witnesses, and they all say that the particular passage in question is not in Aga Mirza's handwriting, and the witness to be contradicted says **[347]** the same thing. If I am to allow him to be contradicted as proposed, this would be allowing the plaintiff, in reply, to give evidence which she might have given before she closed her case, or else it would be merely impeaching his credit, and this is immaterial, as even if he is impeached, there is no evidence on the plaintiff's side. I think, therefore, that this evidence cannot be admitted.

Attorneys for Plaintiff: Messrs. *Morgan & Co.*

Attorneys for Defendant: Baboo *Mooraly Dhur Sen* and Baboo *G. C. Chunder.*

A. A. C.

[17 Cal. 347]

PRIVY COUNCIL.

The 18th and 20th July, 1889.

PRESENT:

LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. COUCH.

Mungniram Marwari and another...........Defendants

versus

Gursahai Nand...........Plaintiff.

Liakut Hossein...........Defendant

versus

Gursahai Nand... ....Plaintiff.

[On appeal from the High Court at Calcutta.]

Act XL of 1858, s. 3—Order granting certificate to act as guardian of minor—Obtaining a certificate—Majority Act (IX of 1875).

When a Court, to which application has been made under s. 3 of Act XL of 1858 for a certificate, has adjudged the applicant entitled to have one, he then substantially obtains it; although it may not be drawn up or issued at the time. Having obtained such an order, he has in substance complied with the terms of the Act; in the same way as, when a plaintiff has judgment that he shall have a decree in his suit, it may be said that he has then obtained his decree. Therefore, where a minor had been represented in a suit by a person who had obtained an order for a certificate under s. 3, but had not had it issued to him, the absence of a certificate was held to be not such an irregularty as entitled the minor, on coming of age, to have the proceedings set aside on the ground that he had not been properly represented.

TWO appeals from two decrees (22nd February 1886) (*Sahai Nand* v. *Mungniram Marwari* (I. L. R., 12 Cal., 542) of the High Court, reversing two decrees (31st March 1884) of the Subordinate Judge of Bhagulpore.

The present respondent brought two suits severally against each of the present appellants, in respect of separate parts of an [348] estate which had been sold in execution of a decree obtained against the plaintiff, now respondent, during his minority. The plaintiff's ground of suit in each case was that in the suit so brought against him when a minor, which had resulted in the sale of the several portions of the estate now sought to be recovered, he had not been represented by a properly-constituted guardian. He also alleged that the lands sold were debutter, or devoted to religious purposes, and were not liable to be attached in satisfaction of the decree against him.

The Subordinate Judge found that the suits had not been brought in due time, and dismissed both on the ground of limitation. On appeals preferred by the plaintiff to the High Court both decrees were affirmed by the first judgment of the Court. But afterwards reviews having been admitted, both the original decrees were reversed by another Division Bench.

Hence these appeals, in both of which the principal question was whether or not the proceedings, which resulted in the sale complained of, were wholly ineffectual, on the ground of the defendant in the primary suit having been a minor unrepresented by a properly-constituted guardian. The appeals were not consolidated by any order, but both raising the same point were heard together.

The lands, attached in execution of the decree in the primary suit, originally belonged to the Mohunts, whom Gursahai Nand, the plaintiff in this suit, had succeeded. This property was said to have been granted to them in the last century, as "Sheottur," meaning, acccording to the evidence, what is granted to Sunniyassi Fakirs.

On the 22nd February 1873, the plaintiff's predecessor Hurri Pershad, described as Mohunt and proprietor of Math Bela Sheottur, mortgaged Mouzas Bela and Bichawan, with other land, to the first appellant Mungniram Marwari, as security for a loan of Rs. 4,000, and afterwards in March 1875 created a further charge upon it, as security for a further loan of Rs. 500 from the same lender. On the 28th September 1875, Hurri Pershad, by an instrument of that date, appointed Gursahai Nand to be his successor as Mohunt, and to take all his properties including these two mouzas.

[349] On the 24th November 1875, Gossain Jitlal Nand petitioned the District Court, stating that Hurri Pershad had died, to grant him a certificate of guardianship of Gursahai, who was a minor, under Act XL of 1858. The order for a certificate was made on that date, but no certificate was ever issued.

On the 24th March 1876, Mungniram Marwari instituted a suit, called the primary suit in this appeal, to enforce his mortgages, describing Gursahai Nand as a minor, also as "heir and disciple of Hurri Pershad deceased under the guardianship of his uncle Jitlal Nand;" and on the latter summons was served; but he did not appear to defend.

On the 16th January 1877, an *ex parte* decree was made in favour of Mungniram, ordering the sale of the property mortgaged. Under this, at a judicial sale, Mungniram himself purchased Mouza Bela; and Syed Liakut Hossein, the defendant in the other suit, purchased Mouza Bichwa.

On the 18th August 1882, Gursahai brought the two suits out of which this appeal arose. In one he sued Mungniram Marwari in respect of Mouza Bela and in the other he sued Syed Liakut Hossein in respect of Mouza Bichwa. The case made out by his plaints was that he, as heir and successor to Hurri Pershad, was entitled to hold the property in dispute as debutter, or property dedicated to sacred and charitable purposes; that it could not have been lawfully seized in execution of a decree against Hurri Pershad upon the bonds of 1873 and 1875; and that the decree of 16th January 1877, obtained against himself, was invalid and ineffectual, inasmuch as he was not properly represented by any guardian in that suit.

The defendants by their written statements denied that the property in dispute was debutter, and asserted that it was property which Hurri Pershad could have disposed of at pleasure, and which was liable to be taken in execution for his debts. They alleged that the plaintiff was properly represented by Jittal Nand as his guardian in the primary suit; also that he was twenty-five years of age, and not twenty-one as he stated, and that his suit, being in effect to set aside a decree made against him when a minor, was barred by limitation.

The suits having been dismissed by the Subordinate Judge **[350]** upon this last ground of defence, and the plaintiff having appealed in both, the only point with which the High Court (TOTTENHAM and AGNEW, JJ.) dealt was whether the plaintiff had been properly represented in the primary suit. After quoting s. 3 of Act XL of 1858, they proceeded thus:—

"It has been frequently decided that a person who claims to have charge of property in trust for a minor, cannot act for him in a suit unless he has been appointed guardian *ad litem* under the provisions of the Civil Procedure Code, or holds a certificate under Act XL of 1858, except where the property is small and the person claiming to act is a relative, when the

Court may grant permission. In all the cases to which we have referred, with the exception of *Aukhal Chunder* v. *Tripoora Soonduree* (22 W. R., 525) and *Chunee Mul Johary* v. *Brojo Nath Roy Chowdhry* (I. L. R., 8 Cal., 967) the person who claimed to act had not taken any steps to obtain a certificate or to be appointed guardian *ad litem*. In the first of these cases, the fact that the formal order granting permission to a relative to act, had not been drawn up, was held not to be a sufficient ground for dismissing a suit on appeal, when the minor had obtained a decree in the lower Court. In the second case it was held, that the making of an order appointing a guardian under Act XL of 1858, and not the subsequent taking out of the certificate, is that by which a guardian of the person or property of a minor is appointed within the meaning of s. 3 of the Majority Act. There is not, so far as we are aware, any authority for holding that a person who has applied for a certificate of guardianship under Act XL of 1858, and who has been appointed guardian by the Court, can, as of right, sue or defend on behalf of the minor without taking out a certificate. But the absence of a certificate is not, we think, such an irregularity as to entitle the minor, on coming of age, to have the proceedings set aside on the ground that he was not properly represented. The appointment of a guardian is a matter of procedure, *Puyikuth Ithayi Umah* v. *Khairhirapokil Mamod* (I. L. R., 3 Mad., 248), and if in reality the minor was represented with the approval of the Court throughout the proceedings by a fit and proper person, it would be a great hardship to allow a defect in procedure of a purely formal character to vitiate the whole of the proceedings, possibly after many years had elapsed. In this case we think that the circumstances are such as to preclude the defendant from obtaining relief on the ground that he was not properly represented, because Jitlal had not taken out the formal certificate of guardianship, to which he was entitled by the order of Court. It appears that before the order for the certificate was made, Jitlal had acted for the plaintiff as his guardian. He applied to the proper Court for a certificate, and his application was only granted after opposition, and he acted for the plaintiff not only in Mungniram's suit, but in suits by other creditors, and in proceedings taken by certain chelas to establish title to the [381] office of Mohunt. The plaintiff, after he attained majority, presented a petition in the Court of the Subordinate Judge, in which he stated that Jitlal had obtained a certificate of guardianship under Act XL 1858, and had been managing his estate, and, on the 6th of July 1881, he was examined as a witness, and stated that Jitlal had been his guardian and used to do all his business. It is too late now for the plaintiff to come forward and ask for relief upon the ground that Jitlal was not his guardian. He has ratified Jitlal's acts in other respects, and must be bound by them in the present matter.

The Judges accordingly dismissed both appeals with costs.

This judgment was, on review, reversed by another Bench (TOTTENHAM and NORRIS, JJ.) (*Sahai Nand* v. *Mungniram Marwari*, I. L. R., 12 Cal., 542), who, seeing that a certificate under Act XL of 1858 was one of the documents mentioned in schedule II of the Court Fees Act VII of 1870, held that such a certificate "cannot actually come into existence until the person, who has the permission of the Court to obtain it, deposits the requisite amount of stamp duty." Without the certificate Jitlal Nand, in their opinion, had no authority to appear in the proceedings. They set aside the judgment of the Subordinate Judge in both suits; whereupon the plaintiff appealed to Her Majesty in Council.

On these appeals,

Mr. *R. V. Doyne*, for the Appellant Mungniram, argued that the respondent, the defendant in the primary suit, had been properly represented by Jitlal Nand as his guardian, and that the proceedings in that suit had rendered effectual the sale in execution of decree. Mouza Bela having been sold at that sale to the appellant, he had become the *bona fide* purchaser. If the respondent was a minor when the primary suit was brought, Jitlal Nand was his guardian, having obtained a judgment and order of the District

Court that the certificate under Act XL of 1858, s. 3, should issue to him. Although Jitlal Nand had not obtained the formal certificate, that was not now ground for invalidating the decree obtained against Gursahai Nand, as represented by the former his guardian, on the 16th January 1877, ordering the sale of the property. Also, there had been a correct finding by the Subordinate Judge that Gursahai was more than 18 years old at the death of Hurri Pershad, which [352] occurred in 1875, so that the present suits, which were in effect to set aside a decree made against him during minority, were not brought in due time, not having been brought till August 1882. Although by the Majority Act, IX of 1875, a minor, of whom a guardian had been appointed, attained his majority at the age of twenty-one years, and not before, the suits were barred under s. 7 of Act XV of 1877, the Limitation Act, and the 12th and 13th Articles of Schedule II. The first judgment of the High Court, correct throughout, had found that the respondent, after attaining full age, had accepted and ratified the acts of Jitlal done in the capacity of guardian.

Reference was made to *Stephen* v. *Stephen* (I. L. R., 8 Cal., 714; on appeal, I. L. R. 9 Cal. 901), *Chunee Mul Johary* v. *Brojonath Roy Chowdhry* (I. L. R., 8 Cal., 967), *Hari Saran Moitra* v. *Bhubaneswari Debi* (I. L. R., 16 Cal., 40; L. R, 15 I. A., 195).

Mr. *C.W. Arathoon*, for the Appellant Syed Liakut Hossein, argued that the first judgment of the High Court, affirming that of the Subordinate Judge, was correct. The minor had been properly represented in the suit against him in 1877. It was also too late for him to have the sale set aside on the ground that Jitlal Nand was not his guardian. The judgment of the High Court upon the review was erroneous, for the mere fact that the certificate which had been duly ordered had not been taken out, did not leave Jitlal Nand without authority to represent the minor. He referred to *Girishchunder Chowdhry* v. *Abdul Selim* (I. L. R, 14 Cal., 55) approving the ruling in *Chunee Mul Johary* v. *Brojonath Roy Chowdhry* (I. L. R., 8 Cal., 967).

Mr. *J. D. Mayne* and Mr. *W. H. Rattigan*, for the Respondent, argued that he not having been represented by a duly authorized guardian in the primary suit, the decree of 16th January 1877 and the sale in execution of it were inoperative against him.

[Sir B. PEACOCK inquired if the certificate was anything more than the statement or record of what the Judge had already ordered.]

[353] The certificate had not been issued, and no form of it was on the record; but it was submitted that the actual production of a document was necessary. There was no necessity for the respondent to sue to set the decree of 1877 aside. He was entitled to treat it as if it had not been made, not having been duly represented by a guardian to whom a certificate under Act XL of 1858 had been issued.

Reference was made to Civil Procedure Code, s. 443; Act XL of 1858, s. 3; The Bombay Minors Act XX of 1864; Act VII of 1870, Schedule I, Article 10. [Sir B. PEACOCK observed that the Court Fees Act of 1870, having been later in date, could not be of any use in construing Act XL of 1858.]

Though the order granting a certificate might be sufficient to constitue a guardian for other purposes, yet he could not sue or be sued, with effect binding upon the minor, without having had a formal certificate issued to him. *Stephen* v. *Stephen* (I. L. R., 8 Cal., 714; on appeal, I. L. R., 9 Cal., 901) was not applicable.

Doorgapersad v. *Keshopersad Singh* (L. R., 9 I. A., 27; I. L. R., 8 Cal., 656), *Durga Churn Shaha* v. *Nilmoney Doss* (I. L. R., 10 Cal., 134), *Vishnu Keshav* v. *Ramachandra Bhaskar* (I. L. R., 11 Bom., 131), *Vasudev Vashnu* v.

Narayan Jaganath (9 Bom. H. C., 289), *Jatha Naik* v. *Venkatapa* (I. L. R., 5 Bom., 14), *Mrinamoyi Dabia* v. *Jogodishuri Debia* (I. L. R., 5 Cal., 450), *Gregory* v. *Molesworth* (3 Atkyns, 626), *Hoghton* v. *Fiddey* (L. R., 18 Eq., 573) were referred to.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on July 20th by

Sir R. Couch.—In this case the plaintiff, the present Mohunt of a Muth called Bela Sheottur, seeks to obtain possession of certain properties, and for a declaration that the decree and auction sale under which the defendants in the two suits became the purchasers of the properties are not binding upon him, as he was a minor, and was not properly represented in the suit in which the decree was obtained. He is the successor in the [354] Mohuntship of one Hurri Pershad Nand, who, in the years 1873 and 1875, borrowed money of the defendant in one of the suits, Mungniram Marwari, and executed mortgages of the properties which are now claimed by the plaintiff. Hurri Pershad, on the 28th September 1875, appointed the plaintiff to be his successor (the terms of the appointment will be referred to), and died on the following day. On the 24th of November 1872 Jitlal Nand, the brother of Hurri Pershad, applied to the District Judge of Bhagulpore for a certificate of guardianship of the person and property of the plaintiff under Act XL of 1858, and on the 19th of February 1876 the application was allowed, after opposition on the part of one Somar Nand. The terms of the application and of the allowance are these: The application stated that Hurri Pershad had in his life-time given the guddi of Mohuntship to Mohunt Gursahai Nand, the present plaintiff, his youngest disciple, of about 13 years of age; and, after stating the vesting in possession of the Muth and other properties, it said that it was necessary, in order to take care of the person of the minor and to look after all the cases and manage the properties, that the petitioner, that is, Jitlal Nand, should obtain a certificate under Act XL of 1858; and it prayed for a certificate. The order of the District Judge, after stating the application, and that it had been objected to by a disciple, a chela, who claimed to have succeeded Hurri Pershad, and that the certificate of guardianship would be only as regards the personal property of the minor, "whatever that property may be at present," said "Order: application allowed."

On the 7th November 1876 Mungniram, the defendant in one of the suits, instituted a suit on his mortgage bonds against the plaintiff, and in the plaint he described the present plaintiff as "minor, disciple and heir of Mohunt Hurri Pershad Nand, deceased, under the guardianship of his uncle Jitlal Nand." In this suit a summons was served on Jitlal Nand personally, but he did not appear, and made no defence to the suit; and, on the 16th January 1877, Mungniram obtained an *ex parte* decree declaring his lien upon the mortgaged property and directing it be sold. In execution of that decree Mungniram caused the property to be attached, and it was put up for sale by auction; and Mungniram became the purchaser of Bela Sheottur, part of the property taken [355] in execution, and the defendant in the other suit, Liakut Hossein, purchased Mouza Bichwa, the other part.

On the 18th August 1882, the plaintiff instituted the present suits, alleging that he attained his majority in January 1880. The first question to be considered is whether he was properly represented in the suit by Mungniram by his guardian Jitlal; and that depends on the construction of Act XL of 1858. That Act in the third section says:—"Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a

certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." The question is, what is the meaning of the words "until he shall have obtained such certificate?" Although the order was made allowing the application for the certificate, no formal certificate appears to have ever been prepared by the officer of the Court, and issued to Jitlal Nand. The Subordinate Judge found that although Jitlal Nand did not take out the certificate, he was the constituted guardian of the plaintiff, but that he did not properly look after the interests of the plaintiff, and did not defend the suit. On that account he held that the decree in the suit was not binding upon the plaintiff, but he thought that the suit was barred by the law of limitation, and decided the case upon that ground.

Then it came by appeal to the High Court. That Court, after noticing some cases which had been quoted, said: "There is not, so far as we are aware, any authority for holding that a person who has applied for a certificate of guardianship under Act XL of 1858, and who has been appointed guardian by the Court, can, as of right, sue or defend on behalf of the minor without taking out a certificate;" and they went on to state what is material as showing the nature of the case, that Jitlal Nand had acted for the plaintiff, not only in this suit by Mungniram, but that he acted in suits by other creditors, and in proceedings taken by certain of the chelas to establish title to the office of the Mohunt and further, that after the plaintiff attained his majority, he presented a petition to the Court of the Subordinate Judge, in which [356] he stated that Jitlal had obtained a certificate of guardianship under the Act, "and had been managing his estate; and on the 6th of July 1881 he (the plaintiff) was examined as a witness, and stated that Jitlal had been his guardian, and used to do all his business." So that it appears that Jitlal had, at all events, although the certificate had not been issued, acted as the guardian of the plaintiff. The High Court then decided against the plaintiff, dismissing the appeal with costs. However, they entertained a petition for review, and, upon that petition, came to the conclusion that they had not put the right construction upon the Act. The ground of this conclusion appears to be that the Court Fees Act, which was passed in 1870, contains this provision: "Except in the Courts hereinbefore mentioned no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules;" and they considered, as they say, that the certificate could not actually come into existence "until the person, who has the permission of the Court to obtain it, deposits the requisite amount of stamp duty." They reversed their previous judgment, and held that the plaintiff ought to have a decree for possession and for mesne profits, on the ground that he had not been properly represented by Jitlal in the suit.

Now the words are "until he shall have obtained such certificate." The section provides that the person who claims a right to have charge of the property may apply to the Civil Court for a certificate. The Court is to exercise a discretion, or at least is to inquire whether the person making the application is entitled to have the certificate. Their Lordships are of opinion that when the Court makes that inquiry, and comes to a decision that the application should be allowed, that is doing all that is substantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate. All is done at that time which is necessary to show that he is the person who should have the

certificate. He then, by getting that order, substantially obtains the certi- [357] ficate, although the officer of the Court, whose duty it would be to draw up the certificate, and prepare it for the signature of the Judge, or the seal of the Court to be attached to it, may not do that for sometime afterwards, on account of the course of business, or the party not applying to him for it. When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time; and so would the certificate in this case relate back; and the terms of the Act that he shall have obtained such certificate are complied with.

The High Court give as a reason, as has been stated, that the Court Fees Act, which was passed twelve years after the Act of 1858, shows that obtaining the certificate is not complete until the fee is paid, and the certificate is actually issued. The answer to this is that it must be seen what was the intention of the Legislature when the Act of 1858 was passed, and when there was apparently no such provision as this in existence requiring the Court-fee to be paid before the certificate was issued. If the meaning of the Act in 1858 was that the obtaining the certificate was complied with by obtaining the order, any subsequent provision in the Court Fees Act could not make any difference in the intention of the Legislature. Their Lordships have to see what the intention was, and what was meant by these words when the Act was passed in 1858. Therefore they have come to the conclusion that the Act was sufficiently complied with by Jital obtaining the order from the Judge, although the certificate was never actually afterwards drawn up. What means there might be under the Court Fees Act to oblige the person who had obtained such an order to take out the certificate it is not necessary now to consider. Probably, if there is not power now to oblige the fee to be paid, it would be for the Legislature to make a provision for it.

The plaintiff being thus properly represented in the suit, the other question which arises, and which has to be determined before considering any other matters or questions which arise in the case, is when did the plaintiff attain his majority? It is not disputed by his learned Counsel that the present suits are suits [358] in the nature of one to set aside a decree, and that such a suit must be brought, according to the law of limitation, within one year from the making of the decree, if the party at that time is of full age; but if he is a minor, then within one year of his attaining majority The plaint in this suit was filed on the 18th of August 1882, and the question is whether the plaintiff had attained his majority more than one year before that time. That depends upon the date of his birth; and the Subordinate Judge who had that question to try upon the second issue, finds this. He says: "With regard to the second issue the plaintiff states in the plaint that he was born in December 1861, and that he attained majority in January 1880, that is, when he completed his age of 18 years. On the other hand, the defendants contend that he was 25 when he brought the suits. The plaintiff was examined as a witness in another case on the 6th July 1881, when he had no idea of bringing these suits, and he then stated his age to be 24 years, and distinctly said that he was a minor up to 1879, that is, until he completed the age of 21. In the present case he has not ventured to come into the box and explain away his previous statement. He has sedulously kept himself out of Court, and though in the course of the trial the Court remarked that it would be satisfactory if the plaintiff himself was examined, his legal advisers have not thought proper to examine him." The statement which is referred to is a deposition

which he made on the 6th of July 1881 in some suit, the nature of which does not appear, and in that deposition there is this statement. "My name is Gursahai Nand, father's name Mohunt Huri Pershad, age 24 years." Mr. *Mayne* has urged upon their Lordships that the heading of a deposition of this kind is not of much importance; that the statement of the age by a witness is taken down in such a way that little weight ought to be attached to it. The answer to that seems to be that if the plaintiff made this statement without considering what his age was, or made it in a loose and informal manner, he might have come forward as a witness, or been produced as a witness by his legal advisers and explained it. He might have shown how it was that he came to allow his age to be put down at 24 years, when, according to his present case, he was some three or four years younger at that time, and would [359] be 19 or 20. The Subordinate Judge has properly attached considerable importance to that. He then goes on to say that he does not attach weight to the evidence which was given on the part of the plaintiff. Some of it, he says, and justly, is hearsay evidence, and he thinks that the evidence of the mother, and of the other persons who give any evidence on the subject, is not to be given credit to. The conclusion he came to was that the plaintiff was born in 1265 Fusli, and that he attained his majority when he completed 21 years of age, and more than a year before the suit was commenced. The difference between the 18 years and the 21 years has been adverted to in the course of the argument, and it has been said, and it may be with some justice, that the plaintiff may have supposed when he talked of majority that it was 18. This difference is explained by the operation of the Act of 1858; because when a minor is brought under the operation of that Act, which the plaintiff was by the certificate, the age of majority is altered from 18 to 21, and therefore it became necessary to show that the age of 21 years was attained.

Besides what the Subordinate Judge has referred to, some observations arise upon the evidence in this case with regard to the law of limitation. The hibanama throws some light upon the matter. That states: "I am Mohunt Gossain Hurri Pershad, inhabitant and proprietor of Mouza Muth Bela Sheottur, Pergunnah Bisthazari, lying within the jurisdiction of Station Sikundara, Sub-Division Jamui, Zillah Monghyr. Whereas life is uncertain, and out of old disciples no one is intelligent and clever enough to discharge and manage the zemindari, village, and court affairs, and the affairs relating to my guddi of Mohuntship, for this reason I, of my own free will and accord in health of body and in a sound state of mind, have out of my disciples appointed a new disciple by name Gursahai Nand, who is competent to manage the zemindari, village. and court affairs, as the holder of the estate to be left, and the guddi of Mohuntship, and successor to my dignity and possession, in order that after my decease he shall take possession of my guddi of Mohuntship, and succeed to my dignity and possession, the moveable and immoveable properties, and household furniture detailed below." Therefore according to the plaintiff's case we have Hurri Pershad saying that no one is [360] intelligent and clever enough out of his old disciples to discharge and manage the zemindari, and appointing a youth at that time only 13 years of age. It seems unlikely that Hurri Pershad, if the plaintiff was only of that age, would have used such language as this in the hibanama. He might do it if the plaintiff were just upon the point of attaining his majority of 18. Again, it is somewhat strange that Hurri Pershad, considering that he said not one of the old disciples was intelligent and clever enough to manage the zemindari, when he appointed a youth of 13, made no provision for the appointment of a guardian. There is no suggestion that the plaintiff was a minor. The terms of this hibanama appear to their Lordships not to be consistent with the case of the plaintiff,

although they may be consistent with the case of the defendants, that at that time the plaintiff was very nearly attaining the age of 18, when he would be of full age if no certificate of administration had beeen obtained, which it would not be necessary then to apply for.

Another fact against the plaintiff's case is this: that an application was made for the return of documents, which was presented by a pleader; and in that application the plaintiff is made to state, or states: it is made through his pleader, and we may use the expression "made to state." "I have attained my majority since 1880, and have been personally transacting my own affairs." Upon that application, after a report was made to the Judge by the Record-Keeper, an order was made that the documents should be returned on the petitioner having attained his majority. The pleader who was employed to present the petition was examined as a witness, and he appears to have done what was quite right: to have asked to see the petitioner, and saw him; he says that the plaintiff on that occasion told him that he had attained majority. It is suggested that the plaintiff had then in his mind the age of 18, but it is not to be supposed that the pleader, who, no doubt, was acquainted with the law, did not consider that the proper age to be attained was 21: and certainly a Judge, whose duty it was to see that the plaintff was entitled to have back the documents, would have to consider whether it was true or not that he had attained his majority. That supports the conclusion to which the Subordinate Judge came when he decided the issue against the [361] plaintiff, and there is certainly no reason for their Lordships thinking that this conclusion is wrong.

That being so, it is not necessary to consider the other question which was raised by Mr. Mayne, whether, as regards Mungniram, he being the plaintiff in the original suit, and being shown by the evidence to have known the whole state of the property, that it was "debuttur" property, and that Hurri Pershad had no right to mortgage it, and knowing also that the suit, which he brought to recover the money was undefended, and that Jitlal was grossly neglecting his duty in not defending it, and raising the question that the estate which had come to the plaintiff as the Mohunt, was not liable to satisfy Mungniram's debt, the decree obtained by Mungniram against the present plaintiff represented by Jitlal was not binding upon him by reason of the gross laches of Jitlal.

The result is that their Lordships will humbly advise Her Majesty that the decrees of the High Court made upon the review should be reversed, and both suits be dismissed with costs in the Subordinate Court and in the High Court, including the costs of the review. This conclusion was correctly arrived at by the Subordinate Judge and by the High Court upon the first hearing of the appeals, although not upon the same grounds as those upon which the judgment is now given. The appellants must respectively have their costs of these appeals.

Appeals allowed.

Solicitors for the Appellant, Mungniram Marwari:	Messrs. *Barrow and Rogers.*
Solicitor for the Appellant, Liakut Hossein:	Mr. *S. G. Stephens.*
Solicitors for the Respondent: Messrs.	*T. L. Wilson & Co.*

C. B.

NOTES.

[The question settled in this case does not arise under The Guardian and Wards Act, VIII of 1890 as under it no certificate is necessary and therefore the moment the order is made, the age of majority is extended.

See also (1906) 31 Bom., 80, (1895) 21 Bom, 400; (1905) 4 C. L. J., 112; (1901) 26 Bom., 109

As regards separate suit, see also (1895) 19 Bom., 571; (1901) 23 All., 459; (1907) 10 O.C., 321.

As regards the rule of interpretation, see also (1890) 15 Bom., 505.]

[362] PRIVY COUNCIL.

The 31st January, 1st February and 1st August, 1889.

PRESENT:

LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE AND LORD MACNAGHTEN.

Strang, Steel & Co, and others ....Defendants

versus

A. Scott & Co .... .Plaintiffs

[On appeal from the Court of the Recorder of Rangoon.]

Maritime law—Jettison—Right to general average contribution—Right of shippers of jettisoned cargo—Default of master—Right of shipowner—Remedies of shippers—Lien on cargo saved in consequence of jettison

In jettison of part of a general cargo the right of those entitled to contribution, and the corresponding obligations of the contributors originating in the actual presence of a common danger, not in the causes of it, are mutually perfected whenever the goods of some of the shippers (not being wrong doers, or those responsible for the latter) have been advisedly sacrificed, and the property of others has been thereby preserved Such exceptions as that recognized where the average loss has been occasioned by the ship's being unseaworthy [*Schloss* v *Heriot*, 14 C B (N S) 59] and as that made in the refusal of contribution to shippers of deck cargo when jettisoned are in truth but limitations on the above rule which have been introduced from equitable considerations Where a ship was stranded owing to the negligence of her master, and thereby ship and cargo were placed in a position of such danger as to make it necessary to jettison part of the cargo in order to save the remainder and the ship *Held*, that innocent owners of the jettisoned cargo were entitled to general average contribution, but that the owners of the ship were not entitled (their legal relations to the shippers not having been varied by contract) The rules of Maritime law as to the rights and remedies in a case of jettison are (1st) each owner of jettisoned goods becomes a creditor of the ship and cargo saved and (2nd) he has a direct claim against each of the owners of the ship and cargo, for a *pro rata* contribution towards his indemnity Contribution can be recovered by the owner of jettisoned goods either by direct suit, or by enforcing, through the ship master, who is his agent for this purpose a lien on each parcel of goods saved, belonging to each separate consignee, for a due proportion of his claim

APPEAL by special leave (29th December 1887) from a decree (15th August 1887) of the Recorder of Rangoon in favour of the respondents.

The respondents sued the appellants for Rs 1,592, money paid by the former to the latter, under protest, to obtain the delivery of goods *ex Abington* detained as subject to a lien, and for [363] Rs. 200 damages for the detention. The plaintiffs were the consignees of the goods, which had been shipped on board the steamship *Abington* from London to Rangoon with a general cargo. The defendants were the agents at Rangoon of the shipowners, and it was on their demand that this money had been paid to them under protest, they detaining the consignment, as being subject to a lien in respect of a probable average claim, on account of the jettison of other cargo from on board the *Abington*

when near the end of her voyage. The master was also joined as a defendant. The circumstances of the jettison are stated in their Lordships' judgment.

The finding of fact by the Recorder was that the jettison took place in imminent danger to the ship and cargo occasioned by the negligence of the master. The Recorder held that, as the danger was occasioned by this negligence, no claim for general average contribution could be enforced, and that consequently no right of lien had arisen. He was also of opinion that the defendants were not entitled to insist on having the assessment in their hands, so as for them to have control over it exclusively of the shippers. The claim was accordingly decreed.

On the present appeal,

Mr. *R. B. Finlay*, Q.C., and Mr. *J. Gorell Barnes*, Q.C., for the Appellants, contended that the respondents were liable to contribute in respect of the cargo jettisoned, and the expenditure incurred. Therefore the appellants had rightly demanded the money, having, as agents of the owners of the ship, a lien on the respondents' goods for the amount of general average contribution payable by them. Although the jettison of part of the cargo was a consequence of the ship's having grounded through the master's negligence in navigation, the respondents were not relieved from their liability to contribute. The appellants were entitled, and also were bound, to assert a lien in respect of the general average contribution, the respondents' liability not being dependent upon any of the causes of the ship's being in peril, but only on the fact that she was in peril, and that she, and the cargo, were saved as the result of the jettison. The negligence of the master or crew in the navigation did not deprive the owners of their right of lien on the cargo for general average contribution. [364] The owners were also exempted from liability in respect of the negligence of the master by the bills of lading, under which the respondents' goods were carried; and for this reason, as well as on the general principle, the negligence of the master did not deprive the owners of the ship of their right of lien on the cargo for sacrifices made for the common benefit. Moreover the agents of the shipowners were entitled to demand a deposit of five per cent. on the value of the goods and to refuse to release them unless the deposit should be made. It was the duty of the master to collect the general average contributions before parting with the goods, and in such case he acted not merely as agent for the shipowners, but also as agent for the shippers Whether the contribution was for the benefit of the ship or for the benefit of the shippers was immaterial, as in either case it was the master's duty to collect it. Reference was made to *Simonds* v. *White* (2 B. & C., 805, 811; 4 D. & R, 375), *Crooks* v. *Allan* (L. R., 5 Q. B D., 38, 41), *Schloss* v. *Heriot* [32 L. J., C. P., 211; 14 C. B (N.S.), 59; 8 L. J. (N. S.), 246; 11 W.R., 596], *Hallet* v. *Bousfield* (18 Ves. Jun., 187), *Dobson* v. *Wilson* (3 Camp., 480, 486), *Burton* v. *English* (L. R., 12 Q B. D., 218); *The cargo ex Laertes* (L.R., 12 P.D., 187); *The Glenfruin* (L R., 10 P.D., 103). Reference was also made to Lowndes on General Average, 4th Edn., 332; Abbott on Shipping, 12th Edn., 532; Parsons on the Law of Shipping; Vol. II, 4th Edn., 285. The claim rested on the general Maritime law and the equitable right to contribution; a right which followed upon the obligation to submit to the jettison.

Mr. *Bigham*, Q. C., and Mr. *J. D. Fitzgerald*, for the Respondents, argued that the judgment of the Court below was maintainable, on the ground that the stranding of the *Abington* had been occasioned by the negligence of the master. The right to general average contribution could not arise upon a jettison in that way rendered necessary; the master and owners being liable for the losses resulting from the master's wrongful acts or omissions. When the master

jettisoned cargo, under circumstances such as caused this jettison, he was the agent of the shipowners, and not of the shippers; the loss must fall upon the owners, and the ship-**[365]** pers were exempted from the consequences; the jettison not being such a one as gave rise to a general average contribution. If the shippers were called upon, the sacrifice would not be for the general benefit of all concerned, but for the benefit of the shipowners, to avert from them the consequences of the wrongful act of their servant the master. This would be contrary to the principle, which was an equitable one, in which contribution took its origin. Reference was made to Parsons on the Law of Shipping, Vol. I, Chap. IX; Abbott on Shipping, Part 6, p. 499, Edn. of 1-81. To show that if the jettison was a consequence of danger into which a ship had been brought by the master's negligence, the goods saved were under no liability in respect of the goods jettisoned Reference was made to Parsons on Marine Insurance, Vol. II, p. 285; Parsons on the Law of Shipping, Vol. I, p. 211, and a case cited in the latter: in a note on deck cargo jettisoned from Ware's State of Maine Admiralty Decisions, p. 326, *The Paragon*. The contract evidenced by the bill of lading and the exceptions in it, did not relate to the questions of general average. On the general questions raised in the appeal, they referred to *Crooks* v. *Allan* (L. R., 5 Q. B. D., 38, 41); *Wright* v. *Marwood* (L. R., 7 Q. B. D., 62) *The Norway* (Br. & Lush., 377) *Huth* v. *Lamport* (L. R., 16 Q. B. D., 442) *Ashmole* v. *Wainwright* (L. R., 2 Q. B. D., 837); *The Ettrick* (L. R. 6 P.D., 127, 135).

Mr. *J. Gorell Barnes, Q. C.*, replied.

On a subsequent day (August 1st) their Lordships' **judgment** was delivered by

Lord Watson. –The steamship *Abington*, on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th October 1886. On the day of her arrival in the port of Rangoon, the appellants, Strang, Steel & Co., local agents for the ship, intimated to the respondents, A. Scott & Co., and other consignees of the cargo then on board, that a deposit of one per cent. upon the value of their **[366]**goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were declined; and on the 25th October, six days after the arrival of the *Abington*, they paid the required deposit, amounting to Rs. 1,592-11, under protest, and obtained delivery of their goods.

The respondents, on the 27th October 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed, the respondents applied to the Court, under s. 492 of the Civil Code, for an injunction to restrain the appellants, Strang Steel & Co., from remitting to England, or removing from the jurisdiction of the Court, the deposit paid to them on the 25th October. These appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the Court, without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th February 1887, the respondents were allowed to add to their original ground of action an allegation, to the effect that they were not liable

to contribute for general average on account of either ship or cargo, because the grounding of the *Abington* and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the Recorder, who ultimately, on the 15th August 1887, gave the respondents a decree for Rs. 1,592-11, and for Rs. 200. in name of damages, with costs of suit. The learned Judge found, as a matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as a matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision **[367]** upon that ground, the learned Judge indicated that, in his opinion, the respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the appellants.

In the course of the argument upon this appeal, three separate points were raised and fully discussed. The appellants argued: (1) that innocent owners of cargo, sacrificed for the common good, are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault: (2) that inasmuch as the bills of lading for the cargo of the *Abington* specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution to plead the fault of the master; and (3) that the respondents did not, before the 25th October 1886, make a sufficient legal tender. The parties were not agreed to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the appellants that the *Abington* was stranded through the negligence of her master; and, on the other hand the respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the respondents made a legal tender depends upon the construction of the correspondence which passed between the parties in October 1886.

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider, first of all, the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each **[368]** of the owners of ship and cargo, for a *pro rata* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (3 Camp., 484) Lord TENTERDEN said: "If a shipper of goods, which are sacrificed for the salvation of the rest of the cargo, is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of

England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain *dicta* of Lord ELDON'S in *Hallett* v. *Bousfield* (18 Ves. Jun., 190). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord ELDON expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of Equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* (18 Ves. Jun., 190), that a master might not be restrained from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicants' claim for contribution in that case to have been well founded, he would have [369] had his remedy at law. In *Crooks* v. *Allan* (L. R., 5 Q. B. D., 38), Lord Justice (then Mr. Justice) LUSH held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed at page 42 of the report that "the right to detain for contribution is derived from the Civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of England."

The rule of contribution in cases of jettison has its origin in the Maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L., 14, Tit. 2), is: "*Si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*" The principle of the rule has been the frequent subject of judicial comment. Lord BRAMWELL, in *Wright* v. *Marwood* (L. R., 7 Q. B. D., 67), said that, to judge from the way in which contribution is claimed in England, "it would seem to arise from an implied contract *inter se* to contribute by those interested." The present Master of the Rolls, in *Burton* v. *English* (L. R., 12 Q. B. D., 220), disputed that view, and stated his opinion to be that the right to contribution "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that [370] upon which claims of recompense for salvage-services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these

rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice:—

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (14 C. B. (N. S.), 59) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by ERLE, C.J., and WILLES and KEATING, JJ.

The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of Maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances, to the safe navigation of the vessel; and their jettison is therefore regarded [371] in a question with the other shippers of cargo, as a justifiable riddance of encumbrances which ought never to have been there, and not as a sacrifice for the common safety But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed £30,000, and that there is a small claim on account of the ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods for the sake of others in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognized in *Schloss* v. *Heriot* (14 C. B. (N. S.), 59) are in truth limitations on the rule, which have been introduced, from equitable con-

siderations in the case of actual wrong-doers or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

[372] In support of the legal proposition which they induced the learned Recorder to accept, the respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping (Ed. 1881, p. 499). It is in these terms: "The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordships that, if Lord Tenterden had really meant to lay down the rule, that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which respondents placed their chief reliance was that of Mr. Parsons, who, in his Treatise on the Law of Insurance, Vol. II., p. 285, and also in his Law of Shipping, Vol. I, p. 211, states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrong-doing of the master." In both works the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of Maritime law; but their Lordships are constrained to say that, in their opinion, the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their Lordships are unable [373] to concur in the opinion expressed by the learned Recorder. The correspondence which passed before the deposit was paid appears to them to show that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their Lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the *Abington* contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondents' action,

with costs in the Court below. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Crump & Son.*

Solicitors for the Respondents: Messrs. *Badham & Gore.*

C. B.

NOTES.

[While in general, the claimant in default cannot recover, it is no answer to claim for contribution by a cargo-owner that the danger which necessitated the sacrifice was due to the inherent vice of the cargo, when there was no wrongful act on his part in shipping it:—*Greenshields* v. *Stephens* (1908) A. C., 431.

If the master neglect to take the necessary steps to enforce contribution and the goods-owner suffer by his negligence, the ship-owner is liable in an action by the goods-owner for the loss:—*Nobel's Co.* v. *Rea* (1897) 2 Com. Cas., 293.

As regards the jettison of deck-cargo see *Maclachlan* on *Merchant Shipping* (1911) V Edn. pp. 745 *et seq.*

See also *The Carron Park* (1890) 15 P.D., 203; *Milburn* v. *Jamaica Fruit Co.* (1900) 2 Q.B., 540; *Pacific Mail S. S. Co.* v. *New York*, 74 Fed. Rep., 564; *The Irrawaddy* (1897) 171 U. S., 187.]

[17 Cal. 373]

APPELLATE CIVIL.

The 20th August, 1889.

PRESENT:

MR. JUSTICE BANERJEE.

Kamini Dassee............Plaintiff

versus

Chandra Pode Mondle and others............Defendants.*

Hindu Law - Maintenance—Obligation of brothers to maintain widow of a brother who predeceased their father whose property they have inherited.

The principle that an heir succeeding to property taken it for the spiritual benefit of the late proprietor, and is, therefore under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal School. [374] It is immaterial whether the property so inherited is moveable or immoveable.

In each case it must be determined whether, having regard to the relationship, the means, and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principle of the Hindu law and to the usages and practice of the Hindu people, morally bound to maintain that party.

The above principle is applicable to the case of a widow claiming maintenance from her husband's brothers who had inherited her father-in-law's property, her own husband having predeceased his father.

Janki v. *Nandram* (I. L. R., 11 All., 194) followed.

Provided, therefore, that there is nothing to show that she was not a dependent member of her father-in-law's family, within the meaning of the rule of Hindu law enjoining a moral obligation on a person to maintain such members of his family, such a widow was entitled to maintenance.

IN this case the plaintiff, who was the widow of the brother of the defendants Nos. 1 and 2, sued them for arrears of maintenance for nine months from

* Appeal from Appellate Decree No. 540 of 1889. against the decree of F. F. Handley, Esq., Judge of Nuddea, dated the 4th of March 1889, modifying the decree of Baboo Sharat Chunder Paul, Munsif of Ranaghat, dated 30th of July 1888.

Joist 1294 to Magh 1294 (May 1887 to January 1888) at the rate of Rs. 3 per month ; and to set aside a compromise of a suit which she alleged had been fraudulently made on the 16th of August 1887, by the defendants Nos. 1 and 2 in collusion with defendant No. 3.

The plaint stated that the defendants Nos. 1 and 2 consented, in accordance with the dying instruction of their father, to pay the plaintiff Rs. 3 per month as maintenance, and that three months' allowance, or Rs. 9, being unpaid, a suit was brought by her against the defendants Nos. 1 and 2; that in that suit the defendant No. 3 acted as her manager, and defendant No. 4 as her pleader and the defendants Nos. 1 and 2, in collusion with the defendant No. 3, fraudulently and without the knowledge and consent of the plaintiff, filed a compromise to the effect that the plaintiff relinquished all her future claim to maintenance in consideration of receiving from the defendants Nos. 1 and 2 Rs. 30 in full satisfaction thereof. The present suit was consequently brought to set aside that compromise and for maintenance.

The defence was that the compromise was made with the knowledge and consent of the plaintiff and that she was bound thereby; and that the plaintiff was not entitled to maintenance as her husband admittedly died before his father.

[373] The Munsif found that the defendants Nos. 1 and 2 had inherited ancestral property, and, on the authority of *Savitribai* v. *Luxmibai* (I. L. R., 2 Bom., 573) and *Apaji Chintaman Devdhar* v. *Gangabai* (I. L. R., 2 Bom., 632), gave the plaintiff a decree for the maintenance claimed, ordering also that the compromise should be set aside as fraudulently made.

The Judge confirmed the Munsif's decree as to the setting aside of the compromise, but held that the defendants were not bound to maintain the plaintiff, as they had not inherited any ancestral immoveable property. As to the maintenance therefore he reversed the decision of the Munsif.

The plaintiff appealed to the High Court.

Baboo *Devendro Mohun Sen* for the Appellant.

Dr. *Troylokya Nath Mitter* for the Respondents.

The arguments are sufficiently stated in the **Judgment**:—

Banerjee. J.- This was a suit by a Hindu widow against her husband's brothers for maintenance and for setting aside a compromise on the ground of fraud. The plaintiff alleged in her plaint that, in accordance with the directions of her father-in-law, her husband's brothers defendants Nos. 1 and 2, agreed to give her maintenance at the rate of Rs 3 a month; that three months' maintenance having fallen in arrears the plaintiff brought a suit to recover the same, and defendant No. 3 was her agent to look after, and defendant No. 4 her pleader appointed to conduct, that case; that defendants Nos. 1 and 2, in collusion with defendant No. 3, caused a petition of compromise to be filed in that case on behalf of the plaintiff without her knowledge and consent; and that the plaintiff accordingly brought the present suit to recover maintenance for nine months and to set aside the compromise. The defence of defendants Nos. 1 and 2 (which is the only defence necessary to consider now) was to the effect that the compromise in question was not fraudulent, but had been duly entered into with the knowledge and consent of the plaintiff, and that she thereby consented to take Rs. 30 in full satisfaction of her claim for maintenance; and that the plaintiff compromised the former suit as she was not entitled to claim maintenance from defendants, her husband having died in his father's life-time.

[376] Upon these pleadings the parties went to trial substantially upon two issues : (1) whether the compromise was fraudulent and liable to be set aside ; and (2) whether the plaintiff can recover any maintenance, and, if so, at what rate.

The first Court found both the issues in favour of the plaintiff and gave her a decree. On appeal the lower Appellate Court, while affirming the finding of the first Court that the compromise was fraudulent, dismissed the suit on the ground that the plaintiff was not entitled to recover maintenance from defendants Nos. 1 and 2, as they had not inherited any immoveable property from their father.

In second appeal it is contended for the plaintiff that the defendants Nos. 1 and 2, having inherited their father's property, were legally bound to maintain the plaintiff whom their father was morally bound to maintain, and that the lower Appellate Court was wrong in holding that the obligation to maintain the plaintiff could arise only if the defendants inherited some immoveable property from their father. And certain *dicta* of Sir BARNES PEACOCK, C.J., and NORMAN, J., in the case of *Khettramani Dasi* v. *Kasi Nath Das* (2 B. L R., A. C., 15; 9 W. R., 413; 10 W. R., F. B., 89) and the decision of a Full Bench of the Allahabad High Court in the case of *Janki* v. *Nandram* (I. L. R, 11 All, 194) are relied upon in support of that contention.

In *Khettramani's case* (2 B. L. R, A. C., 15; 9 W. R., 413; 10 W. R., F.B., 89) Sir BARNES PEACOCK observes: "The obligation of an heir to provide, out of the estate which descends to him, maintenance for certain persons whom the ancestor was legally or morally bound to maintain, is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance." And the reason why what was only a moral obligation in the ancestor, becomes transformed into a legal obligation in the heir, is pointed out in the following passage in the same judgment: "The maintenance of a widow being a moral obligation on the late proprietor, the son who inherits takes the estate, not for his own benefit, but for the spiritual benefit of the late proprietor, and he ought to perform the obligation of maintaining the widow." NORMAN, J., in the same case, observes: "There is a large class of cases where, according to Hindu [377] law, an heir succeeding to property takes it subject to the duty of maintaining those whom the late proprietor was bound to support." And the case of *Janki* v. *Nandram* (I. L. R., 11 All., 194) is clearly in point.

The authorities referred to above clearly support the appellant's contention. But Dr. *Troylokya Nath Mitter*, for the respondents, argues in the *first* place that the proposition enunciated by the learned Judges in *Khettramani's case* (2 B. L R., A. C., 15; 9 W. R, 413; 10 W. R, F. B., 89) is merely an *obiter dictum* and is laid down in terms too broad and vague to admit of convenient practical application, and that the case of *Janki* v. *Nandram* (I. L. R., 11 All., 194) has reference to a different School of Hindu law; in the *second* place that, even if the appellant's view of the law be correct, there is a finding in the judgment of the lower Appellate Court which is sufficient for the disposal of the case; and, in the *third* place, that the evidence as to the value of the property inherited by defendants Nos. 1 and 2 is so meagre that no definite rate of maintenance can be fixed upon that evidence, and that any remand in this case to ascertain the amount of maintenance would, therefore, be practically useless. These objections no doubt require consideration, and I shall examine them separately.

As to the *first* objection: no doubt the remark of the learned Judges in *Khettramani's case* (2 B. L. R., A. C., 15; 9 W. R, 413; 10 W. R., F. B., 89) is an *obiter dictum*; but the proposition laid down has ample basis in the Hindu law, especially of the Bengal School which governs this case.—See Dayabhaga, Chap. XI, s. VI, para. 13. It is quite true that in the practical application of the principle embodied in the *dictum* to any particular case it

will have to be determined whether the party claiming maintenance from the heir is one whom the late proprietor was morally bound to maintain; and that it is difficult to lay down any general rule for the determination of this last-mentioned point. But that alone would be no reason for not accepting the principle in any case. In *Janki* v. *Nandram* (I. L. R., 11 All., 194) the Allahabad High Court held the principle applicable to the case of a widow claiming maintenance from her husband's brother who had inherited her father-in-law's property. That decision is based not upon any doctrine peculiar to the Mitakshara law but **[378]** upon the doctrine of spiritual benefit which is fully recognised in Bengal. Having regard to that principle of the Hindu law and to the usages of the Hindu people, I see no reason to dissent from the decision of the Allahabad High Court. Each particular case, no doubt, has to be determined upon its own merits: in each case it will have to be determined whether, having regard to the relationship, the means and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principles of Hindu law and to the usages and practice of the Hindu people, morally bound to maintain that party." It is not necessary for me to lay down any general rule on the point in this case. All that I am called upon to decide is whether the plaintiff in this case is a person whom, having regard to the circumstances of this case, her late father-in-law was morally bound to maintain.

Now that point does not appear to have been seriously contested in this case. It is true that the issue raised upon the point, namely, the second issue in this case, "whether the plaintiff is entitled to any maintenance, and, if so, at what rate," is very general in its terms; but the objection that was really raised before the lower Appellate Court was that the plaintiff was not entitled to maintenance, being only a deceased brother's widow, and there being no ancestral immoveable property in the hands of the surviving brothers; and the lower Appellate Court has allowed that objection holding that defendants were not shown to have inherited any immoveable property. Now that view of the law is clearly wrong It does not matter whether the property inherited is moveable or immoveable.

As however the case will have to go back to the lower Appellate Court to ascertain the amount of maintenance, I shall leave it open to that Court to determine if there was anything peculiar in the circumstances of this case to show that the plaintiff was not a dependent member of her father-in-law's family within the meaning of the rule of Hindu law enjoining a moral obligation on a person to maintain such members of his family. In deciding this point the lower Appellate Court will, of course, attach due weight to the allegation of the plaintiff that it was her father-in-law's dying request to the defendants that they should support her, if that allegation is found to be true.

[379] In support of the *second* objection the learned Vakeel for the respondents refers to a passage of the learned Judge's judgment, where he says: "It is sufficient that they (defendants) have paid the amount of Rs. 9, &c." Now, if the learned Judge had found that, having regard to the value of the property inherited by the defendants, the payment of Rs. 9 by them to the plaintiff was a sufficient discharge of their obligation to maintain her, that would, no doubt, have disposed of the case. But that clearly cannot be the meaning of the learned Judge. For he finds in the first place that, owing to their not having inherited any immoveable property, the defendants were under no legal obligation to maintain the plaintiff; and when, therefore, he says that it was sufficient that the defendants have paid Rs. 9, all that he means is that it was sufficient as a matter of generosity.

Then as regards the *third* objection: all that is said is, that the evidence as to the value of the property inherited is meagre. Of course if there had been no evidence adduced as to the value or nature of the property inherited by the defendants, though the question as to the amount of maintenance was raised in the second issue, perhaps a remand would have been unnecessary, and the suit would have been liable to be dismissed. But, as it is, there is some evidence on the record as to the extent of the property inherited, and it will be for the Lower Appellate Court to say what maintenance the plaintiff would be entitled to, having regard to the value of that property and to all the circumstances of the family. In dealing with this question the Court of Appeal below will have to take into consideration the allegation of the plaintiff (if it finds that allegation to be true), that maintenance, at the rate of Rs. 3 a month, was given to her by the defendants amicably for some months.

The case will, therefore, go back to the Lower Appellate Court to be disposed of in accordance with the directions contained in this judgment. Costs to abide the result.

J. V. W. *Appeal allowed and Case remanded.*

NOTES.

[The distinction between the moral obligation and the legal obligation in respect of maintenance has been generally recognised, -(1895) 22 Cal., 410; (1898) 22 Mad., 305; (1899) 23 Bom., 608; (1900) 27 Cal., 555; (1901) 29 Cal., 557; 37 Mad., 396; 16 M. L. T., 551: 25 I.C., 759; (1908) 31 Mad., 338; 18 M L J., 251.

There is a very learned discussion of this subject by Mr. *P. R. Ganapati Iyer* in his *Indian Law Quarterly*, 1914, April No, Vol I, pt. 1, pp 28-42.]

---

[380] CIVIL RULE.

The 4th September, 1888.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
AND MR. JUSTICE TOTTENHAM.

In the Matter of the Petition of Kamini Dasi............Claimant

versus

Secretary of State for India in Council... ....Opposite Party.*

Land Acquisition Act (X of 1870), s. 22—Determination of amount of compensation—Assessors, non-appearance of—Claimant, non-appearance of—Pleader, non appearance of.

Where, in a compensation case before the Land Acquisition Court, neither of the assessors nor the pleader for the claimant appear on the day fixed for hearing, the Judge should not proceed with the case in their absence by confirming the Collector's award, but should give notice to the parties, and if they do not, within the time limited by s. 22 of the Land Acquisition Act, cause their assessors to attend or appoint others, the Court should appoint other assessors in the place of those who were not in attendance.

COMPENSATION case under the Land Acquisition Act.

In this case the applicant for compensation was dissatisfied with the amount of compensation awarded to her by the Collector, who, as a consequence, referred the case to the Judge of the Land Acquisition Court.

---

* Civil Rule No. 553 of 1888, against the order of R. F. Rampini, Esq., Judge of the 24-Pergunnahs, dated the 24th of February 1888.

The applicant nominated as her assessor Mr. Heysham, and the hearing of the case was fixed for the 24th February. On the 24th February neither the assessor for the Government nor the assessor for the applicant or her pleader appeared. The Judge thereupon sent the applicant's agent, who was present in Court, for her pleader; but he being engaged in another Court at the time did not appear until 11-45 A. M., when he discovered that the Judge had confirmed the Collector's award. At 2 P. M. the applicant's pleader applied to have the case restored and re-heard. The Judge, however, refused the application.

The applicant thereupon applied to the High Court for a rule calling upon the Government to show cause why the case should not be restored and re-heard.

Baboo *Annoda Prosad Banerjee* appeared to show cause.

Baboo *Boidonath Dutta* in support of the rule.

[381] The **Order** of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

Petheram, C.J.—This is a rule which has been obtained for the purpose of reviewing a decision of the Additional Judge of the 24-Pergunnahs, sitting for the purpose of ascertaining the amount of compensation to be paid for land which was required for public purposes.

This was a piece of land belonging to the applicant here which was to be taken for some public purpose In the first place it came before the Collector. The Collector for some reason referred the matter to the Judge, and then the proceedings had to be regulated by the law on the subject. But before I notice the law, I may as well state what the rest of the facts were. After the matter was referred to the Judge, an assessor was, as the law required, appointed on behalf of the claimant, and an assessor was also appointed on behalf of the Collector, the Collector representing the public body which wished to acquire the land, and a day was fixed for the hearing of the matter. When that day arrived, neither the assessor for the claimant, nor the claimant himself, nor the assessor for the Government was present, and upon that state of things, the Judge, in the absence of every one, made an award giving the claimant the amount which the Collector had offered in the first instance; and he did that on this ground: that the claimant gave no evidence as to the value of the land, and that the only evidence that was before him was the evidence that the parties who wished to acquire the land were willing to give that amount. He said, under these circumstances, the only thing I can do is to make an award for the amount they are willing to give, because there is nothing before me to enable me to ascertain the real value. The question is, whether he was acting within his jurisdiction in doing that.

The sections which apply to the matter are the sections of the Land Acquisition Act contained in Part III of that Act. Section 18 says that the reference to the Judge shall contain certain particulars for his information; and s. 19 provides that, after the reference comes to the Judge, two qualified assessors shall be appointed, one to be nominated by the Collector, and the other by the persons interested, for the purpose of aiding [382] the Judge in determining the amount of the compensation. That was done, an assessor was nominated on each side, and two qualified assessors were appointed for the purpose of ascertaining that amount. Then comes s. 22, which says that, as soon as the assessors have been appointed, the Judge and the assessors shall proceed to determine the amount of the compensation. So that the claimant had done all that it was his business to do. He had nominated an assessor, and there was no reason why he should be present if he did not choose. It was the duty of the Judge and the assessors to assess the amount to be awarded

as compensation. The claimant did not think fit to attend, and he was at liberty to stay away; but that did not relieve the Judge and the assessors, as a body, from ascertaining the value of the land. Then s. 22 also provides what is to be done in case of any or both of the assessors neglecting to act. In that case, the course to be followed by the Judge was to give notice to the parties and to appoint some one else in his or their place. But the Judge did not do that. What he did was to make an award himself without the assessors. There is nothing in the Act which enables him to make an award independently of the assessors, and inasmuch as his powers are derived solely from the Act itself, it seems to me that his award in this case was without jurisdiction altogether. He had not the assistance of the assessors, and without them he himself did not constitute a tribunal for the purpose of determining the amount of the compensation. Under these circumstances we think that these proceedings were without jurisdiction, and this rule must be made absolute to set them aside. We make no order as to costs.

T. A. P. *Rule made absolute.*

---

[383] CIVIL RULE.

The 13th March, 1889.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

In the Matter of T. A. Pearson, Officiating Receiver of the High Court and Receiver of the Estate of the late Mutty Lall Seal............(Claimant) Petitioner

versus

Collector of the 24-Pergunnahs............Opposite Party.*

Land Acquisition Act (X of 1870) s. 22 Determination of amount of compensation—Assessor of claimant, non-appearance of—"Neglect to act"—Appointment of another assessor by Judge without notice to claimant.

On the hearing of a reference in a Land Acquisition case to determine the amount of compensation to be awarded, the assessor duly nominated on behalf of the claimant was not present, owing to some misunderstanding as to the order of the Judge in an application by the claimant for an adjournment of the case made two days previously, and the other side objecting to any adjournment, the Judge called upon the pleader for the claimant to nominate another assessor on the claimant's behalf, which the pleader declined to do as one had been already duly nominated. The Judge thereupon himself nominated another assessor, and, proceeding with the case, confirmed the award of compensation by the Collector. *Held*, assuming that the absence of the claimant's assessor amounted to a neglect to act, the Judge had no power to appoint another without seven days' notice to the claimant, and that the proceedings were consequently irregular and not in accordance with the Land Acquisition Act, and must be set aside.

* Civil Rule No. 169 of 1889, against the order of H. Beveridge, Esq., Judge of the 24-Pergunnahs, dated the 19th of January 1889.

THIS case, in which the claimant was dissatisfied with the amount of compensation awarded by the Collector in respect of certain land forming part of an estate of which he had been appointed Receiver, was referred by the Collector to the Judge for the purpose of having the amount of compensation determined. The claimant, on receiving notice from the Court to that effect, duly stated the amount of his claim, and appointed an assessor on his behalf before the 19th January, the day named therefor in such notice, and, on the 17th of January, the claimant by his pleader made an application to adjourn the hearing of the case, on the grounds that one of his witnesses was at Shahabad and could not attend on the 19th, and that it was necessary to make search for and obtain inspection of papers in the office of the Calcutta Municipality, for which inspection, though applied [384] for, leave had not then been granted. On that application the pleader for the claimant understood the Judge to state that he would make an order, adjourning the case to some other day, when the case came on on the 19th. The claimant, on being so informed by his pleader, told the counsel whom he had retained to conduct his case before the Judge and also his assessor not to attend on the 19th, on which day the pleader mentioned his former application and asked the Judge to fix a day for the hearing of the reference; but the pleader on the other side, whose assessor and witnesses were present, objected to any adjournment of the case. The Judge then proceeded with the hearing, notwithstanding an objection of the pleader for the claimant that he had no power to do so, and asked the said pleader to nominate some other person as assessor on behalf of the claimant, but the pleader declined to do this as such an assessor had been already duly nominated. The Judge thereupon himself nominated an assessor on behalf of the claimant, and, proceeding with the case, confirmed the award of the Collector.

The claimant therefore applied on petition to the High Court for a rule to show cause why the proceedings of the Judge should not be set aside as being irregular and not in accordance with the procedure laid down in the Land Acquisition Act, and a rule to that effect was granted.

Baboo *Annoda Prosad Banerjee* appeared to show cause.

The Advocate-General (Sir *G. C. Paul*) and Baboo *Dwarkanath Mookerjee* for the Petitioner.

The **Judgment** of the Court (WILSON and TOTTENHAM, JJ.) was as follows: —

The course which the proceedings in this case have taken is in many respects unfortunate and it has led to very undesirable results. It appears that land was taken up for a public purpose and that some part of the land so taken up belonged to an estate of which the Official Receiver of this Court on its Original Side was appointed Receiver. The usual notices were issued, and particularly a notice issued calling upon that gentleman to put in his claim and to nominate his assessor, if he desired it, and be prepared to proceed with the hearing, all of which events were [385] fixed for the 19th January of this year, the notice having been issued on the 22nd December.

Two days before the 19th January, that is to say, on the 17th, the pleader who represented the Receiver applied to the Judge, to whom a reference to assess compensation had been made, and asked for some reasonable postponement to a day later than the 19th, but he omitted to give notice of that application to the Government Pleader on the other side. We assume that what is stated to have been said by the Judge as his recollection of what passed on that occasion, viz., the 17th, is strictly accurate; that his memory is clear, and that he did not give the pleader to understand that his application would be granted if renewed on the 19th; and it is in accordance with that, that in the order sheet there is no entry under date the 17th. But it is equally clear

that the pleader did understand, no doubt by mistake, the Judge to have given him reason to suppose that, when his application for the adjournment came on on the 19th, it would be granted. That is clear from two things: *first*, that he did not give notice to the assessor, whom he had appointed, to attend on the 19th, and, *secondly*, from the fact that the counsel whom he instructed was specially notified that he need not attend on the 19th. The matter came on on the 19th, and the application for an adjournment was renewed. In the first instance the pleader who represented the other side assented to an adjournment subject to payment of the costs of the day, and that arrangement would have been carried out, but the pleader of that gentleman intervened and objected to any adjournment, and, on that, the Judge refused the adjournment. It is unfortunate that the case was thus forced on when one of the parties, having been misled, was placed at a disadvantage. Having refused the adjournment the Judge appears to have called upon the claimant's pleader to nominate an assessor. The claimant's pleader, as appears from his affidavit and the Receiver's affidavit, stated that he had already nominated a gentleman and could not nominate another. The Junior Government pleader in his affidavit says he does not recollect this to have been mentioned; but inasmuch as we know it to have been a fact that an assessor had been appointed, and it would have been but natural to mention the fact, we think we must take [386] it that this statement was made. The claimant's pleader not having nominated another assessor, the Judge nominated one on his behalf, and proceeded then and there to inquire into the amount of the compensation. The claimant's pleader appears at that stage to have left the Court and the case was decided on the evidence of two witnesses called apparently by the Government pleader. The result was that the assessors, one of whom was nominated in the way I have mentioned, on the evidence of these two witnesses, came to the conclusion that the offer made by the Collector was enough and more than enough, and the decision was accordingly given against the claimant.

Now it is obviously a very unfortunate thing that the case should have been decided in that way, that is to say, that by reason of a *bonâ fide* mistake on the part of those who represented the claimant, the value to be awarded to him for his land should have been assessed *ex parte* and substantially without any real trial. That is a result we should not allow to stand if we could, consistently with fair administration of the law and without straining it in any way, set it aside.

There is one defect in the proceedings, which, as it goes to the very root of what took place, makes it our duty to intervene in this matter. There are two or three sections in the Land Acquisition Act which have to be referred to. Section 19 deals with notices and the other proceedings which are prescribed for bringing the parties together finally before the Judge. Section 20 says: "In case of failure to nominate either of such assessors within the time so specified, the Judge shall himself appoint an assessor in his stead." That clearly applies to a case where either party has made default in appointing an assessor. That is not the present case, because the claimant had nominated his assessor. Then s. 21 says: "As soon as the assessors have been appointed, the Judge and the assessors shall proceed to determine the amount of the compensation." Section 22 says: "If before such amount is determined, any of the assessors dies or desires to be discharged or refuses or neglects or becomes incapable to act, the party by whom he was appointed may appoint some other qualified person to act in his place." Then it says: In the case of an assessor appointed by either party, "if for the space [387] of seven days after notice from the Court for that purpose, the party

who appointed such assessor fails to appoint another, the Judge shall appoint some other qualified person in his stead." The provision of these sections, which seems to apply to this case, is that, 'If any assessor, already appointed, neglects to act, the Judge shall, after seven days' notice, appoint another person in his place.' Therefore, in the present case, assuming that the absence of the claimant's assessor amounted to a neglect to act, then after seven days' notice, not before, the Judge could have appointed an assessor in his place. A fresh assessor having been appointed on the day of hearing, without seven days' notice to the claimant, which s. 22 contemplates, the proceeding was opposed to the terms of this section.

On this ground, we think, we are bound to set aside the proceedings from the date at which the parties came before the Judge on the 19th January, and to direct that from that period they be resumed and proceeded with in accordance with law.

J. V. W. *Rule made absolute.*

[17 Cal. 387]

SMALL CAUSE COURT REFERENCE.

The 17th January, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE PIGOT.

Okhoy Coomar Bonnerjee............Plaintiff

versus

Koylosh Chunder Ghosal and others............Defendants.*

Small Cause Court, Presidency Towns, Jurisdiction of—Presidency Towns Small Cause Court Act (XV of 1882), s. 19—Suit for legacy — Equitable jurisdiction.

A suit to recover a legacy brought in the Small Cause Court, in which there is no allegation that the executors were in possession of sufficient assets to pay the legacy, or that they had ever assented to the payment of the legacy, is one for the administration of an estate and for an account: such a suit the Small Cause Court has no jurisdiction to try.

THE plaintiff, a legatee under the will of one Durgamoney Dassee, dated the 28th February 1887, brought a suit in the Calcutta Court of Small Causes, against the defendants, who were the executors under the said will, to obtain payment of a legacy of Rs. 300.

[388] Probate of the will was granted in January 1888. No assent by the executors to the payment of this legacy was alleged by the plaintiff. The learned Third Judge, Mr. Chatterjee, dismissed the suit, on the ground that the Court had no jurisdiction to try the suit, it being one for "an account of property and its due administration," and that the suit could only be tried under s. 213 of the Code of Civil Procedure, which had not been, however, extended to the Small Cause Court. On an application for a new trial the learned Judges, Mr. Sconce and Mr. Chatterjee, differed in opinion on this point, and referred to the Court the question whether or no the suit was one

* Small Cause Court Reference No. 9 of 1889, made by G. C. Sconce, Esq., Chief Judge, and K. M. Chatterjee, Esq., Third Judge, of the Court of Small Causes, Calcutta, dated the 14th of August 1889.

"for an account of property and its due administration under a decree of the Court?"

Mr. *Graham* for the Defendants.—The plaint does not allege an assent to the legacy; if anything, it states a refusal to assent. The *first* plea is under s. 292 of the Succession Act; the *second* under s. 19 of the Small Cause Court Act. I admit that if assent has been given by the executor, there is jurisdiction; such an assent is an admission of assets; but where there is no assent, the suit must be for administration. Whatever the jurisdiction under the old Act of 1850 might have been, such jurisdiction is distinctly defined now; and the schedule to the present Act expressly repeals all that remains of the old Act. But even assuming the old Act to have given an equitable jurisdiction in the case of legacies, still, even in Equity, there are only two ways of obtaining a legacy: one, where the executor has assented; the other, by an administration suit. Here no assent has been alleged, and it must therefore be taken to be an administration suit, and, under s. 19 of the Small Cause Court Act, there is no jurisdiction to hear such a suit.

No one appeared for the Plaintiff.

The **Opinion** of the Court (PETHERAM, C. J., and PIGOT, J.) was delivered by

Petheram, C.J.—This is a reference from the Small Cause Court in a case in which two Judges of that Court have differed. The suit was a suit in which the plaint was in these words: "The plaintiff states that one Durgamoney Dassee, late of so and so, duly made her last will, dated 28th August 1887, and codicil, dated 3rd December 1887, and thereof appointed the defendants [389] abovenamed executors, and by such will bequeathed to the plaintiff a legacy of Rs. 300; that probate of the said will was granted by the High Court on 13th January 1888; that the defendants had possessed themselves of the moveable properties of the deceased as also the proceeds of the moveable property, and had not paid the plaintiff his said legacy though demanded;" and the question which arose for consideration was whether the Small Cause Court had jurisdiction to try that suit.

The jurisdiction of the Small Cause Court, as given by s. 18 of the Presidency Small Cause Court Act of 1882, is limited by s. 19 of the same Act; and s. 18 provides that, subject to the exceptions in s. 19, the Court shall have jurisdiction to try all suits of a civil nature when the amount or value of the subject-matter does not exceed two thousand rupees; and one of the suits in s. 19 which the Court has not jurisdiction to try is "a suit for an account of property and its due administration under a decree of Court."

This is a suit to recover a legacy, but it is to be noticed that in the plaint there is no assertion either that the defendants are in possession of sufficient assets to pay the legacy, or that they have ever assented to the legacy being paid to the plaintiff; and, so far as I know, no Court, either of Common Law or Equity, in a suit of a civil nature, has any jurisdiction to decree a legacy simply, unless the executors have assented to that particular legacy, or unless the whole matter of the estate is before them for administration.

In this case there is no allegation whatever that the defendants ever had assented to this legacy, and consequently, the only relief, supposing the facts stated in the plaint to be proved and those facts only, which the Court could give to the plaintiff, would be to decree administration of the estate, so that the accounts must be taken and the estate divided; and s. 19 says that a Small Cause Court has no jurisdiction to entertain such a suit.

For these reasons and for those stated by him in his judgment we agree with the opinion of the Officiating Third Judge of the Small Cause Court, and

this reference will be returned to the Small Cause Court with this expression of our opinion.

Attorneys for Defendants : Messrs. *Bonnerjee and Chatterjee.*

T. A. P.

NOTES.

[This was followed in (1911) 12 I.C., 702 : 13 Bom. L.R., 1025.]

[390.] FULL BENCH.

The 12th February, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY AND MR. JUSTICE GHOSE.

Beni Madhub Roy............Claimant

versus

Jaod Ali Sircar and another............Decree-holders and another Judgment-debtor.*

Bengal Tenancy Act (VIII of 1885), ss. 65,170 –Civil Procedure Code (Act XIV of 1882), s. 278—Attachment of tenure in execution of decree for arrears of rent by a fractional co-sharer –Fractional co-sharer—Arrears of rent of separate share.

An attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share, is not such an attachment as is contemplated by s. 170 of the Bengal Tenancy Act.

IN both these cases a fractional sharer of a zemindari obtained a decree for his share of the rent of a tenure within the zemindari, and in execution of that decree attached the entire tenure; upon which a third party preferred a claim under s 278 of the Code of Civil Procedure alleging that he had purchased the tenure: and this claim was allowed. Thereupon the decree-holder obtained a rule calling upon the claimant to show cause why the order allowing the claim should not be set aside on the ground that, by s. 170 of the Bengal Tenancy Act, s. 278 of the Civil Procedure Code is not applicable to the case of the attachment of a tenure in execution of a decree for arrears of rent due thereon.

On the hearing of these rules it was contended that the attachment of a tenure by a fractional co-sharer, in execution of a decree for his separate share of rent, was an attachment contemplated by s. 170 of the Bengal Tenancy Act, and in support of this contention an unreported ruling of Mr Justice TOTTENHAM and Mr. Justice BANERJEE in Rule No 603 of 1889, was relied on. On the other hand, two other unreported decisions of Division Benches of the Court, in the first, of which PETHERAM, C.J., and TOTTENHAM, J., in Rule No. 269 of 1888, although the point was not actually decided, appeared to take for granted that [391] a sale of a tenure at the instance of a fractional co-sharer was not such a sale as is contemplated by s. 159 of the Bengal Tenancy Act; the point which was directly decided in the rule being that the provisions of s. 174 of that Act were general in their character and not restricted to sales under

* Full Bench on Rules Nos. 1010 and 1112 of 1889 in the matter of Claim Case No. 978 of 1889, against the order of Baboo Moti Lal Haldar, First Moonsiff of Chowki Jehanabad, dated 13th April 1889.

s. 159. In the other case, viz., Rule 554 of 1888, decided by the same Bench, their Lordships held that the provisions of s. 170 of the Bengal Tenancy Act did not apply to a case in which a share of a tenure is attached by a co-sharer landlord in execution of a decree for his separate share of the rent, and contained an expression of opinion which appeared to conflict with the view taken in Rule No. 603 of 1889.

Mr. Justice MITTER and Mr. Justice BEVERLEY, before whom this rule was heard, having regard to the above unreported decisions, and to their unwillingness to concur with the decision in Rule No. 603 of 1889, referred the question stated below to a Full Bench with the following remarks:—

" It appears to us that Chapter XIV of the Bengal Tenancy Act must be read in connection with s 65 of that Act; the sale of tenures and holdings in execution of decrees for arrears of rent, with its incidents and consequences, as provided by the Bengal Tenancy Act, is a creation of the Act itself, and must be strictly regulated in accordance with its provisions. We do not say that tenures or shares in tenures may not be sold, like other property, in accordance with the provisions of the Code of Civil Procedure. But if the sale is one under the Tenancy Act, and if it is to be accompanied by the incidents and conditions attached to it by the Act, then, we think, the Act must be strictly complied with. Now, by s. 188, when two or more persons are joint landlords, anything which the landlord is authorized to do under the Act must be done either by all of them or by an agent authorized to act for all. In order to effect a sale of a tenure, therefore, under Chapter XIV, with all the incidents attaching to it under the Act, we think that all the joint landlords must combine to bring the tenure to sale, and that a sale by one co-sharer alone (whether of the entire tenure or a portion of it only), cannot be treated as a sale under the Act, and that the provisions of the Act will not apply to such a sale or to the attachment in view thereof. The question therefore which we refer to **[392]** a Full Bench is this: Is an attachment of a tenure or holding, in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share, such an attachment as is contemplated by s. 170 of the Bengal Tenancy Act?"

Baboo *Troylokianath Mitter* (with him Baboo *Jadub Chunder Seal*) for the Decree-holder, in support of the rule, cited the unreported decision in Rule No. 269 of 1888, and referred to the case of *Prem Chand Nuskur* v *Mokshoda Debi* (I. L. R., 14 Cal., 201); and contended that, under s. 65 of the Bengal Tenancy Act, each sharer who was entitled to rent had a first charge therefor on the tenure; and that he was in the position of a landlord under s. 3, cl. (4), and was entitled to sell if his rent was in arrear.

Baboo *Rash Behari Ghose*, Baboo *Sharoda Churn Mitter*, and Baboo *Umakali Mukerjee*, for the Claimant, were not called upon.

The **Opinion** of the Full Bench (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY and GHOSE, JJ.) was delivered by

Petheram, C.J.— The question which has been referred to the Full Bench in these rules is: " Is an attachment of a tenure or holding, in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share, such an attachment as is contemplated by s. 170 of the Bengal Tenancy Act?"

In our opinion the answer to that question must be in the negative. Section 170 of the Bengal Tenancy Act gives certain privileges to persons who have taken proceedings under that Act for the purpose of recovering their rents; and s. 188 says that, where several persons are joint landlords, and when anything under this Act is authorised to be done, they must all join in doing

it. That shows, in our opinion, that where landlords are seeking to take the benefit of this Act, they must act in concert; and where one of several co-sharers in a zemindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country, and independently of the Bengal Tenancy Act. For this reason, we answer this question in the negative. The result is that both Rules will be discharged with costs.

Rule discharged.

NOTES.

[This was followed in (1892) 19 Cal., 593; (1899) 26 Cal., 937; (1900) 4 C.W.N., 508; (1901) 29 Cal., 54; (1901) 29 Cal., 219; (1904) 1 C.L.J., 500; (1904) 8 C.W.N., 472; (1904) 9 C.W.N., 34; (1905) 4 C.L.J., 68; *see* also the distinction made in (1899) 26 Cal., 677; (1903) 7 C.W.N., 908: (1906) 5 C.L.J., 285.

In *Pramada* v. *Ramani* (1907) 35 Cal., 331 the Privy Council observed, "It has long been held in Bengal that agreement, either expressly proved or implied by the conduct of the parties may establish the right to sue separately for the shares of rent receivable by the separate, shareholders; and their Lordships have no inclination to question that course of rulings.

"But it has been equally clearly laid down in Bengal that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding: and their Lordships think that this is clearly a sound view of the law. And it appears to their Lordships to be sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that the right to bring the tenure to sale for arrears of rent remains infact, and also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs.

"It only remains to notice section 188 cited above. It was suggested in argument that this section precludes a suit under the Act, for the aggregate rent of the tenure unless all those entitled to share in the rent join as plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Bengal Tenancy Act, 1885, but under the general law."

[393] APPELLATE CIVIL.

The 8th January, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE TOTTENHAM.

Beni Madhub Chuckerbutty............Defendant

versus

Bhubun Mohun Biswas............Plaintiff.*

Bengal Tenancy Act (VIII of 1885), s. 180 -" Utbundi" holding —Right of occupancy.

Case in which the question as to what is an *utbundi* tenure is discussed.

Where the plaintiff, who had been dispossessed from certain land, claimed a right of occupancy in such land on the ground that he had held it for twelve years continuously: *Held*, that if the land formed a separate holding which he had from time to time cultivated on the *utbundi* system during a period which had covered more than twelve years, cultivation at various times and under separate agreements on each occasion (such periods not being continuous although of the same piece of land), would not confer a right of occupancy on the ground that the first of such periods commenced more than twelve years before the alleged dispossession

* Appeal from Appellate Decree No. 1670 of 1888, against the decree of J. Crawford Esq., Judge of Nuddea, dated the 30th June 1888, affirming the decree of Baboo Prossonno Cumar Bose, Munsif of Krishnagore, dated the 30th of July 1887.

THE plaintiff sued, on the 24th February 1887, to recover possession of a certain piece of land situated in the district of Chupra, from which he had been dispossessed by the defendant, who was the putnidar of the mehal, on the 26th January 1886, the plaintiff claiming to have a right of occupancy therein.

The plaintiff alleged that he had been a settled ryot in the village of Chupra, and had held lands under the *utbundi* system for sixty years, and that the particular land in dispute had been in his possession and cultivated by him under such system for forty years.

The defendant admitted the disputed land was let to, and held by, the plaintiff under the *utbundi* system, and that, whilst the defendant had cultivated the land, he had paid rent for it at *utbundi* rates; but he contended that the plaintiff had not held the land for twelve continuous years, because, during such period of twelve years, part of the land was *potit*, and for such land no rent [394] was paid as long as it remained *potit*. As against this contention the plaintiff stated that from the very nature of *utbundi* holdings, it was impossible for a tenant to cultivate the entirety of such holding for twelve continuous years; that he had, as understood by this system of cultivation, paid rent for the whole land during the time at which portions of the land were *potit*, inasmuch as the *utbundi* rate of rent was a higher rate than was payable for other holdings, and that under that system the high rent payable for such lands as were actually cultivated was the reason for no actual rent being made payable for such part of the holding as might be *potit*; and that under that mode of cultivation he was entitled to a right of occupancy.

The Munsif found that the land was held and cultivated by the plaintiff for more than twelve years before the date on which he had been dispossessed before portions of the land became *potit*, and twelve years before the date on which the Bengal Tenancy Act came into force; and holding, in accordance with the case of *Premanund Ghose* v. *Shoorendronath Roy* (20 W. R., 329), that the period during which portions of the land were *potit* ought to be included in the period of the plaintiff's possession, gave him a decree for possession.

On appeal the District Judge stated the question for decision to be, whether possession of the land during the period portions of the land were *potit*, was with the plaintiff or the defendant? As to this he found that the presumption was that the possession was continuous in the plaintiff, and held that the finding of the Munsif, that the plaintiff had obtained a right of occupancy, was correct.

The defendant appealed to the High Court.

Mr. *Woodroffe*, Mr. *Evans*, Baboo *Rash Behari Ghose*, and Baboo *Saroda Prosonno Roy* for the Appellant.

The Advocate-General (Sir *Chas. Paul*) and Baboo *Kali Churn Banerjee* for the Respondent.

Mr. *Evans* for the Appellant.—There are no direct decisions as to what the *utbundi* system is, but there are some, which are not however against me, but which amount to only expressions of [395] opinion on the subject of the different Judges which passed them: *Kenny* v. *Issur Chunder Poddar* [W. R., (1864), Act X, 9], *Mirzan Biswas* v. *Hills* (3 W. R., Act X, 159), *Dwarkanath Misree* v. *Noboo Sircar* (14 W. R., 193), *Premanund Ghose* v. *Shoorendronath Roy* (20 W. R., 329). These opinions are all *obiter*. There is, however, a report on this class of tenures drawn up by Mr. Cotton, which was before the Select Committee when the Rent Act was passed. The words "continuous years" in the Rent Act cannot be said to have

the same meaning as "twelve years." The plaintiff is not entitled to any occupancy rights. There are grave errors in the trial of this case which require remand. The finding that the holding of the plaintiff extended over twelve years continuously, and that he has therefore obtained a right of occupancy, is based on a misconception of an *utbundi* holding, and on an erroneous presumption that the plaintiff was in possession even in the years when he did not cultivate.

The Advocate-General (Sir *Chas. Paul*) for the Respondent.—My case is that an *utbundi* holding is a definite tract of land, part of which may be cultivated and part not, but that rent at a higher rate is paid for such portion as is cultivated, to make up to the landlord for the loss of rent for that which is not paid for and not cultivated. Section 180 of the Tenancy Act merely enacts Mr. Justice JACKSON'S statement of the law in *Premanund Ghose* v. *Shoorendronath Roy* (20 W. R., 329). The plaintiff is entitled to an occupancy right in these lands in accordance with the *utbundi* system.

The **Judgment** of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was as follows:—

This was a suit brought by a ryot to recover four bighas of land of which he had been dispossessed by his landlord, the putnidar, and in which he claimed a right of occupancy by virtue of more than twelve years' continuous holding.

It was the case of both parties that the land had been held under the *utbundi* system; and the landlord's defence included these two points: *first*, that the land in question was part of his *khamar* lands held from year to year, in which, by s. 116 of the Bengal Tenancy Act, no right of occupancy can accrue; and [396] *secondly*, that, if the land was not *khamar*, the plaintiff, an *utbundi* ryot, had never held it for twelve years continuously, and therefore had not acquired in it any right of occupancy.

The first point is settled by the finding that the land is not *khamar*; and with that finding there is no ground for interference in a second appeal. As to the second point, the Court has found that the plaintiff's possession had extended over more than twelve years continuously, and that his right of occupancy had thus become perfect. But it is objected in appeal that this finding is based on a misconception as to the nature of an *utbundi* holding, and on an erroneous presumption that the plaintiff was in possession even in the years when he did not cultivate. It is clear that the lower Court has in fact so held, and that otherwise it could not have come to the conclusion that the plaintiff had acquired a right of occupancy; for s. 180 of the Bengal Tenancy Act prohibits the acquisition of such right in land ordinarily let under the custom of *utbundi*, until that particular land has been held for twelve years continuously. In this respect *utbundi* land is dealt with in the Act differently from ordinary *ryotti* land, in which, by s. 21, a settled ryot has a right of occupancy no matter how short a time he has held possession of it.

Now it is necessary to enquire what this *utbundi* system really is; for there seems to have been some difference of opinion regarding it: and perhaps in fact the incidents of that system do vary in different places.

Several Judges who have sat in this Court have stated their own opinions on this subject, and their opinions have not been quite uniform. Perhaps our safest guide in the matter is what is to be found in special reports made by Revenue officers, and in the descriptions given in the Statistical Account of Bengal compiled by Sir W. W. Hunter from information carefully collected through local officers in the districts where the system exists. When the present Bengal Tenancy Act was under consideration by the Select Committee of the Legislative Council a memorandum by Mr. Cotton, then a

Secretary to the Board of Revenue, on the various land tenures in Bengal, was submitted by the Government of Bengal for the information of the Select Committee. Mr. Cotton here reports upon the *utbundi* system [397] and transcribes the passages describing it in the Statistical Account of Bengal in the districts of Nuddea (in which the land now in question is situated), Jessore, Moorshedabad, and Pubna; and he sums up the results. We quote the passage in the Statistical Report relating to the *utbundi* system in Nuddea :— *Utbundi* is applied to land held for a year, or rather for a season only. The general custom is for the husbandman to get verbal permission to cultivate a certain amount of land in a particular place at a rate agreed upon when the crop is on the ground. The land is measured and the rent is assessed on it." Mr. Cotton says too that the *utbundi* ryot abandons altogether (*i.e.*, has no right to claim again) any land, except such as he has under cultivation in any given year. The zemindar may let in jumma to some one any land which the *utbundi* ryot has not got under cultivation in any year.

Again, in September 1884, the Commissioner of the Presidency Division submitted to Government an analysis of the reports of his district officers regarding *utbundi* tenures. The Collector of Nuddea stated that cultivators who take such lands are not obliged to cultivate them a second year ; but as a rule they can keep them for certain for three years if they elect to do so. Generally the lands under this system are cultivated from one to five years, and then left fallow for the same period. The cultivators acquire no right of occupancy, nor do they desire to do so.

These descriptions of *utbundi* do seem to refer rather to particular areas taken for cultivation for limited periods and then given up, than to holdings of which parts are cultivated and other parts lie fallow while the rent for the whole is assessed year by year with reference to the quantity within the holding under cultivation in that year. A holding of the latter description hardly seems to answer to the general conception of *utbundi*, although the rent may be arrived at each year by ascertaining what area has been cultivated. It is not clear to which description the four bighas of the present suit belong : whether they are part of a larger holding once settled with the plaintiff, or whether they form a separate holding which he has from time to time cultivated on the *utbundi* system during a period which has covered more than twelve years If it is the former case, his right of occupancy [398] would seem to be complete : but if it is the latter case, we are not prepared to hold that cultivation at various times and under separate agreements on each occasion, such periods not being continuous, although of the same piece of land, would confer the right upon the ground that the first of such periods commenced more than twelve years before the alleged dispossession.

We accordingly set aside the decree of the lower Appellate Court and remand the case to that Court for a finding, after taking evidence, if necessary, on the question whether these four bighas are part of a larger holding or whether they have been occupied from time to time under the custom of a separate *utbundi* as above described. Costs to abide the result.

T. A. P. *Appeal allowed and case remanded.*

NOTES.

[Notice was held to be unnecessary in (1907) 5 C. L. J., 398 : 11 C. W. N., 581.]

[17 Cal. 398]

APPELLATE CIVIL.

The 2nd September, 1889.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GORDON.

Gobind Lal Roy............One of the Defendants

versus

Biprodas Roy and others (Plaintiffs) and others (Defendants.)*

Sale for arrears of revenue—Suit to set aside sale—Attachment of property sold, not necessary—Sale ultra vires, *When—Act XI of 1859, ss. 5 and 17.*

The right to set aside a sale for arrears of Government revenue under Act XI of 1859 is not confined to proprietors alone, but extends to all persons, such as mortgagees, having an nterest in the property antecedent to its sale.

Watson v. *Sreemunt Lal Khan* (5 Moore's I.A., 447) relied on.

There is nothing in s. 5† of Act XI of 1859 which indicates that property sold for arrears of Government revenue should be under attachment at the time of sale.

A sale in contravention of ss. 5 and 17 of Act XI of 1859 is *ultra vires,* and therefore void.

The principle laid down by the Full Bench in the case of *Lala Mobaruk Lal* v. *Secretary of State for India in Council* (I.L.R., 11 Cal., 200) applied.

THIS was a suit to set aside a sale for arrears of Government revenue under Act XI of 1859.

[399] The plaintiffs were the executors to the estate of the late Bhagirat Das, the son of Bhuban Mohan Das, deceased. On the 15th Bhadro 1286 (30th August 1879), Zahuruddin Mahomed Abu Ali Chowdhry (defendant No. 5) and his two sons executed a mortgage-bond in favour of Bhuban Mohan Das, whereby they mortgaged an eight-annas share in Mehal Khurd Muradpore situate at Malunga, and a moiety of their eight-annas share in Mouza Padamsar

* Appeal from Original Decree No. 42 of 1888, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Rungpore, dated the 6th February 1888.

† [Sec. 5 :—Provided always that no estate, and no share or interest in any estate, shall be sold for the recovery of arrears or demands of the descriptions mentioned below, otherwise than after a notification in the language of the district, specifying the nature and amount of the arrear or demand, and the latest date on which payment thereof shall be received, shall have been affixed for a period of not less than fifteen clear days preceding the date fixed for payment, according to section III of this Act, in the office of the Collector or other officer duly authorised to hold sales under this Act, in the Court of the Judge within whose jurisdiction the land advertised lies, and in the Munsiff's Court and Police Thannah of the division in which the estate or share of an estate to which the notification relates, is situated ; or if the estate or share of an estate be situated within the jurisdiction of more than one Moonsif's Court or Police Thannah, in some one or more of such Courts or Thannahs ; and also at the Cutcherry of the malgoozar or owner of the estate or share of an estate, or at some conspicuous place upon the estate or share of an estate, the same to be certified by the peon or other persons employed for the purpose :—

(Margin: Proviso in the case of certain descriptions of arrear.)

First.—Arrears other than those of the current year, or of the year immediately preceding.

Secondly.—Arrears due on account of estates other than that to be sold.

Thirdly.—Arrears of estates under attachment by order of any Judicial authority or managed by the Collector in accordance with such order.

Fourth.—Arrears due on account of tuccavee, poolbundee, or other demands not being land revenue, but recoverable by the same process as arrears of land revenue.]

situate at Govindgunge, both in the District of Rungpore, to secure the repayment of the sum of Rs. 15,000 and interest. Bhagirat Das, who had inherited his father's estate, died on the 5th Bysack 1290 (17th April 1883), leaving a will which was proved by the executors, the plaintiffs. In 1886 the plaintiffs brought a suit (No. 19 of 1886) in the Court of the Second Subordinate Judge of Rungpore against defendant No. 5, Zahuruddin Mahomed, and his two sons (the original mortgagors), Ramjanam Misser (defendant No. 3), Mahomed Zakaria (defendant No. 4), and others having an interest in the mortgaged properties to recover the sum of Rs. 30,716 and 12 annas due on account of principal and interest under the mortgage-bond of the 15th Bhadro 1286. During the pendency of this suit, on the 26th June 1886, Mehal Khurd Muradpore was sold by public auction by the Collector of Rungpore for arrears of Government revenue, including the arrear of Falgoon 1292 which fell due on the 1st Chyet 1292 (13th March 1886), and was purchased by Gobind Lal Roy (defendant No. 1) for Rs. 6,500. On the 22nd July the plaintiffs, and Ramjanam Misser and Mahomed Zakaria (defendants Nos. 3 and 4) applied to the Commissioner of the Rajshahye Division to set aside the sale on the ground of irregularities in publishing and conducting the sale and of the low price fetched by the property; but their appeal was dismissed on the 23rd October 1886, on which date also the sale was confirmed. On the 8th November 1886 a sale-certificate was granted to the auction-purchaser Gobind Lal Roy (defendant No. 1). On the 10th December 1886 the plaintiff's suit (No 19 of 1886) was decreed against the original mortgagors personally; but Mehal Khurd Muradpore, which had been sold on the 26th June, was exempted from liability under the decree.

It was further ordered by the decree "that in case the plaintiffs shall succeed to have the auction-sale of Khurd Muradpore [400] set aside by instituting a regular suit or otherwise, they shall be able to revive their claim to make the said Khurd Muradpore liable under this decree."

On the 19th October 1887, the plaintiffs instituted the present suit, making Ramjanam Misser and Mahomed Zakaria defendants, because they refused to join them in bringing the suit. The Secretary of State was made a defendant, but did not appear. Sometime after the institution of the suit, the defendants Ramjanam Misser and Mahomed Zakaria applied to be made co-plaintiffs; but their applications were refused on the ground that they were not made within a year of the date on which the sale had been confirmed.

The plaintiffs alleged "that long before the Government revenue kist for March of 1886 became due, the Collector of this District (Rungpore) under the Road Cess Act, gave an order for attachment of the said Mehal Khurd Muradpore for realizing the arrears of road-cess and public works-cess in respect of that mehal; and, accordingly, the aforesaid Mehal Khurd Muradpore was attached on the 12th March 1886: and a prohibitory order was issued to the tenants of the mehal, forbidding them to pay rents to the zamindars, and a Cess Collector was appointed for collecting rents of the mehal. That being the case, the Collector had no power to sell the aforesaid mehal at auction for arrears of Government revenue due for kist for March 1886. The aforesaid Mehal Khurd Muradpore was under an attachment in execution of a decree of the Civil Court, and the sale was made for arrears of Government revenue for the previous year; but the Collector did not issue any notice as required by s. 5 of Act XI of 1859, and, without the fulfilment of the requirement of s. 5, the aforesaid mehal could by no means be sold at auction. Therefore the sale of the aforesaid Mehal Khurd Muradpore, which was held by the Collector on the 26th June 1886, is illegal and invalid, and the Collector by so holding the sale acted without jurisdiction. It is no sale at all, and

it cannot in any way affect the mortgage-lien of the plaintiffs." The plaintiffs further alleged that no sale-proclamations were issued or notices served as required by law, and that at the time of the sale the agent of Gobind Lal Roy (defendant No. 1), by stating that he would bid up to Rs. 50,000 **[401]** or Rs. 60,000, dissuaded intending purchasers in attendance from offering bids. They also alleged that the mehal was worth not less than Rs. 60,000.

The plaintiffs prayed that the revenue sale of Mehal Khurd Muradpore, held on 26th June 1886, should be set aside as illegal and made witout jurisdiction. They also prayed for a declaration that Mehal Khurd Muradpore was liable to be sold for the debt due to them under the mortgage-bond of 15th Bhadro 1286, and that the amount due under their decree of the 10th December 1886 upon the said bond should be realised by sale of the said mehal. The plaintiffs further prayed that if the sale be not set aside, the defendant Gobind Lal Roy should be made liable in damages for the amount that should be found due under their decree of the 10th December 1886. Ramjanam Misser and Mahomed Zakaria (defendants Nos. 3 and 4) supported the plaintiffs, contending that the sale was illegal and ought to be set aside.

The defence set up by the principal defendant, the auction-purchaser Gobind Lal Roy, was that the plaintiffs as mortgagees were not entitled to bring this suit; that they could not enforce their lien against the mortgaged property, inasmuch as that property had been exempted from liability for the mortgage-debt by the decree of the 10th December 1886 passed in plaintiffs' previous suit No. 19 of 1886; that the sale was legal and valid and was protected by the sale-certificate granted to him under Act XI of 1859 on 8th November 1886: and that, by s. 8 of the Bengal Act VII of 1868, the plaintiffs were precluded from questioning the validity of the sale on the grounds of non-publication of the sale-proclamations and want of notices: that the plaintiffs in their appeal to the Commissioner did not object to the irregularities set forth in their plaint, and that, therefore, they were prevented by s. 33 of Act XI of 1859 from bringing a suit to set aside a sale on the ground of those irregularities; and, lastly, that the property had been sold for an adequate price.

The material issues were: -

(*1st*) Whether the plaintiffs, as mere mortgagees only of a half share, can bring this suit for setting aside the revenue sale, and whether they have any *locus standi* in Court? Further, whether they have any cause of action?

[402] (*2nd*) Whether by the defendant Gobind Lal's purchase at the revenue sale, he purchased the Estate Khurd Muradpore free from all encumbrances; and, if so, can the plaintiffs enforce now their mortgage-lien?

(*3rd*) Whether the revenue sale of Khurd Muradpore on 26th June 1886 is valid, made after due sale-proclamations and notices, and whether the sale is invalid for its non-publication in the *Official Gazette*? Next, whether the Collector acted without jurisdiction?

(*4th*) Whether the sale is invalid if the estate was under attachment by the Collector for arrears of road cess, and whether such attachment, even if made, was legal?

(*5th*) Whether the plaintiffs are competent to contest the revenue sale under s. 8 of Bengal Act VII of 1868?

(*10th*) Whether the plaintiffs are mortgagees at all, and whether the plaintiffs' right to Khurd Muradpore was extinguished before the revenue sale?

(*11th*) Whether the sale is valid if the property was attached by the Civil Court?

It appeared from the documents filed by the plaintiffs that one Ishan Chunder Roy had obtained a decree against the defendant Ramjanam Misser; and that in execution of that decree Ramjanam's interest in Mehal Khurd Muradpore had been attached by order of the Munsif on the 12th September 1885, and remained under attachment until the 13th March 1886, when the execution case was dismissed on the ground that the decree-holder had not paid the sale-proclamation fee On the 22nd March 1886 the order of dismissal was set aside, and the execution case restored to its former number. The attachment thus revived continued up to the 18th May 1886, when the decree having been fully satisfied the execution case was finally disposed of. It also appeared from the plaintiffs' documentary evidence that, on account of arrears of road-cess, the Estate Khurd Muradpore had been attached by the Collector on the 12th March 1886 and continued under attachment up to the 25th September 1886 In consequence of the report of the Cess Head Clerk, and the request of the Cess Deputy Collector, sanction to proceed [403] under s. 99 of the Cess Act 1880 against certain habitual defaulting proprietors was granted by the Collector on 5th February 1886.

On the 9th March the following notice was issued to the ryots of Khurd Muradpore:—

DISTRICT RUNGPORE.

Notice under s. 99 of Bengal Act IX of 1880 for realization of revenue.

Lot Khurd Muradpore, Towzi No. 526.

This prohibitory order is issued to the parties in possession of the mehal or the talooks, etc., as well as to the talookdar and the defendant talookdars and ryots, to the effect that they should pay the rent which is or may thereafter be due by them on account of any land included in the said mehal or talook, etc., to the Collector of this said District, or to Ugrakant Ghose, who is hereby appointed as Cess Collector, and they should not pay anybody else till they obtain the orders of the Collector On receipt of the said sum, the Collector or the said Cess Collector hereby appointed will grant receipts, and such receipts shall be taken as a valid discharge, according to the provisions of the said law, in respect of any debts that are or may be due by the person who may obtain such receipt. If the rents be paid, without obtaining the orders of the Collector, to any other person, such payment shall be null and void.

ABDUL KHALIK,
Deputy Collector.

Dated 9th March, 1886.

There was evidence to show that Abdul Khalik, the Deputy Collector, had been vested with the powers of a Collector under s. 99 of the Cess Act, 1880.

The Subordinate Judge found that Ishan Chunder Roy's attachment continued against the Estate Khurd Muradpore from 12th September 1885 up to the 18th May 1886, but had ceased to exist on the date of the revenue sale which took place on 26th June 1886; that the sale of the property had been published in the *Calcutta Gazette*, but that, as prescribed by s. 5 of Act XI of 1859, fifteen days' notification had not been given before the latest day of payment of the arrears of Government revenue, namely, the 28th March 1886; and, accordingly, held that the [404] Collector had no power to sell the estate. He also found as a fact that, on account of arrears of road-cess the Estate Khurd Muradpore was under attachment by order of the Collector from 12th March to September 1886, and held that, by cl. 2, s. 17 of Act XI of 1859, the

Collector had no power to sell the estate so long as it was under attachment. He also found that the estate was worth about Rs. 50,000, and that the plaintiffs had sustained substantial injury by the sale. He accounted for the absence of bidders from the sale by the fact that the property was under attachment both by the Civil Court and by the Collector.

The Subordinate Judge held that the plaintiffs as mortgagees were competent to bring the suit, and that, by the decree of the 10th December 1886, they could renew their lien on the property upon the revenue sale being set aside. He also held that, under s. 8 of Bengal Act VII of 1868, a sale-certificate cured only defects in the serving and posting of notices under the sale-laws, but nothing further, and was no protection to the purchaser when the sale was irregular and the Collector had acted without jurisdiction. He was of opinion that the sale was bad for irregularities, and, as the plaintiffs had sustained substantial injury by it, the sale should be set aside. He also held that the plaintiffs' mortgage was duly proved.

Having decided the above issues in favour of the plaintiffs, the Subordinate Judge decreed their suit, set aside the revenue sale of 26th June 1886, and ordered the sale of the mortgaged property under the decree of 10th December 1886.

The defendant Gobind Lal Roy appealed to the High Court.

The Advocate-General (Sir *G. C. Paul*), Mr. *Woodroffe*, Baboo *Srinath Das*, Baboo *Opendro Nath Mitter*, and Baboo *Jogendro Chunder Ghose* for the Appellant.

Mr. *Evans*, Baboo *Mohini Mohun Roy*, Baboo *Jogendro Nath Bose*, and Baboo *Mohini Mohun Chuckerbati* for the Plaintiffs-respondents.

Mr. *Das*, Baboo *Ashutosh Dhur* and Baboo *Prosunno Gopal Roy* for the Defendant-respondent, Ramjanam Misser.

Dr. *Rash Behari Ghose* and Baboo *Aukhil Chunder Sen* for the Defendant-respondent, Mahomed Zakaria.

[405] Baboo *Mohesh Chunder Chowdhury* for the Defendant-respondent, Ram Kisson Khettry.

The arguments are sufficiently stated in the judgment.

The **Judgment** of the High Court (TOTTENHAM and GORDON, JJ.) was as follows:—

This was a suit to set aside a sale of certain property for arrears of Government revenue. The property in question is an estate known as Mehal Khurd Muradpore, and it was sold by the Collector of Rungpore on the 26th of June 1886 for Rs. 6,500.

The plaintiffs are the executors to the estate of the late Bhagirat Das, the son of Bhuban Mohan Das deceased, who was the mortgagee of an eight-anna share of the property sold; and the principal defendant Raja Gobind Lal Roy is the auction-purchaser. The defaulting proprietors of the estate, Ramjanam Misser and Mahomed Zakaria, who are the successors in interest of the original mortgagors, have also been made defendants, because they declined to join with the plaintiffs in bringing this suit. There are also other defendants, including the Secretary of State, who however did not appear, and may therefore be left out of consideration in this appeal.

Sometime after the institution of the suit, the defendants Ramjanam Misser and Mahomed Zakaria applied to the Court to be made co-plaintiffs, but the Subordinate Judge, before whom the case was pending, refused their application on the ground that it was made more than a year after the date on which the sale had become final by law, and therefore it was too late.

The plaintiff's case is substantially this: In 1886 they brought a suit against the original mortgagors and other persons having an interest in the mortgaged property to recover the money due under the mortgage by sale of the property in question. Pending the decision of that suit, the property Khurd Muradpore was, as I have just said, sold for arrears of revenue on the 26th of June 1886. On the 10th December 1886, the plaintiffs' suit was decreed against the original mortgagors; but the mortgaged property, which had already been sold by the Collector, was exempted from liability under the decree. At the same time this further order was made in the decree: "that in case the plaintiffs shall succeed to have the auction sale of Khurd Muradpore set aside [406] by instituting a regular suit or otherwise, they shall be able to revive their claim to make the said Khurd Muradpore liable under this decree." The plaintiffs, then, being unable to enforce their lien in consequence of the sale of the mortgaged property for arrears of revenue, and their appeal to the Commissioner against that sale having been dismissed, now ask to have the revenue sale set aside on certain grounds set out in the plaint, and for a declaration that the property in question is liable to be sold for the debt due to them under their mortgage. They further pray that, if the sale be not set aside, the defendant Gobind Lal Roy may be made liable in damages on the ground that he is the chief wrong-doer in the case, because his agent by saying he would bid up to fifty or sixty thousand rupees dissuaded intending purchasers in attendance from offering bids. The plaintiffs say that the sale is illegal and was made without jurisdiction: because, *firstly*, no notification was issued by the Collector as required by s. 5 of Act XI of 1859, and, *secondly*, that the estate at the time of sale was under attachment for arrears of road-cess under the Cess Act, and that it was sold for arrears of revenue which accrued during such attachment, and that these irregularities caused the property, which was worth about sixty thousand rupees, to be sold for the small sum of six thousand and five hundred rupees, thereby causing them substantial injury.

The defence set up by the auction-purchser is that the plaintiffs as mortgagees are not entitled to bring this suit; that they cannot enforce their lien against the martgaged property, when that property was exempted from liability for the mortgae-debt in the previous suit No. 19 of 1886; that the sale is legally valid and is protected by his sale-certificate; that in their appeal to the Commissioner the plaintiffs did not object to the irregularities now set out in the plaint and therefore they cannot now ask to have the sale annulled on the ground of those irregularities; and, lastly, that the property was sold for an adequate price.

The proprietor defendants Nos. 3 and 4 support the plaintiffs, and say that the sale was illegal and ought to be set aside.

On these pleadings the Subordinate Judge framed twelve issues; and having decided the substantial issues in favour of the [407] plaintiffs, he has decreed their suit, that is, he has ordered the sale to be set aside, and the mortgaged property to be sold under the plaintiffs' mortgage-decree of the 10th of December 1886.

The auction-purchaser appeals. But before considering his grounds of appeal it will be convenient here to say that, when the appeal was first called on for hearing before this Court on the 29th of July last, Mr. *Evans*, on behalf of the plaintiffs-respondents, represented that an arrangement had been come to between Mr. *Woodroffe*, counsel for the Appellant, and himself, that the plaintiffs-respondents should withdraw all opposition to the appeal, and consent to the appeal being decreed on certain terms. And Mr. *Evans*, accordingly, on the abovementioned date, made a formal application to the Court that the

appeal should be decreed in accordance with the terms arranged; and this application was recorded. But at the same time the *pro forma* defendants-respondants, Ramjanam Missor and Mahomed Zakaria, claimed to be heard in opposition to the appeal and in support of the judgment and decree of the lower Court; and the Court decided that it would hear the appeal as against them on a future date, to which the appeal was then adjourned. Subsequently, on the appeal being called on on the 12th of August, Mr. *Evans* informed the Court that the appellant had repudiated the aforesaid agreement, but as his clients considered it to be binding and conclusive, he would not appear and oppose the appeal, and, on the following day, Mr *Evans* filed an affidavit setting out the circumstances of the arrangement and the view his clients took of it. On a subsequent day, in answer to a Rule issued on the appellant, his counsel, Mr. *Woodroffe*, filed certain correspondence, and at the same time certain letters were put in by the pleader for the appellant; and all these papers have been, at Mr. *Evans*' request, placed on the record.

With these observations, which we have thought it necessary to make in order to explain why the plaintiffs' counsel did not appear to oppose the appeal, and as showing that his and their conduct in that matter was both proper and honourable, as also that of the learned counsel, Mr. *Woodroffe*, for the appellant, we now proceed to consider the various points argued before us by the learned counsel for the appellant.

[408] The points are these: —

(1.) The plaintiffs as executors of a mortgagee, and, not being in possession of the property sold, are not entitled to bring this suit.

(2.) The plaintiffs' suit No. 19 of 1886, for a declaration of their right to sell the mortgaged property, having been practically dismissed by the exemption of the mortgaged property from sale, a second suit to enforce their lien will not lie.

(3.) That s. 5 of Act XI of 1859 does not apply to the present case, because the property sold was not under attachment at the time of sale; and that even if there was any irregularity in not publishing the notification required by that section, that irregularity was cured by the provisions of s. 8 of Bengal Act VII of 1868.

(4.) That the provisions of s. 17 of Act XI do not apply, because the property was in fact not under attachment by the Revenue authorities when the arrears accrued.

(5.) The grounds on which it is now sought to set aside the sale were not declared and specified in the appeal to the Commissioner, and, therefore, under s. 33 of Act XI the suit will not lie.

(6.) There is no proof that the plaintiffs have sustained substantial injury by reason of the irregularities complained of, and, therefore, under s. 33 the sale cannot be annulled.

We will consider these objections in the order in which they are stated:—

(1.) As regards the first objection, we think that the Subordinate Judge is right in the view he took *that a mortgagee can maintain a suit like the present.* Sections 33, 34 and 35 of Act XI of 1859 are relied on as showing

* [Sec. 34: —If a sale made under this Act be annulled by a final decree of a Civil Court, application for the execution of such decree shall be made within six months after the date thereof; otherwise the party in whose favour such decree was passed shall lose all benefit therefrom. And no order for restoring such decree-holder to possession shall be passed until any amount of surplus purchase-money that may have been paid away by order of a Civil Court be repaid by him, with interest at the

Effects of annulment by decree of Court of sale under this Act.

that only a person who his proprietor can bring a suit under the Act to set aside a sale. But we do not think that there is anything in these sections that warants the inference that a right to sue is limited to proprietors only. Clearly the plaintiffs have an interest in the property in suit, inasmuch as that property is their security for the debt of the mortgagors, and if, as they allege, they have been deprived of this security by the illegal sale of the property by the Collector, we see no reason why, in the absence of [409] any express provision of law to the contrary, they should not be entitled to ask the Court to grant them relief by declaring that the sale is illegal and inoperative as against them. We are not awaie of any authority in which this particular point has been expressly decided. But there is a judgment of the Privy Council [*Watson* v. *Sreemunt Lal Khan* (5 Moore's I. A., 447)] under the old sale-law, Regulation XI of 1822, in which it was laid down that the right to impeach the sale of land for arreais of Government revenue extended not only to the defaulting proprietors, but also to derivative holders under them, that is, in the particular case before their Lordships, to permanent leaseholders or istamrardars. And this too was the view of the Privy Council, although s. 23 of Regulation XI empowered proprietors only to contest the validity of such a sale. This we think is a clear authority in favour of the view that persons other than proprietors, who had an interest in property antecedent to its sale, could under that Regulation maintain a suit to impeach the validity of the sale : and *a fortiori* will such a suit lie under the present sale-law, in which the language used (see s. 53 of Act XI of 1859) is of a more general nature. We are accordingly of opinion that this suit will lie ; and we decide this point against the appellant.

(2.) The *second* objection is that the plaintiffs' suit No. 19 of 1886 for enforcing their lien against the property having been practically dismissed, a second suit for the same relief cannot be maintained : and in support of this contention certain cases are relied upon viz., *Watson & Co.* v. *The Collector of Zillah Rajshaye* (13 Moore's I. A., 160 ; 3 B. L. R., P.C., 48 ; 12 W.R., P.C., 43) and *Sukh Lall* v. *Bhikhi* (I.L.R., 11 All., 187). But we do not think that these cases are on all fours with the present case. In the first place, the present appellant was not a party to suit No. 19 of 1886, and therefore there can be no question of *res judicata* as between him and the plaintiffs. Further, if the sale be set aside, the appellant will cease to have any right to the property, and will therefore not be affected by a declaration of the plaintiffs' lien on it. Again, the defaulting-proprietors raise no objection [410] to the form of the plaintiffs' suit. On the contrary, they support the plaintiffs and wish the sale to be set aside ; so that, having regard to this fact as well as to the state of things existing when the decree of the 10th December 1886 was passed, which absolutely precluded the Subordinate Judge from directing the mortgaged property to be sold, we think that this objection ought not to prevail.

(3.) The *third* objection is that, as admitedly the property was not under attachment by order of any judicial authority at the time of sale, s. 5 of Act XI does not apply. We think, however, that there is nothing in that section which indicates that the property sold for arrears should be under attachment at the time of sale. The object of the notification prescribed by s. 5, as pointed out in a decision of the Privy Council in *Bunwari Lal Sahu* v. *Mohabir Pershad Singh* (12 B.L.R., 297; L.R., 1 I. A., 89, 104), is to give timely inform-

highest rate of current Government Securities. And if such party shall neglect to pay any amount so recoverable, within six months from the date of such final decree, he shall lose all benefit therefrom].

ation to an attaching-creditor that the property is in arrears, so as to enable him to step in and pay the revenue before the latest date of payment, and so to save the property from forfeiture and sale. If, therefore, a property is in arrears, and is also under attachment by order of any judicial authority, it seems to us that, having regard to the provisions of s. 5, the Collector could not legally sell it without first publishing a notification of the arrears not less than fifteen clear days prior to the latest date of payment; and in this view, it is immaterial whether the attachment was or was not subsisting at the time of sale.

The question then for decision in connection with this objection is whether the facts proved in the present case bring it within the purview of s. 5. Now the facts are these: One Sham Chunder Roy obtained a decree against the proprietor Ramjanam Misser; and, in execution of that decree, Ramjanam's interests in the Mehal Khurd Muradpore were attached by an order of the Munsif, dated the 12th of September 1885, and the mehal remained under attachment until the 13th of March 1886, when the decree-holder having neglected to deposit the Court-fee required for the publication of the sale-proclamation, the execution case was dismissed. On the 22nd of March 1886, [411] the order of dismissal was set aside, and the execution case was restored to its number, and the attachment which was thus revived continued to subsist up to the 18th May 1886, when the decree having been fully satisfied the case was finally disposed of. It is clear from these facts that the property was under attachment by order of the Munsif for the whole of the period during which the arrears of revenue accrued, including the arrear of Falgoon 1292 which fell due on the 1st Cheyt 1292 (13th March 1886), for the realization of which it was liable to be sold; and therefore the Collector ought to have published the notification required by s. 5 at the latest on 13th of March, that is, fifteen clear days before the latest date of payment, namely, the 29th of March (the 28th being a Sunday). Admittedly no such notification was published; and, therefore, having regard to the prohibitive language of s. 5, we think that the Collector acted illegally in selling the property.

Then, as to this irregularity (supposing it to be a mere irregularity and not an illegality) being cured by the certificate granted to the auction-purchaser under s. 8, Bengal Act VII of 1868, we are of opinion that this section does not apply to a case in which no notification under s. 5 was published at all; and this point too was not pressed before us.

(4.) Paragraph 1 of s. 17 of Act XI of 1859 [as amended by s. 2, Bengal Act III of 1881] runs thus: "No estate held under attachment by the revenue authorities otherwise than by order of a judicial authority shall be liable to sale for arrears accruing whilst it was so held under attachment." Now, it is clearly established that there being arrears of road-cess due in respect of Mehal Khurd Muradpore, the Collector took proceedings under s. 99 of the Cess Act (Bengal Act IX of 1880) by issuing a notification in the form in Schedule F annexed to the Act. That notification is in substance an order prohibiting ryots and other persons in possession of the mehal from paying rent to anybody else except to the Collector or the Cess Collector, until the further orders of the Collector; and it was published on the spot on the 12th of March 1886, and continued in force up to the 25th of September of the same year. But with reference to these proceedings, it is contended that this prohibitory order is not an attachment within the true meaning of the term; and that even if it be, [412] then the attachment was not valid, because the Collector did not record his opinion as required by s. 99 of the Cess Act. We think, however, that a prohibitory order of this kind is in effect a mode of

attachment; and we also think that the evidence shows that both the Collector and the Deputy Collector who had been vested with the powers of a Collector under s. 99 (see letter of the Commissioner, dated November 14th, 1882, at p. 38 of the paper-book) substantially recorded their opinions that proceedings should be taken under that section. There was thus a valid attachment of this particular property for arrears of road-cess by the revenue authorities on the 12th of March 1886: and on the 13th March 1886 (1st Chyet 1292), as we have already observed, the revenue of the preceding month of Falgoon fell due, and became an arrear of revenue under s. 2 of Act XI; and, therefore, this arrear accrued while the property was so held under attachment. Consequently, the Collector was positively prohibited from selling the property.

(5 and 6.) The substantial question involved in the *fifth* and *sixth* objections taken by the learned Advocate-General is whether s. 33 of Act XI is applicable to the present case. We think that this question is not altogether free from difficulty. If s. 33 does apply, then it appears to us clear that the suit must fail, because the grounds now taken under ss. 5 and 17 of Act XI were not declared and specified, as s. 33 requires, in the appeal preferred to the Commissioner, the main ground taken in that appeal being one of hardship on the ground of lowness of price. Further, although it appears that the property, which was worth about fifty thousand rupees, was sold for the inadequate sum of rupees six thousand five hundred, thus, we think, causing substantial injury to the plaintiffs who had a charge on the surplus sale-proceeds, it is urged that there is no proof that this smallness of price flowed directly from the irregularities (if there be any), and therefore it cannot be said that the plaintiffs sustained substantial injury by reason of such irregularities. It is quite true that there is no evidence worthy of the name to show that the inadequacy of price was caused by the so-called irregularities. But then it is argued for the respondents that if s. 33 does apply, we are at liberty, in the absence of evidence, to [413] infer that the irregularities deterred bidders and so were the cause of the property being sold at so low a price: and in support of this argument, Mr. Justice AINSLIE's judgment in the case of *Mohabeer Pershad Singh* v. *The Collector of Tirhoot* (15 W. R., 137) is relied upon. We think, however, after giving all these arguments our best consideration, that we need not express any decided opinion on this latter point, because it seems to us that we are bound by the judgment of a Full Bench of this Court in a somewhat similar case, *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* (I. L. R., 11 Cal., 200); and that, in accordance with that judgment, we are compelled to hold that s. 33 of Act XI is not applicable to the present case, whatever be our own opinion on that point. In the case referred to the Full Bench the provisions of s. 6 of Act XI had not been complied with, because the date notified for the sale was less than thirty days from the affixing of the notice, and it was held that this was not a mere irregularity or one of those errors of procedure which are intended to be cured by the purchaser having obtained his certificate, but that the sale by the Collector was absolutely illegal and void, as not being a sale which the Collector had power to hold under the Act: and for these reasons it was also held that the sale was not a sale within the meaning of the term as used in s. 33 so as to render it necessary for the plaintiff to prove that he had sustained substantial injury. We think that the principle laid down by the Full Bench is applicable to the present case; and that if a sale is illegal and made without jurisdiction, because the date notifying the sale was less than thirty days from the affixing of the notice, and so contrary to the provisions of s. 6; *a fortiori* is a sale illegal and made without jurisdiction, when, as in the present case, such a sale is positively prohibited

by the provisions of ss. 5 and 17 of the Act And even if it be conceded that the omission to issue a notification under s. 5 was a mere irregularity (which we are not prepared to say it was), it is impossible to say that a sale made under circumstances positively prohibited by s. 17 is anything short of an absolute illegality. In this view and in accordance with the Full Bench ruling, we must hold that the sale in the present case was null and void.

[414] The plaintiffs no doubt ask to have the sale annulled, using the words of s. 33: but in the view we take they might just as well have asked for a declaration that the sale was void and inoperative as against them. This, however, is a mere matter of form, and therefore not material to the present case. The result arrived at in either case would be the same. The appeal therefore fails on all points, and is accordingly dismissed with costs payable to the respondents who contested the appeal.

C. D. P. *Appeal dismissed.*

NOTES.

[*See* (1898) **21 Cal.**, 70 wherein this case was **reversed** by the Privy Council.]

[17 Cal. 414]

APPELLATE CIVIL.

The 2nd August, 1889.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE RAMPINI.

Gujraj Sahai........ ....Plaintiff

versus

Secretary of State for India in Council and another............Defendants.*

Public Demands Recovery Act (Bengal Act VII of 1880), ss. 21, 22—Sale in execution of a certificate under that Act—Procedure— Satisfied certificate—Act XI of 1859.

The procedure laid down by Bengal Act VII of 1880 must be strictly followed; and it is therefore, absolutely incumbent on the Courts, when considering the validity of sales under that Act, to rigidly require an exact compliance with the formalities prescribed therein by the Legislature.

Where a certificate is issued in respect of a demand under the Act, upon payment of such demand it becomes the duty of the Collector, under s. 22, to enter satisfaction upon the certificate, and also in the Register kept under s. 21.

A sale in execution of a satisfied certificate, or of a certificate not duly made under the Act, is absolutely void.

Abdul Hye v. *Nawab Raj* (B. L. R., Sup. Vol., 911) and *Lala Mobaruk Lal* v. *The Secretary of State for India* (I. L. R., 11 Cal., 200) followed; *Mohan Ram Jha* v. *Baboo Shib Dutt Singh* (6 B. L. R., 235) referred to.

* Appeal from Original Decree No. 138 of 1888, against the decree of A C. Brett, Esq., Judge of Tirhoot, dated the 10th of May 1888.

Semble :—Demands in respect of cess under Bengal Act VII of 1880 are not on the same footing as revenue demands to which Act XI of 1859 applies, and therefore the procedure prescribed by Act XI of 1859 for the recovery of the latter is not applicable to the recovery of the former.

SUIT for a declaration of right and confirmation of possession.

In execution of a certificate, purporting to be issued under Bengal Act VII of 1880 and dated the 13th January 1886, the entire estate of Ghouspore, Chuck Mujahed, consisting of three villages, was sold by auction on the 15th April 1886, and purchased by [416] Abdool Hai, 3rd party defendant, for Rs. 560. The estate originally belonged to Bibi Amina, Bibi Nesar Fatima, and Munzurul Fatima. The plaintiff Gujraj Sahai, who was a person of wealth in the enjoyment of an income of about Rs. 1,50,000 a year from zemindaries and indigo factories, purchased the estate in 1882 under a deed of sale from the Land Mortgage Bank of India, and in 1884 had his name registered under the Land Registration Act, 1876.

The certificate of the 13th January 1886 was issued in respect of road-cess on account of this estate falling due in 1885. It was not addressed to the plaintiff but to the original owners, and did not bear the signature of the Collector. There was also a note on the certificate in these words :—

"Seen to-day. No signature at foot. Pasted as at present.

The 20th August 1886. (Sd.) D. NORTON."

The certificate (Exhibit 4) was as follows :—

Certificate of demand of Government, which was annexed to the record in the Court of the Collector of the District.—Vide ss. 7 and 9 of Bengal Act *VII of 1880.*

Number of certificate.	Name of defaulter.	Address of defaulter.	Amount of Government demand for which this certificate is granted.	Rs.	As.	P.	Amount of Government demand for which this certificate is granted, and the name of the Government officer or member or person who is to give the detail of the mohal.
65	Bibi Amina and Bibi Nesar Fatima and Munzurul Fatima within the property purchased by Babu Gujraj Sahai	Inhabitant of Mouza Bagh 1 Mamar, Chuckla Garjoul, Pergunnah Bisara	Mal	38	2	0	On account of arrears of cess due on account of Mouza Ghouspore, Chuckla Garjoul, Pergunnah Bisara, original with dependency. Cess No. 3887, Towzi No 9656.
			Interest	1	15	0	
			Commission	3	3	6	
			Total...	13	4	6	

I do hereby certify that the amount mentioned above is due to the Secretary of State in Council, or Manager of the Mohal, or as the case may be, from the person named above. This day the 13th January 1886.

SHAFI AHMED,

Mohurir

The 18th January 1886. *Collector.*

(Illegible),

(Illegible).

[416] On the 21st January 1886 a notice (Exhibit A), also purporting to be under Bengal Act VII of 1880 but neither addressed to the plaintiff nor signed by the Collector, was drawn up in the following form :—

Notice under s. 10 of Bengal Act VII of 1880.

THE GOVERNMENT ... ... *Decree-holder.*

versus

BIBI AMINA, BIBI NESAR FATIMA AND MUNZURUL FATIMA,	in connection with the property, purchased by BABU GUJRAJ SAHAI, inhabitant of Mouza Baghi Maniar, Chuckla Garjoul, Pergunnah Bisara.	... *Debtor.*

You are hereby informed that a Road Cess Certificate for Rs. 43-4-6, which you are to pay under the provisions of Bengal Act VII of 1880 is written out. That certificate is annexed to the file of this Court. If you deny your liability for the amount, you must show cause within thirty days why such a certificate should not be enforced. If you do not show any sufficient cause within thirty days, then the certificate will be executed like a decree of the Civil Court for the amount in question. But this will not be done, if you deposit the amount in this Court. As long as this amount is not paid, you are hereby interdicted from conveying your immoveable property or any part thereof by sale, gift, mortgage or otherwise. A copy of the above certificate is hereto annexed.

This day the 21st January 1886. ——— ———*Collector.*

On account of Mouza Ghouspore, Chuck Mujahed, original with dependency, Chuckla Garjoul, Pergunnah Bisara, Towzi No. 9656, Cess No. 3887.

Tulubana-fee 12 annas.

HURRIHUR PERSHAD,
Mohurrir.

E. STEWART,
Depy. Collector.

On this notice there was an endorsement, dated 26th January, to the effect that the plaintiff had become acquainted with the order and would carry it out, and had paid the peon 12 annas process fee. This was signed "Babu Gujraj Sahai, by the pen of Ramruchhia Lal, servant and putwari of Babu Gujraj Sahai aforesaid."

On the 5th February 1887, the plaintiff instituted this suit against the Secretary of State for India in Council (1st party), Makbul Hossein (2nd party) as the real purchaser, and Abdul Hai (3rd party) as the benamidar of Makbul Hossein.

[417] The plaintiff's case was that, on the date of the auction-sale, he had paid up all demands in respect of road-cess and public works-cess due from him to the Government Tehsildar Laldhari Singh, who had granted him a receipt for the same on the 28th January 1886; that the certificate of the 13th January 1886 was not in due form under the Act; that no notice under s. 10 of the Act had been served upon him, and that the person to whom the notice was alleged to have been delivered had no authority to accept service on his behalf: that the processes under which the sale was stated to have taken place were invalid and were not duly issued and executed. The plaintiff submitted that, upon payment of all demands due by him, the certificate of the 13th January 1886 ought to have been cancelled. He charged that the proceedings were taken in collusion with Makbul Hossein (2nd party defendant), who was one of the original proprietors of the estate. The plaintiff alleged that he came to know of the certificate and the proceedings taken under it for the first time

on the 16th August 1886, the date on which possession had been given by the Court; and that he thereupon filed two petitions, dated 19th and 25th August 1886, respectively, praying for a cancelment of the certificate and the setting aside of the sale, but that his petitions were rejected on the 25th September. That, thereupon, on 13th December, he appealed to the Commissioner of Patna, but having faint hopes of obtaining redress by that means he had filed his suit. He stated that, although his actual possession had not been disturbed, symbolical possession had been taken by the purchaser, and that the security of his title had been thereby affected.

The plaintiff prayed for a declaration that the certificate of the 13th January 1886 was of no effect, and that the sale in execution thereof was void as the money due for road-cess and public works-cess had been paid up; for confirmation of his right and possession in the estate, and for an order that the defendants, 2nd and 3rd parties, had acquired no right therein.

The Secretary of State was made 1st party defendant; and although two months' time was obtained to file a written statement on his behalf, no written statement was filed, nor did he appear in the Court below. The case was contested by the Secre-[418]tary of State and by defendant 3rd party who was admitted at the hearing to be the purchaser. Their principal defence was that the conditions of law had been complied with, and that the sale and purchase had therefore been legally carried out and could not be interfered with.

The Judge found that the notice under s. 10 of Bengal Act VII of 1880 had been duly served upon the plaintiff, and that he was not ignorant of it as alleged by him; that the plaintiff had failed to prove that he had paid the arrears for which his property was sold before the sale was effected; and that there was no informality in the sale-proclamation nor was the sale brought about by fraud.

As regards the 6th issue, which was in these words: "Was the certificate of the 13th January 1886 informal? If so, what is the effect?" the Judge observed:

"The only informality alleged in the plaint is that "the certificate was not formally drawn up." It is in the list of documentary evidence that we find special mention of informalities. There it is said that the certificate is informal, because (a) it is not signed by the certificated officer. (b) it does not specify the name of the creditor, (c) it does not correctly describe the debtor: according to the description the plaintiff is not the debtor.

"As to (a), it is undoubtedly the case that, under the law, a certificate is to be under the hand of the Collector; but here the place for his signature has disappeared bodily; and as it is undoubtedly issued from his office, the presumption is that it was signed. As to (b) it is true that the word "Mozufferpore" is not filled in after the word 'district of;' but this does not rise beyond the dimensions of a clerical error. As to (c), the names of some ladies are mentioned as the debtors; but it is admitted that these are the original proprietors from whom (through the Land Mortgage Bank, it is said,) plaintiff derives his title. It is merely owing to oversight and general slovenliness that the alteration of names has not been made; that plaintiff cannot complain is shown by the facts that the names of the ladies occur in his own exhibits (Exhibits 1, etc.). And his own name appears throughout as purchaser (*Khariddar*). I hold that there has been no informality, at all events any such as would amount to material irregularity. I therefore decide issue 6th against the plaintiff."

In a previous portion of his judgment, the Judge made the following observations regarding the certificate itself:—

"I have caused the original to be placed on the record. as no copy could give any idea of its tattered appearance. Indeed, now that I have patched it up, it is very different from the rag that was first presented to me. It is [419] drawn up in the usual slovenly manner; but it is in accordance with the form given in

Form 2, Schedule II, attached to the Act. . . . . It is impossible to say now whether it was signed, as the place for the signature has bodily disappeared, but it apparently bore no signature on the 20th August 1886, as I find a note on it in these words: "Seen to-day. No signature at foot. Pasted as at present. (Signed) D. Norton, 20th August 1886." Mr. Norton was a Joint-Magistrate here. The note does not indicate whether the place for the signature had disappeared; but not improbably the allusion to pasting connotes this."

The Judge dismissed the suit, and the plaintiff appealed to the High Court.

Mr. *M. P. Gasper* (instructed by Messrs. *Watkins & Farr*), Baboo *Nallit Mohun Mullick*, and Baboo *Promoth Nath Sen* for the Appellant.

Mr. *C. Gregory* and Baboo *Saligram Singh* for the Respondent, Abdul Hai.

The Secretary of State, although made a respondent, was not represented.

The **Judgment** of the High Court (PIGOT and RAMPINI, JJ.) was as follows:—

This suit is instituted for a declaration of right and confirmation of possession of an estate, consisting of three mouzas in the District of Mozufferpore. The plaintiff says that the estate was sold at an auction-sale held on the 15th April 1886 in execution of a certificate, purporting to be issued under Bengal Act VII of 1880 and dated the 13th January 1886, and that the defendant became purchaser of the estate at this sale for the price of Rs. 560. The estate is alleged by the plaintiff to be of the value of Rs. 40,000.

The certificate was issued in respect of road-cess stated to be due to the amount of Rs. 43-4-6.

Substantially the plaintiff's case, in the plaint, is that at the time of the auction-sale he had paid up all demands due by him; that the certificate was not in due form under the Act; that no notice under s. 10 of the Act was served on the plaintiff; and that the person to whom it is (he says) untruly alleged to have been given had no authority to receive it on his behalf; that the processes under which the sale is said to have taken place were not [420] valid and were not duly issued and executed. Fifthly, repeating his allegation of payment, he submits that on such payment the certificate of January 13th, 1886, ought to have been cancelled and he charges that the proceedings had against him were taken in collusion with the 2nd defendant, the purchaser. He says that he has filed a petition under s. 12, but having faint hope of a remedy by that means also files this suit. He says that although his actual possession has not been disturbed, symbolical possession has been taken by the purchaser; and the security of his title has been thereby affected: and he asks for a declaration that the certificate of January 13th, 1886, was of no effect, and that the sale was void as the money due for road-cess and public works-cess had been paid up: for confirmation of his possession, and an order that the defendants, 2nd and 3rd parties (the 3rd as benamidar purchaser for the 2nd), have acquired no right in the estate.

The Secretary of State was made 1st party defendant. No written statement was filed on his behalf, and he did not appear either in the Court below or before us. He is made a party respondent in this appeal.

The lower Court dismissed the suit and the plaintiff appeals.

The estate was purchased by the plaintiff in 1882. It was formerly the property of Bibi Amina, Bibi Nesar Fatima and Munzurul Fatima. Plaintiff purchased under a deed of sale from the Land Mortgage Bank, and his name was registered, under the Land Registration Act, in 1884. Plaintiff says in his evidence that he paid the cesses for the year 1884. The cesses, in respect of which the certificate which is impeached was issued, were those falling due

in 1885; they are three in number, inasmuch as the sudder jumma of the estate is Rs. 94-0-10; and under the Board's rules, for estates below Rs. 100, three kists are fixed for the year, namely, where the Fasli era prevails, June 7th, January 12th, and March 28th. The total of Rs. 43-4-6 is made up of Rs. 38-2-0 for cess, Rs. 1-15-0 for interest, and Rs. 3-3-6 for commission. The plaintiff is a person of wealth. His income from zemindaries and indigo factories is about Rs. 1,50,000 a year. We have not, however, to regard either such considerations of apparent hardship as seem involved in the sale for Rs. 560 [421] of an estate worth Rs. 40,000 in order to enable the State to recover from a person of great wealth the sum of Rs. 43-4-6. We have only to consider whether the proceedings taken under the Public Demands Recovery Act, 1880, were in accordance with law; and, if not, whether they were, as the plaintiff contends, defective to such a degree, that either the certificate should be cancelled and the sale set aside under s. 20, or the sale be set aside because not made under the Act at all.

The Act (s. 7) provides that "when any arrears of the following public demands are unpaid by the person liable to pay the same, that is to say" [then follows in clauses 1 to 9 inclusive, a specification of the numerous demands to which the provision applies, to which are added, by s. 98 of the Cess Act (Bengal Act IX of 1880), demands coming due under that Act], "the Collector of the district may make under his hand in Form 2 in the second Schedule annexed to this Act a certificate of the amount of such arrears so remaining unpaid, and may cause the same to be filed in his office."

Section 8 provides that "subject to the provisions of this Act every certificate made under the provisions of s. 7 shall, as regards the remedies for enforcing the same, and so far only, have the force and effect of a decree of a Civil Court," and that in cases other than cases (7) mentioned in this Act "the Secretary of State for India in Council shall be deemed to be the decree-holder and in all the cases mentioned the person therein named as debtor shall be deemed to be the judgment-debtor."

Section 10 provides that "when a certificate has been filed in the office of the Collector under the provisions of s. 5" (which relates to arrears due in respect of revenue) "or s. 7" (which relates to demands payable to a person other than the Collector) "such Collector shall issue to the judgment-debtor a copy of such certificate and a notice in form No. 4 in the second Schedule annexed to this Act. From and after service of such notice such certificate shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of s. 274 of the Code of Civil Procedure."

Sections 12 and 13 provide that when the person served with [422] notice denies his liability he may "within thirty days after service of such notice, or *where no such notice has been duly served* within thirty days after execution of any process for enforcing such certificate, file a petition denying his liability before the Collector by whom such certificate has been made," and (s. 13) "such Collector shall fix a day for hearing the petition and determine whether the petitioner is liable for the whole or any part of the amount for which such certificate was made," and may set aside or vary the certificate accordingly. The Collector is to have all the powers of a Civil Court in hearing, &c., the petition: and the provisions of the Civil Procedure Code shall apply to the Collector exercising these powers. The Collector (s. 15) may refer any such petition for hearing to any Deputy Collector, or Assistant or Extra Assistant Commissioner.

Section 18 provides that "every certificate made under the provisions of . . . . or s. 7, ... may be enforced and executed upon the expiry of one month after service of the notice mentioned in s. 10," or as soon as any petition under s. 12 has been heard and determined.

Section 19 provides that "such certificate may be so enforced and executed by all or any of the ways and means provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money," &c., &c., &c., all duties, powers and authorities by the Code conferred on the Court being exercised by the Collector, or subject to his control by any Deputy Collector, &c.

These are the powers conferred by the law upon the Executive Officers. The protection given to the subject is first the right to present a petition under s. 12: and the rights given to him by s. 8, *cl.* (*b*), and by s. 20.

By s. 8 (*b*) the judgment-debtor may, at any time within one year after the service of the notice given to him under s. 10, bring a suit to contest his liability to pay the amount stated in the certificate and to have it cancelled: but no such suit shall be entertained unless the judgment-debtor has stated in a petition under s. 12 the ground on which he claims to have the certificate cancelled, or unless having omitted to state such ground in such petition, he shall satisfy the Civil Court that there was good reason for such omission.

[423] By this section it is provided that no certificate duly made under the provisions of this Act shall be cancelled by a Civil Court otherwise than on the grounds:--

(1) that the amount stated in the certificate was actually paid or discharged before the making of such certificate.

(2) (which we need not detail);

(3) in cases other than (2), to which the present belongs, that the amount stated in the certificate was not due by the judgment-debtor under the certificate:

(4) want of jurisdiction.

Section 20 enacts that, when immoveable property is sold in execution of a certificate under s. 18, and if such certificate is subsequently set aside by a competent Court, such Court may set aside such sale and may direct that the amount may be refunded to the purchaser with or without interest as the Court may direct: provided the purchaser has been made a party to the suit.

The matters of fact which the appellant contends for before us are: that no notice under s. 10 was served upon him; and that the arrears in respect of which the sale took place were, if due, paid to the proper person on the 28th January 1886 by the plaintiff's agent; and that the certificate was not, as required by law, signed by the Collector. This latter point gives rise to what may be called a question of fact, owing to the circumstance that the certificate has in some way so suffered since it was filed in the Collector's Office (assuming that to have been done) that, according to the judgment of the lower Court, the place for the Collector's signature "has disappeared bodily:" and the District Judge felt himself entitled, and, therefore, (we suppose), bound to resort to the presumption that it was signed "as it undoubtedly issued from the Collector's office." There are certain other alleged defects in this certificate upon which the appellant also relied.

As a matter of law it was argued that, as the money was received before the sale, that sale was illegal: *first*, because of the express declaration in the notice that upon payment the sale would not be held; and, *second* that as the certificate is by the Act placed on the same footing as a decree, a sale could no more take place under a satisfied certificate than under a satisfied **[424]** decree;

and s. 22 (*b*) was cited to show that, upon payment, it falls on the Collector in the case of a certificate, and not, as in the case of a decree, upon the judgment-debtor, to cause satisfaction to be entered up.

The *second* contention of the appellants in point of law was that (under the provisions of the Act VII of 1880) the certificate was not duly made under the provisions of the Act: that for that reason no execution could issue upon it as a decree; and that the sale made under colour of execution of such certificate was absolutely void; and further, as we understood, that, as no notice under s. 10 of the Act was given, nothing in the nature of an attachment of the property ever took place, and that no proceedings in execution under the sections of the Civil Procedure Code made applicable by s. 19 were ever had at all: and that therefore the sale was bad.

We shall first refer to the matters of fact in dispute. And at the outset we do not understand that it was seriously contested that, at the date of the issue of the certificate, January 13th, 1886, the three kists for 1885 were unpaid. This indeed is recorded as admitted by the plaintiff's pleader before the lower Court.

As to the payment of the money on January 28th, or, at any rate, on or before February 1st, we are quite unable to agree with the lower Court. We think it proved that the money was paid by Munraj Sahai, the plaintiff's agent, to Laldhari Singh, Tehsildar of Road Cess for the District. Exhibit 1 is a receipt signed by Laldhari for the sum of Rs. 431-9-0: Exhibit 2 is the counterfoil of it. Munraj says he paid this money to the Tehsildar, took No. 1 as a receipt, and wrote on the counterfoil (No. 2) the memorandum which is on the back of it. In both, the payment purports to be made on account of road-cess due in respect of Mouza Ghouspore Road Cess Register No. 3887, which is the correct cess number of the estate. Munraj is not cross-examined. Laldhari (still at the time of his examination, 6th January 1887, Tehsildar of Road Cess) says, he received, on the 28th January 1886, about Rs. 175 from Munraj, at Mozufferpore, on account of road-cess payable plaintiff on account of several mouzas. He corroborates Munraj as to Exhibits 1 and 2: the latter, the [426] counterfoil, he kept. He produces a challan (Exhibit 3), which was given to him about the payment of the money. At the top of the challan is the date February 1st and the signature of the Road Cess Clerk. The challan is numbered 41. It states the money is remitted by Bibi Amina (the first in order of the names of the former owners), through Laldhari Singh, on account of cess of Mouza Ghouspore, etc., Cess Towzi 3887. Dabi Pershad, Treasurer for three years, says that Exhibit 3 bears his initials. He is not cross-examined as to when or under what circumstances he put them there.

Exhibit 3*a* is an extract from the Treasury Register for February 1886: it is produced by Dabi Pershad or on requisition to him. It records the payment of Rs. 43-9-0 for cess from Laldhari Singh. and notes the No. 41 of the challan relating to this payment, which, as we have noticed, specifies the mouza in respect of which the cess was paid. He says the date is February 1st, 1886. There are many challans on that date entered as issued, against which there are no payments. Issur Chunder Sen, Deputy Collector and Treasury Officer, in charge of the Road Cess Department, says that Exhibit 2 bears the signature of Khirod Nath Mookerjee, Head Clerk. He says that No. 1, and (as we understand the note of his evidence, which, no doubt, is a little obscure) No. 2 also, bears, not his written signature but his stamped signature, which, until lately, he appears to have used in these books when issuing them. No evidence is adduced which appears to us to displace the effect of this evidence. Jogesswar Sahai is called. He is one of the Tehsildars of Road Cess. He was

given a cheque book (as it appears these books are called) K. In it there is the counterfoil and receipt relating to the demand in respect of which the certificate was issued. The "cheque" as well as the counterfoil is still there, unseparated. The amount is Rs. 43-4-6, which, and not Rs. 43-9-0, is that for which the certificate was drawn up. It bears a note written by him "agreeably to the order of January 13th, 1886, case sent up for proceedings under Act VII of 1880." He is not asked and does not say, what, or by whom, was the order of January 13th referred to in this note. He speaks of a report: if he made one, it is not deposed to or produced. It was of course [426] on this (Exhibit *Ka*) that the certificate was issued. By whose order it was issued, or under what circumstances, there is no evidence whatever. He says : "I went there at the end of December and the beginning of January. Gujraj Sahai said : 'I don't know anything. If it is due, I am going to write to the mukhtear. He will pay it.' He says a little before this, that Laldhari was one of the Tehsildars of Chukla Gargone, in which Ghouspore is, in September 1885, and he has still been (in service). The mouzas are not divided among the Tehsildars . . . . I never said that our mehal was placed under the charge of two Tehsildars."

There is one more piece of evidence which we think we should expressly notice. We cannot, of course, refer to every item of evidence in the case. It is Exhibit H, an entry from the Register of the Road Cess Department. It records as of the 1st February the payment of the items making up Rs. 43-9-0. But this entry is placed subsequent to one of the date, February 25th. It is put in by the defendants; but no evidence is given about it; the date when it was written up does not appear: whether after February or how long after, if so, it is left to speak for itself.

Upon the whole evidence, that which we have referred to and that which we have been obliged not to expressly notice, we think the money was paid as the plaintiffs' witnesses depose; that we must hold it to have been paid, on the fair balance of the evidence. There is reason to think, notwithstanding Issur Chunder Sen's expression of opinion, that different "cheque books" were issued to different Tehsildars, which in some cases, at any rate, contained, each of them, counterfoils and receipts for the same demand. It is true that Laldhari's "cheque" No. 1, is dated July 17th, for cess down to September: and Issur Chunder says kist money is never asked for in advance. But then the document is unexplained by evidence on the part of the defendants, and the payment of it sworn to, or corroborated, by officials still in the employment of the Cess Department, and by the entries which were not seriously impeached by any evidence brought from that Department.

Exhibit H may, or may not, be suspicious, according to the nature and history of it, as to which there is no evidence: and [427] there might well have been. It is true, that Exhibit 1 is for some annas more than Exhibit *Ka*, or the certificate based on it. Which of them is correct, there is no evidence to show. They differ, not in the amount of cess, but in the charges for interest and commission; mysterious items in these cess bills, which often attract the attention, but as to which one of us can say that in no case relating to cess demands has he ever read any evidence showing how the interest and commission were computed. It may be that in Laldhari's bill, interest was computed to a later period; and that in Jogesswar's larger charge was made for commission, on account of the calls made by him for collection. But this is conjecture: the defendants have not thought fit to develop any case on the point: and we think it, and the comment on H, wholly insufficient to justify the Court in disregarding the strong affirmative proof of payment.

Then Jogesswar's evidence, and also the service of the notice under s. 10 on the plaintiff (treating the latter as established, as the defendant urges that it is) would make the payment of the money soon after highly probable. It is improbable that, if this formidable certificate was served, or notice of it served, on the plaintiff personally, in respect of property so lately purchased by him and of such value, that he would have neglected to give directions about it: while the omission to pay up until then the cess for 1885 may, perhaps, be explained by this estate having been, as Jogesswar states, in ticca.

We hold payment proved. Upon payment, it became the duty of the Collector under s. 22 to enter satisfaction upon the certificate: and also in the Register kept under s. 21.

Section 22 creates a different law as to the satisfaction, both entry of it and proof of it, from that existing under the Civil Procedure Code: under which it is practically cast on the judgment-debtor to see that satisfaction shall be entered, and satisfaction not entered up is treated as, *qua* satisfaction of the decree, a nullity. But s. 22 casts on the Collector the duty of entering satisfaction, and nothing prevents the judgment-debtor under this formidable certificate of procedure from, at any rate, proving satisfaction of the certificate, if it be satisfied. That being so, we have a sale made in execution of a satisfied **[428]** decree at a tremendous undervalue: and applying the principles laid down in the case of *Abdul Hye* v. *Nawab Raj* (B. L. R., Sup. Vol., 911), we hold that the sale was absolutely void; even assuming that the *bona fides* of the purchaser was as unquestionable as his good fortune was in buying an estate at 1/80th of its value.

No one can in this country pretend to do more than arrive at a conclusion upon conflicting testimony as a matter of probability. If we should be in error in the conclusion that the money was paid, we are deceived by a conspiracy involving both forgery and perjury, such that, if it existed as the District Judge must suppose, it would show that the Road Cess Department in this district is corrupt to the core: a startling state of things, could we suppose it to exist, considering the tremendous powers given by the Act for enforcing the demands made out by the officers of that Department. We would refer here also to the following passage in *Mohan Ram Jha* v. *Baboo Shib Dutt Singh* (8 B. L. R., 235): "It is clear also, from the provisions of Bengal Act VII of 1868, that the certificate is to have the effect of a decree, and that for sales in execution thereof, the whole of the procedure prescribed by Act VIII of 1859 must be adopted. Therefore, as in the case of execution of decrees, if a party, before the sale takes place, comes into Court and pays the amount of the debt due or tenders the amount of the debt due, the Court is bound to receive the money and to abstain from selling the property attached; so in the case of the property which has been under the certificate for a Government demand, if the proprietor either before or at the time of sale come into Court, and before the property is actually sold, tender the amount of the demand, the Collector is bound to hold his hand and to abstain from selling the property."

Apart, however, from the question of payment, we think the sale must be set aside as not made under a certificate duly made under the provisions of the Act.

The Act is an extremely stringent one: the policy of it we do not of course discuss. But we suppose it to be, that, as a matter of executive convenience, demands of a public nature, the justice of which has been enquired into and certified by officials of high rank and unquestionable integrity, may properly enjoy, for the **[429]** enforcement of them, the very exceptional privileges

accorded to them by this Act; but subject to whatever safeguards are provided by the Act by the procedure laid down in it.

We think, therefore, that that procedure must, according to the familiar rule in construing and applying enactments of this nature, be strictly followed. The certificate does not bear a signature. It did not bear a signature on August 20th, 1886, as the note upon it shows. That note does not show that at that date the place for the signature had then been removed, as from the District Judge's judgment, seems now to be the case. We say "seems," for, in the slovenly fashion so common in some parts of this Presidency, a copy only, and not the original, has been sent up with the record. In the state in which the document was when put in evidence, we think it lay on the defendants to show that it had been duly signed. Upon the evidence, we must find as to this in the negative. There is not a tittle of evidence, as there might and ought to have been, to show by whose order it was issued, and by whom it was signed, if it was signed by any one, which we greatly doubt. In the notice under s. 10 put in by the defendant, which, according to the form given in the schedule, is to be issued by the Collector, there is a blank where the name of the Collector ought to be. If the Collector had signed the one, it may be supposed he would have signed the other. This defective notice confirms the conclusion to be drawn from the certificate itself; under what circumstances the certificate has been tampered with, and in what way, there is no evidence: not a question was put by Court or defendant, on the subject; one of the many respects in which the form in which this case comes before us, is imperfect and unsatisfactory. Having regard to these circumstances, we must hold that the certificate was not signed by the Collector or by any person authorised to sign it under the provisions of the Act.

Then the certificate was not addressed to the plaintiff. The second column of it, in place of being filled up as it ought to be, contains the following description:—"Bibi Amina and Bibi Nesar Fatima and Munzurul Fatima within the property purchased by Babu Gujraj Sahai." This defect runs through all the subsequent proceedings. In the notice to the Nazir, Exhibit 5, [430] in execution, dated 18th March 1886, the heading is as follows:—"Under the orders of the Deputy Collector of Zillah Mozufferpore. The Government (Decree-holder v. Bibi Amina and Bibi Nesar Fatima and Bibi Munzurul Fatima, in connection with the property purchased by Baboo Gujraj Sahai (Debtors)."

Nay, the memorandum of bids of sale, Exhibit 7, describes the property sold as:—

"Memorandum of bids of sale of the right and interest owned by Mussammat Bibi Amina, Bibi Nesar Fatima and Bibi Munzurul Fatima, in connection with the property purchased by Babu Gujraj Sahai, in Mouza Ghouspore, Chuck Mujahed, Chuckla Garjoul, Pergunnah Bisara, bearing Towzi No. 9656 and Cess No. 3887.

The sale-certificate to the third defendant has not been put in: for all we can tell, all that was purchased was the "right and interest owned by" the ladies, and not the plaintiffs' estate at all.

We think that these two defects are fatal to the certificate. There are others, which have been dwelt on in argument before us. But these are enough. We think it absolutely incumbent on the Courts, when considering the validity of sales under this Act, to rigidly require an exact compliance with the formalities prescribed by the Legislature: to do so at least as rigidly as the Courts at home have, for instance, in copyright cases and in many others, insisted on exact obedience to prescribe formalities. In this kind of case, the matter is of infinitely greater importance: as this appeal will illustrate.

It is said that the plaintiff could not have been misled, if he got the notice; as he of course knew that he was the real owner. That is true, in this case perhaps: and if he did get the notice his prompt payment is well accounted for. But that is not the question. The question is, shall slovenly disregard of the formalities prescribed by the Legislature be treated as immaterial, or as invalidating the acts done under colour of its authority? As in the case of *Lala Mobaruk* v. *The Secretary of State for India* (I. L. R. 11 Cal., 200), we hold that the non-compliance with the provisions prescribed by the Act prevented the Collector from being clothed [431] with the powers conferred on him by the Act, and that the sale was not a sale under execution of a certificate duly made under the provisions of the Act, and was absolutely void.

The judgment of Mr. Boxwell, the Commissioner, in appeal from the Deputy Collector, was put in, without objection, as evidence. We have not relied on it: but we are glad to find that our conclusion is the same as that arrived at by him: that the certificate was not signed and that the money was paid, as plaintiff contends. We are wholly unable to agree with the lower Court in treating para. 6 of the plaintiff's petition to the Commissioner as amounting to an admission that the money was not paid. It is going far to treat such a statement in such a document as evidence to be seriously relied on. We must express our regret that the District Judge should have cast a most serious imputation in his judgment upon the plaintiff's son, who is Vice-Chairman of the Road Cess Department. He says, "it is part of defendant's case that" he "has been able to manipulate the books." There is not a tittle of evidence to show that he could do so; not a suggestion in the evidence that he did do so: and no evidence that they were tampered with at all. We feel it our duty to say that there is nothing in the evidence to afford the smallest justification for this most serious charge; which is none the less a charge, apparently influencing the District Judge, because put as a recital of part of the defendant's case.

Holding the sale void on the two grounds of satisfaction before sale and of the invalidity of the certificate, we think it unnecessary to go into the other grounds of fact or of law, argued by the appellant.

We wish to add a remark upon the argument addressed to us, that as Act XI of 1859 is to be read with this Act, the procedure prescribed and the powers conferred under that Act are applicable (and particularly ss. 6* and 18† of that Act)

*[Sec. 6 :—The Collector or other Officer duly authorized to hold sales under this Act shall as soon as possible after the latest day of payment fixed in the manner prescribed in section III of this Act, issue notifications in the language of the district, to be affixed in his own office and in the Court of the Judge of the district, specifying the estates or share of estates which will be sold as aforesaid, and the day on which the sale of the same will commence, which day shall not be less than fifteen or more than thirty clear days from the date of affixing the notification in the Office of the Collector or other Officer as aforesaid. And if the Government revenue of any estate or share of an estate to be sold exceed the sum of five hundred rupees, a notification of the sale of such estate or share of an estate shall be published in the Official Gazette. Except as hereinafter provided, all estates or shares of estates so specified shall, on the day notified for sale, or on the day or days following be put up to public auction by and in the presence of the Collector or other officer as aforesaid, and shall be sold to the highest bidder. And no payment or tender of payment, made after sunset of the said latest day of payment shall bar or interfere with sale, either at the time of sale or after its conclusion.]

Notifications of sale to be issued, and no tender after latest day of payment to stop the sale.

† [Sec. 18 :—It shall be competent to the Collector, or other Officer as aforesaid, at any time before the sale of an estate or share of an estate shall have commenced, to exempt such estate or share from sale: and in like manner it shall be competent to the Commissioner of Revenue at any time before the sale of an estate or share of an estate shall have commenced to exempt such estate or share from

Estates may be specially exempted from sale.

to the recovery of public demands of the nature arising in this case. We wholly dissent from this view. It has at no time been attempted by the Legislature to place demands in respect of cess on the same footing as revenue demands to which Act XI of 1859 applies. They have been always kept carefully separate in legislation : **[432]** and for obvious reasons, although the absolute powers of the Collector under s. 6 have been habitually, under administrative orders from the Board of Revenue, used to enforce payment of cess demands amongst others.

We allow the appeal, set aside the decree of the lower Court, and make a decree in favour of the plaintiff in the terms of his prayer. The declarations made will be as between the Secretary of State as well as between him and the other defendants. The plaintiff must have his costs throughout as against all the respondents, including the Secretary of State. It is true that the Secretary of State has not been represented in this matter, but the Government has supported the validity of the proceedings in this case. Two months' time was obtained in the Court below to enable a written statement to be filed on behalf of the Secretary of State, and we think that under the circumstances, having regard to the source of the errors which have led to these proceedings, the Government ought to be liable for costs quite as much as the other defendants. Whether the Government will also think itself bound to consider the position of the defendant, the unsuccessful purchaser, it is not for us to say.

C. D. P. *Appeal allowed.*

NOTES.

[This case was **affirmed** by the Privy Council on appeal, **(1893) 20 Cal., 826.** It has been followed in 5 C. L. J., 687 ; (1901) 29 Cal., 73 overruling 23 Cal., 641 ; (1909) 13 C. W. N., 710 ; (1911) 14 C. L. J., 83.]

---

sale, by a special order to the Collector or other Officer as aforesaid to that effect in each case ; and no such sale shall be legal if held after the receipt of such order of exemption. Provided, however, and it is hereby enacted, that the Collector or other Officer as aforesaid or the Commissioner shall duly record in a proceeding the reason for granting such exemption ; and provided also that an order for exemption so issued by the Commissioner shall not affect the legality of a sale which may have taken place before the receipt by the Collector or other Officer as aforesaid of the order of exemption.]

Proviso.

[17 Cal. 432]
PRIVY COUNCIL.

The 31st July, 1889.

PRESENT:

LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. COUCH.

Seth Jaidayal............Defendant

versus

Ramsahae and others............Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Contract—Contract which had become impossible to perform—Further and other relief—Damages—Contract Act (IX of 1872), s. 56—Novation.

Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender, of land, which however had then already been attached under a decree, and had been taken under the Collector's management under s. 326* of the Code of Civil Procedure. To perform the contract by delivery of possession of the land having thus become impossible, it was *held* that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him.

[433] APPEAL from a decree (6th March 1885) modifying a decree (3rd September 1883) of the District Judge of Sitapur.

The suit out of which this appeal arose was brought by the respondents against Seth Sitaram, whom the appellant, by revivor, represented, and related to the following transaction: Seth Sitaram, the defendant, being indebted to Shukulji Gur Parshad, a Mahajan of Cawnpore, to the amount of Rs. 16,000, in consideration of that amount and the promise of a further loan of Rs. 5,000, mortgaged to him by way of zur-i-peshgi lease, dated 11th June 1877, villages comprised in a talukhdari estate, in effect contracting to give possession for a term commencing on the 23rd September 1877. The Rs 5,000 were not advanced by Gur Parshad, and he never entered into possession of the land. On the 7th July 1877, the mortgaged estate, which had previously been under attachment in execution of a decree, was taken under the direct management of the Collector, the Deputy Commissioner of Sitapur, under s. 326 of the Civil Procedure Code. On the 13th April 1882, Gur Parshad issued a notice to the defendant, calling upon him to pay the money due under his contract. To this the defendant replied, asserting that the contract had become void in consequence of the non-performance by Gur Parshad of his part of it. On the 17th June 1882, Gur Parshad died, having left all his property to the second and third plaintiffs, then minors, of whom the first

*[Sec. 326:—When, in any local area in which no declaration under section 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share. In such case the provisions of sections 320, paragraph two, to 325 C. (both inclusive) shall apply, as far as they are applicable.]

When Court may authorize Collector to stay public sale of land.

became guardian, obtaining a certificate under Act XL of 1858 The suit, commenced on 11th June 1883, claimed completion of the terms of the zur-i-peshgi lease of 11th June 1877, offering to pay at the time of possession delivered, Rs 5,000, and, in the alternative, a decree for Rs 27,520 to be realized by the sale of the property, with a mortgage lien thereon until such sale, also, any other relief The defence was that the document of 11th June 1877 was inoperative, being an attempt to revive a time barred debt for Rs 15,000 and further, that the contract had become null and void

The District Judge dismissed the suit upon the grounds adverted to in the judgment of the Judicial Commissioner who, after stating the above facts, continued thus —

Upon these facts the Judge held that the contract was void, in the terms of s 56 * of 'the Indian Contract Act 1872 and dismissed the plaintiffs' **[434]** suit The grounds upon which the Judge refrained from acting under the final clause of s 56 of Act IX of 1872 are thus stated in his decision —

There remains the question whether the plaintiffs are entitled to any equitable relief other than the remedies which they have themselves indicated

When an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he received it

'I am however unable to find that the defendant in this case received any advantage under the agreement which became void on the 7th July 1877 Prior to that date the plaintiff's representative could scarcely have recovered from him the amount of the debt on the notes and in any case the rights of Gur Purshad as endorser revived against the defendant as acceptor as soon as the contract as to the lease became void It would be impossible to hold that the void contract had the effect of extending to six years the term within which the plaintiffs might sue on the promissory note

I agree with the Judge in thinking that the zur-i-peshgi lease became void in the way stated by the Judge but I am unable to follow the learned Judge in his reasons for refusing to award compensation for the loss sustained by the promisee through the non performance of the promise I consider it proved that on the execution of the document of the 11th June 1877 the obligation created by the note of hand [illegible] on the 20th May which fell due on the 11th June 1877 was cancelled and the obligation created by the zur-i-peshgi lease was substituted for it This was I consider a valid novation and in the terms of s 62 Act IX of 1872 the defendant was thereby discharged from his liability to perform the original contract to pay Rs 16,000 And this being so I must hold that plaintiff is equitably entitled to recover from the defendant Rs 16,000 with reasonable interest thereon from the 11th June 1877 up to date of payment It has been objected for the defendant that the suit is barred (quoad the relief to which I hold the plaintiff to be equitably entitled) by the provisions of the Indian Limitation Act 1877 Sched II Arts 57 and 64 But in my judgment neither of these articles applies and the article applicable is Art 116

The decree of the District Judge is modified The plaintiff will recover from the defendant Rs 16,000 with interest at the rate of [illegible] per cent per annum from the 11th June 1877

Agreement to do impossible act void

* [Sec 56 An agreement to do an act impossible in itself is void

Contract to do impossible act or one which afterwards becomes impossible or illegal when void

A contract to do an act which after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent unlawful becomes void when the Act becomes impossible or unlawful

Compensation for loss on non performance of act known to be impossible or unlawful

Where one person has promised to do something which he knew or with reasonable diligence might have known and which the promisee did not know to be impossible or unlawful such promisor must make compensation to such promisee for any loss which such promisee sustains through the non performance of the promise]

to date of payment. The rest of the plaintiff's claim is dismissed. The costs of the suit will be borne by the parties in proportion to the extent of the plaintiff's claim now decreed and dismissed.

In assessing costs the valuation of the claim as now decreed will be taken as Rs. 21,760.

[435] Mr. *R. V. Doyne*, for the appellant, argued that the suit was not maintainable. The plaintiff's equity was to be remitted back to the rights existing at the time when the document of 11th June 1877 was executed; performance having been impossible, and the contract void (s. 56 of the Indian Contract Act IX of 1872). Those rights, which had arisen out of the advances made by Shukulji Gur Parshad on hundi-transactions, in and before 1877, might be enforceable, if a suit upon them was not barred by time. It was submitted that such a suit was barred, however, there not having been any complete novation effected, as had been supposed by the Judicial Commissioner.

Mr. *J. D. Mayne*, for the Respondent, was not called upon.

Their Lordships' **judgment** was devered by

Sir B. Peacock.—Their Lordships are of opinion that the decree of the Judicial Commissioner is correct, and ought to be affirmed.

The action was brought upon a contract, dated the 11th June 1877, and was commenced on the 11th June 1883 The contract was not a void contract as was supposed by the Subordinate Judge. It was a binding contract ; but it was one which the defendant was not able to fulfil. He states : "I have of my own accord and free will, in consideration of my having taken an advance of Rs. 21,000, put the said share, with the exception of talukhdari sir lands, in possession of Shukulji Gur Parshad, Mahajan, resident of Cawnpore, by way of settlement in a lease and farm for a period of twelve years from 1285 till 1296 Fusli," that is from the 23rd of Septemper 1877, a date within the period of limitation. Then he shows that the whole of that Rs. 21,000, which he admits having received, in fact had not been received: he had not received Rs. 5,000 of that amount; and although the contract states that he had put Shukulji into possession, he had not in fact put him into possession. Then the contract goes on : "The first condition is that the said Shukulji" (that is the ancestor of the plaintiffs) "shall retain possession as lessee of all the villages of the ilaka to the extent of seven annas for the stipulated term." There was a contract, therefore, that he was to have possession of that property for a term commencing [436] on the 23rd of September 1877. It turned out that the estate had been seized into the hands of the Collector under a decree against the defendant, and it was impossible for him to put the plaintiffs into possession.

Then the question arises, What were the damages for their not being put into possession? The damages awarded were for the Rs. 16,000 which had been received, and interest upon that amount, from the date of the contract, at 12 per cent. If the defendant had given possession, as was intended by the terms of this contract, the plaintiffs would have had the property for a period to commence from the 23rd of September 1877 as a security for Rs. 16,000 and interest.

The plaintiffs not having been put into possession, and the defendant not being able to give them possession, the damages which they sustained by not having that security for the Rs. 16,000 and interest were the Rs. 16,000 and interest which the Judicial Commissioner has allowed.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the Judicial Commissioner ought to be affirmed, and the appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Barrow & Rogers.*

C. B.

NOTES.

[*See* also (1905) 3 C. L. J., 220; (1895) 21 Bom., 175; (1893) 16 Mad., 325.]

[17 Cal. 436]

PRIVY COUNCIL.

The 23rd July and 1st August, 1889.

PRESENT:

LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. COUCH.

Kissorimohun Roy and others............Defendants

versus

Harsukh Das............Plaintiff.

[On appeal from the High Court at Calcutta.]

Attachment— Wrongful attachment—Claim to attached property—Civil Procedure Code, ss. 278, 283, 483—Attachment before judgment—Liability of creditor who caused attachment of goods not belonging to the debtor- - Damages after sale—Difference between English and Indian law on the subject.

Orders for attachment in security under s. 483 * of the Civil Procedure Code being issued on the *ex parte* application of the creditor, who is bound to specify [437] the property which he desires to have attached and its estimated value, it follows that the attachment is the direct act of the creditor, for which he is immediately responsible. Should the goods be proved not to belong to the debtor, the litigation and delay, and also any

---

Application before judgment for security from defendant to satisfy decree, and in default for attachment of property.

* [Sec. 483:—If at any stage of any suit the plaintiff satisfies the Court by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

(a) is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or

(b) has quitted the jurisdiction of the Court, leaving therein property belonging to him,

the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the Court shall be attached until the further order of the Court.

Contents of application.

The application shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.]

depreciation of the goods by an intermediate fall in the market, between attachment and sale, are the natural and necessary consequences of the creditor's unlawful act.

The plaintiff having taken, without success, the summary proceeding under s. 278, to get the release of goods attached under s. 487*, in a suit to which he was not a party, afterwards, in a suit brought by him in accordance with s. 283, established his right of property in the goods: *Held*, that (*a*), in order to entitle him to the full indemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under s. 278 maliciously, or without probable cause; and that (*b*), the goods having been sold under the Court's order, the difference in market value of the goods at the time of their attachment (November 1883) and their price when they were sold (June 1884), the selling prices having fallen intermediately, must be added to the damages.

Held, also that, without bringing under review the judgment under s. 278, the effect of the judgment in the suit brought in accordance with s. 283 was to supersede the order under s. 278, and to render it inconclusive. The procedure on attachment not being the same in India as in England, where a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods taken in execution in satisfaction of his debt, that proposition does not hold good under the Indian procedure; and *Walker* v. *Olding* (1 H. & C. 621: 9 Jur., N. S., 53; 32 L. J., Exch., 142; 7 L. J., N. S., 633) is inapplicable to the latter.

APPEAL from a decree (13th March 1886) of the High Court (See *Kishori Mohum Rai* v. *Hirsook Das*, I. L. R., 12 Cal., 696) affirming a decree (28th April 1884) of the High Court in its Original Civil Jurisdiction.

The suit out of which this appeal arose was brought on 28th April 1884 by the respondent, Harsukh Das, in accordance with s. 283 Civil Procedure Code, to establish his right of property in, or a lien upon, 922 bales of jute which had been attached on 28th November 1883, before judgment, under s. 483, by the present appellants, Kissorimohun Roy and his brothers, in a suit brought by them on 23rd November 1883, in the Court of the Subordinate Judge of the 24-Pergunnahs District, against Borodakant Dey and Umakant Dey, at that time dealers in jute. That suit was one to recover about Rs. 4,500 from the Deys in respect of transactions [438] between them and the Roys, who caused to be attached the above bales of jute in the screwing-godowns of Harsukh Das at Chitpore as the property of the Deys. A claim was preferred, under s. 278, by Harsukh Das, who was to screw the jute into bales, having had transactions with the Deys in the autumn of 1883, and having made a contract on 7th November 1883 with them, under which he was to have a lien on their jute for advances made by him, and for interest and other charges. Harsukh Das's claim was disallowed on the 15th April 1884 by the Subordinate Judge, under whose order, afterwards made for the benefit of all concerned, the jute was sold on 30th June 1884, realizing Rs. 12,053. This was upon a decline in the market price.

On the dismissal of his claim, and before the sale, Harsukh Das brought this suit, claiming to have his right of property in the jute at the time of the attachment declared, and claiming that, if the Court should find that he was not in fact the proprietor as against the Roys, he should be declared to have a lien on the jute for his advances to the Deys, amounting to Rs. 42,025; also, if the jute should be sold, that he should have a decree for its value when attached, *viz*., Rs. 23,355.

The Courts below concurred in conclusions opposed to those of the Subordinate Judge, and held that the plaintiff, at the time of the attachment in November

Investigation of claims to property attached before judgment.

*[Sec. 487 :—If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money.]

1883, was the actual owner, by purchase from the Deys, of 848 of the bales, and was therefore entitled to recover the full market value of those bales at the date of the attachment; and as to the residue of the bales, that the plaintiff had, under an agreement in writing with the Deys, the lien claimed by him. The result to these appellants was that the market value of the 848 bales having fallen largely between the 25th November 1883, when they were attached, and the 30th of June 1884, when they were sold by order of the Court of the Subordinate Judge, these appellants were declared liable to make good to the plaintiff that depreciation, amounting to Rs. 12,703-12. And they were also declared liable to pay the plaintiff the sum of Rs. 1,690-10 in respect of his lien. The total damages decreed were Rs. 25,584.

An appeal from the decree of WILSON, J., in the Original Jurisdiction, was heard by a Divisional Bench [GARTH, C.J., **[439]** and CUNNINGHAM, J.) The hearing of the case and the judgments on appeal are fully reported in (I. L. R., 12 Cal., 697.) The result was that the appeal was dismissed.

The Roys appealed to Her Majesty in Council, and on the 12th February 1889, before their appeal came on for hearing, an application was made on their behalf by Mr. *R. V. Doyne*, on affidavits setting forth that there had been a judgment in their favour by the Subordinate Judge on the claim made by Hursukh Das under s. 278, to their Lordships, Lord WATSON, Lord HOBHOUSE, and Sir R. COUCH, then present. The petition was to have that judgment, not then contained in the record of the appeal, added thereto. It was argued that the appellants were entitled to have this judgment made part of the record, and to refer to it, as showing that they had, in the opinion of the Subordinate Judge, acted in good faith throughout. The application was refused, on the ground that this judgment should not have affected the question raised in the subsequent independent suit permitted by s. 283.

Afterwards, on the hearing of this appeal (July 23rd)

Mr. *R. B. Finlay*, Q. C., and Mr. *R. V. Doyne*, for the Appellants, argued that the Courts below had taken an incorrect view of the plaintiff's right to damages. It was not disputed that, as the Courts found, the property was not that of the Deys, but of Harsukh Das. But it was insisted for the appellants that, as they had acted *bona fide* in attaching the jute in 1883, believing it to be that of the defendants, as it had remained in custody of the Court, and as it had been sold by order of the Court, they were not liable for the amount of damages decreed by the Courts below. The attachment could not be regarded as having been made without reasonable cause, and the respondent was an assenting party to the order made by the Court for the subsequent sale, which took place to prevent loss by injury to the goods *in specie*. The respondent could not claim as damages the reduction in price, the result of the fall in the market. In a case like the present, the party attaching goods for security, even although he might have caused the attachment of goods not the property of his debtor, could only be held liable for such damages as had been occasioned by his acting without reasonable and probable cause; or by his having wilfully misled the Court into action, whereby the oppo-**[440]**site party had been injured; or by reason of his having acted with malice. The attachment was the act of the officer of the Court, and it would be contrary to the principle declared in the judgment in *Walker* v. *Olding* (1 H. & C., 621; 9 Jur., N. S., 53; 32 L. J., Exch, 142) that a person who merely conducted litigation in Court should be held liable for what he had done in good faith. Reference was made to *Walker* v. *Olding* (1 H. & C., 621; 9 Jur., N. S., 53; 32 L. J., Exch, 142), *The Quartz Hill Consolidated Gold-mining Company* v. *Eyre* (L. R., 11 Q. B. D., 674), *Mitchell* v. *Mathura Das* (L. R., 12 I. A., 150: I. L. R., 8 All., 6).

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for the Respondent, contended that the appeal must be determined on the fact, found by both the Courts below, that the goods at the time of the attachment were the plaintiffs', rendering the attachment illegal. It was no part of their case that it was malicious, nor was it necessary for them to assert that there was an absence of probable cause, although no admission was made as to the latter, of which the Committee were not in a position to judge. The finding of the Courts below must be taken as to all the matters of fact, in which they had concurred, no ground having been shown by the appellants for impeaching that finding. The attachment was illegal, as depriving the plaintiff of his right; and the illegality was sufficiently brought home to the defendants by their having set the Alipore Court in motion. At their own risk they had caused the attachment, and the order of the Court in directing the sale of the goods to save further loss, was an executive act, not a judicial proceeding; which act was the direct consequence of the defendant's mistake The Civil Procedure enacted the law, which was not identical with English law on the subject, though, if, in *Walker* v. *Olding* (1 H. &. C., 621 ; 9 Jur., N. S., 53; 32 L. J., Exch. 142), the defendants had pointed out the particular goods to the Sheriff's officer, the decision would probably have been different. Here the wrongful attachment was directly occasioned by the appellants, who were therefore responsible for all the direct consequences.

Mr. *R. B. Finlay* Q. C., replied.

On a subsequent day (1st August) their Lordships' **judgment** was delivered by

[441] Lord Watson.—The present appellants, in a suit brought by them before the Subordinate Judge of the 24-Pergunnahs, obtained a decree for a debt of Rs. 4,523 against two persons, who, in these proceedings, are called the Deys, on the 7th January 1884. During its dependence, the appellants made application, in terms of s. 483 of the Civil Procedure Code, for attachment in security of 1,900 bales of jute, more or less, then lying in the present respondent's premises at Chitpore, which they alleged to be the property of one of the Deys, the defendants in the suit. On the 28th November 1883 a perwana was issued, directing the Nazir of the Court "to proceed to the spot and make an inventory of the bales of jute actually attached, *the same will be identified by Hari Churn Sircar on plaintiff's behalf*"

The Nazir, in execution of the warrant, proceeded to the respondent's premises on the 28th November, and there attached a quantity of jute which was pointed out to him by the appellants as the property of Borodakant Dey, consisting of 848 bales, which the respondent alleged had been purchased by him from the Deys, and 74 bales over which he alleged that they had given him a lien for advances. The respondent then preferred a claim to the goods attached under s. 278 of the Code, which was disallowed, after inquiry, by the Subordinate Judge, on the 15th April 1884.

On the 28th April 1884 the respondent, as authorized by s. 283 of the Code, instituted the suit in which this appeal is taken before the High Court at Calcutta, in order to establish the rights which he claimed in the goods, and for damages in respect of their wrongful attachment. By decree dated the 28th December 1884, WILSON, J., declared that the respondent was sole and absolute proprietor of the 848 bales, and had a valid and effectual lien upon the remainder for advances exceeding their value, and assessed damages at Rs. 24,584, being the market value of the jute at the time of the attachment. The Court of Appeal, on the 13th March 1886, affirmed the judgment of WILSON, J., with costs.

The decree of the Subordinate Judge, dismissing the respondent's claim, was not brought under review in these proceedings [442] before the High Court; but the effect of the judgment of the High Court has been to supersede his decree and render it altogether inconclusive. The goods in question were sold in June or July 1884 by order of the Subordinate Judge, when, owing to the intermediate fall in the market, the price obtained for them was about half of what they were worth at the date of the attachment.

The validity of the respondent's claim to these 922 bales of jute depends upon the authenticity of the documents of title produced and founded on by him, which has been affirmed in this action by the concurrent findings of both Courts below. In the argument addressed to their Lordships the appellants did not impeach these findings; but they maintained that damages were assessed on an erroneous principle, and that the respondent was not entitled to recover more than the price which the jute realized when sold by order of the Subordinate Judge in the year 1884.

The appellants argued that to condemn them in payment of the market value of the jute on the 28th November 1883 was, in reality, to make them responsible for delay occasioned by litigation, and that the respondent could not recover the difference between that value and the depreciated price arising from such delay, unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party, after the wrong is done, in order to obtain redress. But, in this case, there has been no action and no proceeding instituted by the appellants against the respondent Harsukh Das. The summary proceeding under s. 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that, in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the respondent is bound to allege and prove that the appellants resisted his application maliciously, and without probable cause.

The appellants mainly relied upon the English case of *Walker* [443] v. *Olding* (1 H. and C., 621; 9 Jur., N. S., 53; 32. L. J, Exch., 142) which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* (1 H. and C., 621; 9 Jur., N. S., 53; 32, L. J., Exch., 142) would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value. In the present case, by the terms of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on the 28th November 1883 was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent depreciation of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which

they incurred has been rightly estimated at the value of the goods upon the day of the attachment.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants : Messrs. *Barrow and Rogers.*

Solicitors for the Respondent : Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[This was followed in 6 Bom. L. R., 704 ; 29 Mad. 208 ; 12 I. C., 26 (Burma) ; (1911) 12 I. C., 507 (Mad.)]

---

[444] PRIVY COUNCIL.

The 6th November, 1889.

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, AND SIR R. COUCH.

Ram Singh and another............Plaintiffs

versus

Deputy Commissioner of Bara Banki............Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Talukhdars--Title obtained by Talukhdar under his sanad—Effect of confiscation of 1858 upon previous gift---Attempt to establish trust for claimants as to part of talukhdari estate—Claim to sub-proprietary right distinguished.

The sanad granting a talukhdar's estate confers *prima facie* an absolute title upon the grantee.

A gift of villages by a talukhdar to collateral relations, if effectively made in 1850, and whether absolute or only for the maintenance of the donees out of the rents and profits, was rendered, by the effect of the confiscation of 1858, inoperative after that event to establish an interest as against the talukhdar holding under a sanad comprising the villages.

Where a claim was based upon the principle that the conduct of a sanad-holding talukhdar and of his predecessor had been sufficient to establish against him a liability to make good, out of his taluk, interests, as to which ground was supposed to have been given for his relations to claim : *Held*, that such a claim was not established merely by the claimants having been left in possession of villages, and having paid to the talukhdar only the proportion of the revenue assessed upon them, during the whole time of the troubles in Oudh and afterwards. *Held*, also, that the question of the claimants having an under-proprietary right in such villages was entirely irrelevant to a claim for a declaration that they had proprietary right therein, on which latter title they sought to found a right to have their names entered in the settlement record ; and *held*, that, although there are cases in which the claimant of a proprietary right may be allowed to maintain, on the same facts, that he is an under-proprietor, this claim was not one of them.

APPEAL from a decree (5th April 1886) of the Judicial Commissioner of Oudh, affirming a decree (30th October 1885) of the District Judge of Lucknow, dismissing the suit of the appellants with costs.

In the suit out of which this appeal arose, the plaintiffs sought a declaration that they were in full proprietary possession of six villages in Pergunnah Haidargarh, part of the Pokhra Ansari Taluk, of which the Deputy Commissioner of Bara Banki was [445] Manager on behalf of the talukhdar, a minor, under the Court of Wards. They claimed under a deed of gift to their father Babu Gurdet Singh, from his nephew Rajah Sahaj Ram Buksh, then the talukhdar, executed in 1258 (Fasli), corresponding to 1267 (Hijri), and to 1850 (Christian). This alleged donor was the deceased elder brother of the present minor talukhdar. The question on this appeal was, whether they had established their proprietary right, it being insisted against them that the mere fact of their possession for many years was consistent with the villages having only been given to them for their maintenance; and that, according to the defendant, was what had occurred. The plaintiffs alleged that they were entitled to mutation of names in the settlement record, but had only recently required and applied for it; having lately mortgaged parts of the villages, which rendered it necessary for them to have their names recorded as proprietors.

The defendant, the Deputy Commissioner of Bara Banki, as Manager of the Pokhra Ansari Estate, on behalf of the minor talukhdar, admitted that the parties were descended from a common grandfather Rajah Surkam Singh; but alleged that the taluk descended by old family custom, and in accordance with the Oudh Estates Act I of 1869, to a single heir, while the *chutbhayas* (or cadets of the family) were entitled only to maintenance; the plaintiffs holding the disputed villages as *guzaradars* or holders of subsistence allowance. He disputed the deed of gift of 1850, which, as he contended, was of no operation, in consequence of the confiscation of the 15th March 1858, the revival of the talukhdari system in place of the village system, the summary settlement of 1859, the talukhdari-sanad, and the legislation of the Oudh Estates Act I of 1869. The minor talukhdar was entitled, according to the defendant, to an absolute proprietary right, without being liable in respect of any trust, express or implied.

At the hearing, upon issues raising the questions of the genuineness of the deed of gift, and the effect of the plaintiffs' long possession, it appeared that the latter held possession, paying to the talukhdar only the revenue assessed upon the villages, some of their witnesses describing their tenure as *pukhtadari*.

[446] The District Judge, without finding that the alleged deed of gift was genuine, decided that, if it was, it would have been inoperative, for the reasons above stated. Although the sanad, and the law, protected inferior rights, this suit having been brought for the full proprietary right, being to all intents and purposes a suit for the partition of the taluk, could not be maintained for the under-proprietary right.

On an appeal, urging that the talukhdar had by his conduct constituted himself a trustee for the appellants, who also, failing their rights as proprietors, were entitled to a declaration of their rights as under-proprietors, the Judicial Commissioner, intimating that he had no doubt of the genuineness of the deed of gift of 1855, said :—

"But I am of opinion that under the terms of Lord Canning's proclamation of the 15th March 1858, the deed of gift ceased to be of effect from the date of that proclamation. The words of the proclamation are clear. 'With the above-mentioned exceptions the proprietary right in the soil of the province is confiscated;' and the plaintiffs' right is not among the exceptions. If the plaintiffs had a right to a sub-settlement, their right was no doubt protected by the letters printed in the Schedule to Act I of 1869; but the plaintiffs

cannot bring themselves within the terms of Act XXVI of 1866, and what they claimed in this suit was the proprietary right in the villages. The statement that under-proprietary right only was claimed is an after-thought put forward for the first time at the hearing of the appeal.

"I am unable to find that ' the evidence shows that the talukhdar by his conduct constituted himself a trustee for the plaintiffs.' The trust must [*Hardeo Baksh* v. *Jawahir Singh* (I. L. R., 3 Cal., 523; L. R., 4 I. A., 178; L. R., 6 I. A., 161)], have been created at some time after the grant of the talukhdari-sanad, and I can find nothing in the evidence to suggest the creation of any such trust. The evidence goes no further than to show that plaintiffs were allowed to hold the villages as cadets of the family. When attempts at alienation were made, they were resisted : and in 1871 the talukhdar endeavoured to get the villages made liable for his debts."

"The appeal fails and is dismissed with costs."

On this appeal,

Mr. *J. H. A. Branson*, for the appellants, adverted to their uninterrupted possession, and that of their father before them, of the villages, in which he contended that they certainly had rights. [147] The family connection of the parties, their payment only of the Government revenue, the acquiescence of the talukhdar for the time being in a state of things favourable to the plaintiffs' claim, went far to show that he had recognized a trust for them. At all events, the appellants had shown themselves entitled to rights as under-proprietors. He referred to the judgment in *Gauri Shunker* v. *The Maharaja of Bulrampore* (L. R., 6 I. A., 1; I. L. R., 4 Cal, 839), showing that a plaintiff, seeking by his plaint a direct settlement in superior-proprietary right, might modify his claim to one for a sub-settlement of an under-proprietary right The appellants were entitled to a decree stating what their rights had been found to be, and that there ought to be a sub-settlement with them.

Mr. *W. F. Robinson, Q. C.*, and Mr. *C. C. Macrae*, for the respondents, contended that the only ground on which the plaintiffs could maintain the claim which they had made, upon the issue which they had raised, had failed entirely, leaving them no right of falling back on the claim to a sub-settlement. The case cited was distinguishable, and the present claim was in effect, disposed of by what their Lordships had said in *Haidar Ali Khan* v. *Nawab Ali* (L. R., 16 I. A., 183; I. L. R., 17 Cal., 311). The plaintiffs could not, on this record, rely, for a decree, upon any title they might have as under-proprietors, which might or might not be brought forward, but had not been put in issue.

Mr. *J. H. A. Branson* replied.

Their Lordships' **Judgment** was delivered by

Lord Hobhouse.—The villages which are the subject of this suit are part of the defendant's taluk, and are included in the sanad under which he holds that taluk. The plaintiffs claim to be proprietors of the villages by virtue of a deed of gift, which was dated in the year 1850, and of possession taken under that deed, and continued up to the present time. The deed of gift was made by the son of the then Rajah, or talukhdar, who was the manager of the estate, and made to the brother of the then talukhdar, who is the father of the plaintiffs. The genuineness of the deed is disputed; but it has been held to be genuine by [448] the Judicial Commissioner; and for the purposes of the present appeal the correctness of the holding may be assumed. But there is no doubt that the deed of gift (whether it is an absolute gift, or one for maintenance only, is a matter of dispute) was displaced by Lord CANNING'S proclamation; and that the sanad of the taluk conferred an absolute title upon the grantee *prima facie*.

The plaintiffs base their claim upon the principle of those decisions of this Committee, in which it has been held that the conduct of the holder of a sanad has been sufficient to establish against him a liability to make good, out of his sanad, interests in the property which he has by that conduct either granted to other people, or given them ground to claim. But the plaintiffs do not show that there has been any such conduct beyond the fact that that they have been left in possession of the property during the whole time of the troubles in Oudh, and down to the present time.

The talukhdar has paid to the Government the revenue for the whole taluk, and the plaintiffs have paid the talukhdar that share of the revenue which would be payable for the villages that they hold.

They are now desirous of selling or mortgaging the property. They have attempted to do so, and they have failed because they cannot get a mutation of names; and the present suit is a declaratory suit, in which they seek a declaration that they are the proprietors of the property in order that they may obtain a mutation of names.

Their Lordships are of opinion that the mere fact of possession, which is consistent with an intention to give maintenance as well as proprietorship, does not establish any case against the talukhdar obliging him to make the plaintiffs proprietors of that portion of his taluk.

Other cases are now set up. One is that the plaintiffs have a good title by adverse possession. Possession may be adverse or not, according to circumstances; and the question of adverse or non-adverse possession is mainly a question of fact. But there has been no allegation of adverse possession in the plaint, and no issue raised as to it before the Court below. Their Lordships think that it is impossible now to suggest a case of adverse possession.

[449] Then the plaintiffs claim that, if they are not proprietors, they have at all events a sub-proprietary right; and there are cases in which it would be quite just and proper to allow one who comes to claim recovery of villages, or the right to a settlement in villages, on the ground of a proprietary right, to maintain upon the same facts that he is in effect a sub-proprietor; but this is not such a case The question of sub-proprietary right is entirely irrelevant to the relief claimed in this suit, which is for a declaration of right on which to found a mutation of names in order that effect may be given to the dealing with the estate by the plaintiffs.

Their Lordships, thinking that the suit fails upon the main point, hold that it also fails upon the other points; and the result will be that they will humbly advise Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Watkins and Lattey.*

Solicitor for the Respondents: *The Solicitor, India Office.*

C. B.

[17 Cal. 459]

SMALL CAUSE COURT REFERENCE.

The 15th January, 1890.

PRESENT :

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE PIGOT.

Gubboy...............Plaintiff

versus

Avetoom............Defendant.*

Principal and agent—Contract Act (IX of 1872), s. 230—Undisclosed principal.

A broker gave to one Gubboy the following sold note :—"Sold this day by order and for account of E. E. Gubboy, to my principal, G. P. Notes for Rs. 2,00,000 (two lacs) at Rs. 98-11.

"(Sd.) A. T. A.
Broker."

This note was endorsed—"A. T. A., for principal."

In a suit by Gubboy against the broker for failure to take delivery . *Held*, that there was nothing in this contract to rebut the personal liability of the broker.

[460] REFERENCE from the Calcutta Court of Small Causes.

The suit was originally brought in the Court of Small Causes, by one E. E. Gubboy to recover from the defendant one A. T. Avetoom, a broker, Rs. 2,000 as damages for refusing to take delivery of Government 4 per cent. Paper of the value Rs. 2,00,000.

The contract in the case was dated the 4th October 1888 and ran as follows: –

"Sold this day by order and for account of Elias E. Gubboy, Esq., to my principal, Government of India 4 per cent. Promissory Notes for Rs. 2,00,000 (two lacs only), at the rate of Rs. 98-11, clear of brokerage.

Endorsed,
A. T. AVETOOM,
4-10-88. *for principal.*

A. T. AVETOOM,
Broker.

"Delivery and cash on the 3rd and 4th January 1889."

On the 8th November A. T. Avetoom wrote to E. E. Gubboy stating that he had accepted the contract for his principal adding, "Please note that principal is Babu Tincowrie Dass, to whom please deliver the paper on due date."

To this letter the attorney of E. E Gubboy replied, "My client cannot accept any principal in the transaction whatsoever, you having declared to him at the time of entering into the contract that it was a mere matter of form your entering the words 'my principal' in the contract, and that when asked you declined to disclose the name of your principal." The facts stated in this letter were denied by A. T. Avetoom in a letter in reply.

The plaintiff tendered the paper on due date, but the defendant, believing himself not to be liable, had made no arrangements to take up the paper.

* Small Cause Court Reference No. 7 of 1889, made by G. C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 8th July, 1889.

At the hearing the plaintiff's own evidence failed to establish the facts stated in his attorney's letter to A. T. Avetoom, viz., that the defendant had told the plaintiff that he himself was really the buyer; and the evidence of the defendant as to what passed was considered by the Court to be the most reliable; that evidence was "I am sorry I cannot tell you the name of my principal. If you won't accept the contract, you are at liberty to do so, I cannot force your signature. Tincowrie Dass was present, [451] and, after some talk between plaintiff and Tincowrie Dass which I did not hear, plaintiff said he would accept the contract."

Tincowrie Dass was not called by either party; but it was proved that he had failed in business before the 2nd November 1888.

On those facts the learned Chief Judge of the Small Cause Court, in delivering judgment, said:-- "The case turns on the construction of s. 230 of the Indian Contract Act (here followed the section) . . . It is for the defendant to rebut the presumption that a contract exists by which he is personally bound. I do not think he has done so. Among other cases *Southwell* v. *Bowditch* (L. R., 1 C. P. D., 374) was especially relied upon by Mr. *Avetoom* for the defendant. It was said by COUCH, C. J., in *Greenwood* v. *Holquette* (12 B. L. R., 42 (16)), 'we must not adopt as a rule of construction that it was intended to make the Contract Law of India the same as the law of England . . . . . and therefore we cannot refer to any English case as a guide. We must look at the words of the law and gather from them as well as we can what was the intention of the legislative authority.'

"According to *Southwell* v. *Bowditch* (L. R., 1 C. P. D., 374), in England, the plaintiff in a case such as this must prove positively that, by some usage of trade, a contract exists which makes the broker personally liable, or fail in the suit. In India, under s. 230 of the Contract Act, the burden of proof is thrown on the defendant to prove the negative, that no contract exists making him personally liable. He must rebut the presumption that a contract does exist by which he is personally bound. This point was clearly shown by WILSON, J., in *Soopromonian Setty* v. *Heilgers* (I. L. R., 5 Cal., 71). The other Indian cases are *Mackinnon Mackenzie & Co.* v. *Lang Moir & Co* (I. L. R., 5 Bom., 584) *Hasonbhoy Visram* v. *Clapham* (I. L. R., 7 Bom., 51) All these Indian cases were actions on charter-parties, and are in many ways distinguishable from the present case It might not unreasonably have been contended that when the defendants in those cases stated themselves to be agents of the owners of the ships, they disclosed the names of these principals within the meaning of [452] the Contract Act. The name of the ship being given, and the other party knowing the agents were not owners, it would not have been difficult to find out who the owners were (see *per* WEST, J., I. L. R., 7 Bom., 589).

"In *Soopromonian Setty* v. *Heilgers* (I. L. R., 5 Cal., 71), Mr. Hill, for the plaintiff, contended that a contract, that the agent shall be personally liable is to be presumed when the agent does not disclose the name of the principal; that means, in the case of a contract in writing, when the name of the principal is not disclosed on the face of the instrument. Mr. Phillips contended that any discolsure is sufficient. WILSON, J., said, 'I am inclined to think Mr. *Hill's* view is right,' but he did not decide the point.

"Section 231 of the Contract Act treats of the case of a person who neither knows nor has reason to believe he is dealing with an agent; but s. 230, if I understand it aright, assumes full knowledge on both sides that the agent is entering into a contract only as agent for some principal whose name he does

not disclose. Such knowledge may be conveyed to the plaintiffs verbally or in writing, or, as in the present case, in both ways.

"It is enacted that under these circumstances a contract (a supplementary contract, if I may say so) shall be presumed to exist by which the agent (the broker) is personally bound. In the present case there was no disclosure of the principal's name, written or verbal, at the time the contract was made; there was a positive refusal to disclose the principal's name; and I do not think that a subsequent disclosure of the principal's name by the broker is sufficient to rebut the presumption against him. I can see no difference whatever in substance between the contract in *Southwell* v. *Bowditch* (L. R., 1 C. P. D., 374) and the contract in the present case."

This judgment the learned Judge made contingent on the opinion of the High Court as to "whether or not upon the terms of the contract as they appear on the face of the sold note, and on the terms of s. 230 of the Indian Contract Act the judgment is correct?"

Mr. *Sale* for the Plaintiff.—The defendant is personally liable. He has not disclosed his principal. I distinguish the case of **[463]** *Soopromonian Setty* v. *Heilgers* (I. L. R., 5 Cal., 71) from this case, as there is nothing in the contract here disclosing the principal. In England evidence of usage is admissible to make the agent liable; here the Contract Act presumes that he is liable when he does not disclose. The case of *Fleet* v. *Murton* (L. R., 7 Q. B., 126) is on all fours with this case as far as the terms of the contract is concerned. [The Court here called upon the defendant.]

Mr. *Avetoom* for the Defendant.—The personal liability of the defendant is here rebutted by the words "for my principal;" but further, on the 8th November, the defendant disclosed the name of his principal. It is not necessary that the disclosure should be on the face of the contract. [PETHERAM, C.J.—I am not by any means prepared to say that the disclosure must be on the face of the contract.] The intention of the parties to the contract must be looked at to determine the liability: the words "sold by order and for account of" mean that the broker was selling for a principal. In *Gadd* v. *Houghton* (L. R., 1 Exch. D., 357), the words "on account of the principal" were held to be sufficient to save the agent from liability; see also *Pike* v. *Ongley* (L. R., 18 Q. B. D., 708), where the words were "for and on account of owner."

Mr. *Sale* in reply. The words "sold by your order and for your account to my principals," in *Southwell* v. *Bowditch* (L. R., 1 C. P. D., 374), were held to be, in the absence of evidence of custom, sufficient to free the broker from liability.

The **Opinion** of the Court (PETHERAM, C.J. and PIGOT, J.) was delivered by

Petheram, C.J.—The facts of this case sufficiently appear from the judgment of the learned Judge of the Small Cause Court in the reference which has been sent up to us, and it is not necessary to re-state them here, and the argument on the law is also very fully dealt with, so it is not necessary for us to say very much. The point which was most pressed before us by the learned Counsel for the defendant was that this contract on the face of it shows that the presumption which **[464]** arises under the Contract Act is rebutted in this case, because it is said that from the words of the contract itself it was not intended that the broker should himself be liable. The case of *Soopromonian Setty* v. *Heilgers* (I. L. R., 5 Cal., 71), decided by Mr. Justice WILSON, shows that the presumption which arises under s. 230 of the Indian Contract Act may be rebutted, and with that view we entirely agree; but the question here is

whether that presumption has been rebutted in this case. It is not contended that there is any evidence outside the contract to rebut it, but it is contended that certain words in the contract itself do so. Now the words which are relied on are those at the top of the contract, which are " A. T. Avetoom, for principal." These words show that A. T. Avetoom was acting as agent for a real principal; but the presumption which arises under s. 230 only arises when an agent is acting for a principal, so that those words cannot be said to rebut the presumption. In addition to this the case of *Fleet* v *Murton* (L. R., 7 Q. B., 126) is sufficient to show that the agent may be liable notwithstanding words of this kind in the contract. In the result, therefore, we think that the Chief Judge of the Small Cause Court was right in his view of this case, and we answer the question referred to us in the affirmative. With this expression of our opinion the case will be returned to him.

Attorney for the Plaintiff : Mr. *Moses*.

Attorney for the Defendant : Mr. *Sowton*.

T. A. P.

NOTES.

[See also (1890) 14 Mad. 362 ; (1891) P. R., 15 , (1890) 22 Bom. 754 ; (1898) 20 All. 497 ; (1905) 27 All. 361.]

---

[455] APPELLATE CIVIL.

The 31st January, 1890.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE PIGOT.

Lutf Ali Khan (one of the Defendants, Respondents) ....Petitioner

versus

Asgur Reza and another (Minor) by his next friend J. H. Lewis, Manager of his Estates (Plaintiffs, Appellants)...... .....Opposite Party.*

Appeal--Privy Council Department, Order in—Letters Patent, High Court, cls. 15, 39 - Appeal from order of Judge in Privy Council Department—" Judgment," Meaning of.

No appeal will lie from an order of a Judge granting a certificate that a case is a fit and proper one for appeal to the Privy Council.

IN this case an application was made to Mr Justice CHUNDER MADHUB GHOSE, sitting in the Privy Council Department, for a certificate granting leave, under cl. 39 of the Letters Patent of 1865, to the applicant, to appeal to the Privy Council from a decision passed against him by Mr. Justice NORRIS and Mr. Justice BEVERLEY ; the learned Judge of the Privy Council Department granted his certificate, and from his order so granting such certificate, the respondent, who was unsuccessful in the Appellate Court, appealed under cl. 15 of the Letters Patent.

* Letters Patent Appeal No. 3 of 1889, against the decree of Mr. Justice GHOSE, one of the Judges of this Court, dated the 20th of February 1889, in Privy Council Appeal No. 21 of 1888.

Mr. *Woodroffe* (with him Mr. *Evans* and Mr. *Twidale*) for the respondent in the Letters Patent Appeal.—There is no appeal from an order passed under cl. 39 of the Letters Patent; it is suggested that cl. 15 gives a right of appeal, under which clause an appeal lies against a "judgment." The meaning of the word "judgment" is discussed in the following cases, in which it has been held that no appeal lies:— *Mowla Buksh* v. *Kishen Pertab Sahi* (I. L. R., 1 Cal., 102), *Amirrunnessa* v. *Behary Lall* (25 W. R., 529), *Manly* v. *Patterson* (I. L. R., 7 Cal., 339), *In the matter of Kally Soondery Debia* (I. L. R., 6 Cal., 594). The case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (I. L. R., 9 Cal., 482), does not lay down any rules upon which it can be said that an appeal lies to this Court from an order of a Judge in the Privy Council **[456]** Department admitting an appeal; this case has been observed upon by Sir JOHN EDGE in *Banno Bibi* v. *Medhi Husain* (I. L. R., 11 All., 375).

The Advocate-General (Sir *Charles Paul*, with him Mr. *Sandel* and Moulvi *Mahomed Yusuf*) for the Appellant.—I cannot say that the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (I. L. R., 9 Cal., 482) in express terms overrules the decision of the High Court but it lays down that the decision of the High Court was erroneous I can only ask for a reference to a Full Bench. In the case of *Kally Soondery Dabia* (I. L. R., 6 Cal., 594), GARTH., C. J., took a mistaken view of what is a ministerial act. Granting a certificate is a ministerial act, but the matters preliminary to so granting a certificate are not ministerial, the Judge has to exercise his discretion; eliminating any ministerial acts, the step which a Judge takes, after hearing arguments, is to deliver *judgment*. The case of *DeSouza* v. *Coles* (3 Mad. H.C., 384) lays down the construction to be placed on cl. 15 of the Letters Patent. [PIGOT, J. I think that has been dissented from in *Sonbai* v. *Ahmedbhai Habibhai* (9 Bom., H. C., 410)]. The present appeal is not from an error of discretion, but from an error of law. I submit that the word "judgment" means every order where reasons are given. As to what is a judgment within cl. 15 of the Letters Patent, see the cases cited in *De Souza* v. *Coles* (3 Mad. H. C., 384). [WILSON, J.—The meaning of the word as given by the Madras High Court is dissented from in *The Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (8 B. L. R., 433; 17 W. R., 364)]

Mr. *Twidale*, in reply, referred to the case of *Sonbai* v. *Ahmedbhai Habibhai* (9 Bom. H. C., 410) as showing that the view taken of the word "judgment" in *De Souza* v. *Coles* (3 Mad. H. C., 384) was not approved of.

The **judgment** of the Court (WILSON and PIGOT, JJ.) was delivered by

Wilson, J.—This is an appeal against an order made by Mr. Justice CHUNDER MADHUB GHOSE, granting a certificate to the respondent to the effect that the case is a proper one for appeal to the Privy Council. Mr. *Woodroffe* has raised a preliminary objec- **[457]** tion that such an appeal does not lie to us has been decided in three cases that that is so. It was decided, first, in the case of *Mowla Buksh* v. *Kishen Pertab Sahi* (I. L. R, 1 Cal., 102) by Mr. Justice MACPHERSON AND Mr. Justice JACKSON. The same view was taken by Chief Justice GARTH and Mr. Justice AINSLIE in the case of *Amirunnessa* v. *Behary Lall* (25 W. R., 529), and again by Sir RICHARD GARTH and Mr. Justice MCDONELL in the case of *Manly* v. *Patterson* (I. L. R., 7 Cal., 339); and I may observe that the last decision was given with a full knowledge of the decision in this Court of a case on which reliance had been placed, the case of *In re Kally Soondery Dabia* (I. L. R, 6 Cal., 594).

These decisions are binding upon us and we have not been asked to take upon ourselves the responsibility of dissenting from them; but we have been

asked to refer the question to a Full Bench in order that those decisions may be reconsidered. We should have been justified in doing that if we ourselves were of opinion, on principle, that those decisions were wrong. But we are not inclined to dissent from the view taken in those cases.

We should also be justified in referring the question to a Full Bench if the view were correct, which has been pressed upon us, of the decision of the Privy Council in the case of *Hurrish Chunder Chowdhry* v. *Kali Sundari Debi* (I. L. R., 9 Cal., 482) which is subsequent to the decision of this Court in the case I have last mentioned. We were asked to hold that the decision of the Privy Council in that case was based upon principles inconsistent with the decisions arrived at in this Court upon the question before us. Had that been so, we should no doubt have been justified in referring this case to the Full Bench. But it appears to us that that is not so. The case before the Privy Council was this: a decree had been passed by the Privy Council and transmitted to this country for execution; the learned Judge exercising that particular branch of jurisdiction known as the Privy Council Department held, on an application before him, that one of the decree-holders was not entitled to execute the decree, and he gave effect to that decision by refusing to transmit it to the local Court for execution. The Privy Council, affirming the judgment of a majority of this Court, held [458] that that decision, which actually determined the rights of the decree-holder, was a judgment within the meaning of cl. 15 of the Letters Patent. Speaking of the judgment of the majority of this Court, which judgment they approved and upheld, their Lordships say: "Those learned Judges held (and their Lordships think rightly) that whether the transmission of an order under s. 610* would or would not be a merely ministerial proceeding, Mr. Justice PONTIFEX had in fact exercised a judicial discretion and had come to a decision of great importance which if it remained would entirely conclude any rights of *Kali Sundari* to an execution in this suit. They held therefore that it was a judgment within the meaning of cl. 15."

That is a very different case from the present case, where the order against which this appeal is brought is not one deciding finally or otherwise any question at issue in the case, or the rights of any of the parties to the suit. It is merely a step taken to enable the parties to go before the Privy Council and obtain from that tribunal a decision on the merits of the case. The result is that the appeal does not lie and must be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[See also (1890) 18 Cal., 182: (1895) 22 Cal., 928; (1895) 17 All. 438.]

* [Sec. 610.—Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed to the Court from which the appeal to Her Majesty was preferred.

Procedure to enforce orders of Queen in Council.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

When any moneys expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of finanacial transactions between the Imperial and the Indian Governments.]

[17 Cal. 458]

APPELLATE CIVIL

The 20th December, 1889.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE TOTTENHAM.

Rakhal Das Addy, Executor to the Estate of the late Gobind Chunder Addy Defendant

versus

Durga Sunduri Dasi............Plaintiff

and

Durga Sunduri Debi.........Plaintiff

versus

Rakhal Das Addy, Executor to the Estate of the late Gobind Chunder Addy............Defendant.

Settlement—Settlement by Government of land on which stood a hat—Calculation for purpose of settlement—Tolls—Hat—Regulation XXVII of 1793—Injunction.

A settlement of land (on which stood a *hat*) by the Government to a private person, such settlement being arrived at by taking into calculation the profits of the *hat*, does not amount to a grant of the tolls, but of the land [459] only; the reason for looking at the tolls being to ascertain the value of the land. Such a settlement, therefore, does not imply a monopoly which will enable the holder to restrain other persons from setting up another *hat* close by.

IN these cases the facts were that in the vicinity of Kalighat a *hat*, called Chetla *hat*, which was alleged to be of very long standing, was resumed by Government in 1828, but the title of Government was not definitely affirmed until 1837. The Government appeared to have held the *hat*, at first under direct management, but in the year 1856 it was let in farm to one Luckhi Narain Sircar, and in 1867 Government sold to him all its proprietary rights for a sum of Rs. 7,000 with a rent reserved of over Rs. 3,000. This estate was entered in the rent-roll as No. 1069, and it contained an area of rather more than 17 bighas. After the death of Luckhi Narain, his heirs mortgaged the estate to Gobind Chunder Addy, whose executor was the present defendant, and subsequently granted to the defendant, the then mortgagee, a mourasi pottah of three cottahs, on which the defendant built a temple. In 1881 Gobind Chunder Addy obtained a decree on his mortgage, and in execution thereof brought to sale in the same year this property, which was purchased by the plaintiff. In the proclamation of this sale, the defendant omitted to state that he held under a mourasi-mokurari lease two plots of land in the estate. Subsequently Gobind Chunder Addy purchased six bighas of lakhiraj land adjoining the *hat*, in which apparently originally fish, and fish traps were sold; and he induced several of the stall-keepers, who used to frequent Chetla *hat*, to come and establish themselves on his land. The plaintiff thereupon brought this suit to obtain possession of the six bighas, alleging that they belonged to Chetla

* Appeals from Appellate Decrees Nos. 1823 and 1861 of 1888, against the decrees of C. B. Garrott, Esq. Judge of the 24-Pergunnahs, dated 4th of June 1888, modifying the decree of Baboo Krishna Chunder Chatterjee, Subordinate Judge of the 24-Pergunnahs, dated the 18th of September 1886.

hat; secondly, if it should be found that he was not entitled to possession, for an injunction restraining the defendant from holding his *hat* upon that land; and, thirdly, to have it declared that the defendant could not set up against him the two mourasi-mokurari leases of which no mention was made in the sale-proclamation.

The only question material to this report is raised in the second contention of the plaintiff as to which the District Judge said:—

"In respect of the first question, the plaintiff submits to the decision of the Subordinate Judge, and admits that the six bighas of lakhiraj land [460] are not included within taluk No. 1069: but as regards his decision on the second point, he contests it entirely. His contention is, that the Chetla *hat*, being both an established *hat* and also a *hat* established by Government, the defendant cannot establish a new *hat* to the detriment of existing ones. The vakil for the plaintiff relied first on Regulation XXVII of 1793, by which *sayer* duties were abolished. In the preamble of that Regulation, no doubt, the right of the Ruling Sovereign to establish or to authorize subjects to establish *hats* and *gunges* is very broadly claimed; but if such an authority did or does exist in the Sovereign, it is an authority which never appears to have been exercised, and I am not referred to a single instance of a *hat* thus established. Nor is there any report in the books of such a right as the plaintiff claims ever having been claimed or adjudicated on in any Indian Court.

"No doubt such privileges conferred by a grant from the Crown have been adjudicated on in English Courts. But because the Crown has and has exercised that right in England, it does not follow that the Sovereign possesses the same rights in India, and the English cases do not, in my opinion, apply. It seems to me therefore that the right of opening a *hat* in Bengal is not of the nature of a privilege or a monopoly, but a simple right which every landholder possesses, and that a landholder, who has an old-established *hat*, has no more right to be protected against the competition of the surrounding landholders, than an old-established shop has to be protected against the competition of other shops. But the plaintiff's pleader contends that Chetla *hat* stands in an unique position, from the fact that it was established by Government, and he seeks to make out that the sums collected in the *hat* were in the nature of a tax or *sayer* duty, and not of the nature of compensation for the use of the land on which the stalls of the *hat* are situated. There does not seem to me to be a particle of evidence to support this contention. The Government, in this country, is a many-sided institution; some of its acts are referable, no doubt, to an exercise of the Sovereign power, but others are merely the acts of a zamindar, a trader, or a common carrier. *Hat* Chetla appears to have existed long before Government resumed the mehal, and it is clear that the action of Government in carrying on the *hat* was referable, not to an exercise of the Sovereign power, but was simply an act by which the talukhdar of lot No. 1069 sought to make his lands more profitable. Nor is there anything to show that the fees levied on the persons frequenting the *hat* were anything in the way of a tax or toll. They were apparently nothing but rent or compensation for use and occupation. No person was compelled to carry his goods to Chetla *hat* for sale; and any person who did do so, did it because he found his profit in doing so. It seems to me, therefore, that the defendant is perfectly justified in erecting a new *hat* in proximity to Chetla *hat*, and inducing by fair means (if he can) the persons who now carry their goods to Chetla *hat* to bring them to his new [461] *hat*, and I agree with the Subordinate Judge that the plaintiff has no right to be protected from such legitimate competition. I therefore affirm the Subordinate Judge's order on the point.

From this decision the plaintiff appealed, and the defendant brought a cross-appeal on matters not now material.

Mr. *Woodroffe*, Mr *Evans*, Baboo *Durga Mohun Das*, Baboo *Bhuban Mohan Das*, Baboo *Preonath Sen* and Baboo *Tarit Mohan Das* for the appellant in No. 1861 and respondent in No. 1823.

The Standing Counsel (Mr. *Phillips*) and Baboo *Bhowani Churn Dutt* for the Appellant in No. 1823 and Respondent in No. 1861.

Mr. *Evans* contended that the amount paid for this old-established *hât* to the Government was arrived at by taking into account the profits of the *hât*, and therefore the sale was a grant from the Crown of a right to hold the *hât* and take tolls; and, if so, that implied a monopoly enabling the holder to restrain others from setting up markets near to it; and referred to the following cases:—*Bungsho Dhur Biswas* v. *Mudhoo Mohuldar* (21 W. R., 382), *Shistee Dhur Ghose* v. *Shib Kishen Mitter* (S. D. A., 1852, 402), *Kishoree Lall Roy* v. *Gokool Monee Chowdhrain* (16 W. R., 281), *Mayor of Penryn* v. *Best* (L. R., 3 Exch. D., 292), *Luchmessur Singh* v. *Leelanund Singh* (I. L. R., 4 Cal., 599), *Parmeshari Proshad Narain Singh* v. *Mahomed Syud* (I. L. R., 6 Cal., 608).

Mr. *Woodroffe* on the same side.—Whether or no Government had power to make grant or transfer by way of farm to the plaintiff there is no case to negative the idea that the Crown cannot interfere with *hât*-holders in this country. The law stands thus: that a market, in the true sense of the word, cannot be held by any person in this country without a grant from the Sovereign power; that is the old law undoubtedly, the rule even in England where the Sovereign power is said to be vested in the Crown and Houses of Parliament; conjoint action of the three is the mode by which law is made in England. The prerogative of the Crown in England is not affected by Acts of Parliament unless the Crown is mentioned in the Act. The Regulations in this country stand [462] on a different footing from Acts of Parliament; and if the Crown is not affected by Acts of Parliament in England unless mentioned in the Act, *a fortiori* it cannot be so in this country under the Regulations (see Maxwell on Statutes, 161). It is clear that the Regulations cannot affect the prerogative of the Crown. The holding of markets was an internal duty; it came under the heading "*sayer*;" it was part of the law of this country that Government did, from time to time, grant *sayer* mehals, salt mehals, etc.; Government used to delegate their rights in respect of these monopolies, and the preamble of the Regulation shows that they did it with regard to *hâts*. Under the Regulation, the holding of markets was an exclusive privilege of Government. The first 43 Regulations of 1793 were passed on one day, and by s. 8 of Regulation I of 1793 the Government decided that *sayer* collections should be abolished, and directed compensation to be given to the zamindar therefor; but nevertheless keeping a power to re-impose the *sayer* collections. There, therefore, was an express reservation of power to re-impose the duty, but without the Regulation they could have done so. The Government, therefore, could re-establish *hâts* and *bazaars* or delegate this power to others. Government still had power to prevent over-taxation and imposts. *Morley* v. *Chadwick* (7 B. & C. 47).

The Standing Counsel (Mr. *Phillips*) for the Respondents.—There is no point of law in the question as to the *hâts*, as the finding of the lower Court is, that whether or no Government had power to grant such a franchise as this, it has not done so. In the Court below the Judge says, that the sums collected were rents and not taxes, and that is a finding to the effect that Government never exercised any right of market with regard to the property, and that Government did not intend to convey any such right to the plaintiff. The *rubokari* shows that no franchise was granted, and that no market was measured. The *rubokari*, moreover, is not a grant, but a record by the Collector of what was done. There is no market in the sense of a franchise which was being dealt with at that time. There was no franchise, the Government only insisted on sharing in the profits made out of the mehals. There are obligations and duties attached to all

[463] franchises, and they are granted by the Crown for the benefit of the public, and in consideration of the public benefit the Crown parts with its rights, but here everything in the Regulation of 1793 is consistent with the parties being licensees; they acquired no right against the Crown, and it follows that they obtained no right against the public. The Regulation starts from the point of view of taxing, and not of franchise. The word "authority" in the Regulation refers only to establishing markets. The rules of the 11th June are not directed to markets only, but to any and all lands. The rights contemplated by Regulation XXVII are of a different nature from franchise (see ss. 4-11 of that Regulation). The intention of that Regulation was to abolish all such collections. With regard to franchise of a market, see Bacon's Abridgment Title "Fair and Market" B, and with respect to the manner of holding them, see Bacon's Abridgment Title "Fair and Market" C, and with regard to tolls see Bacon's Abridgment Title "Fair and Market" D. There may be a grant of a market without tolls being reserved. *Prince* v. *Lewis* (5 B. & C., 363) shows that there is a duty in the case of a franchise; in the present case there is no duty at all; there is a total absence of corresponding obligation to support the conclusion which I ask the Court to draw from the Regulations, viz., that they had nothing in the nature of the franchise. In the case of *Bungsho Dhur Biswas* v. *Mudhoo Mohuldar* (21 W. R., 383), the observations of JACKSON, J., were not strictly necessary for the decision, but he says the provisions of Regulation XXVII applied to *hâts* existing at that time, and that the payments were compensation for the use of the land. In *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* [I. L. R., 5 Cal., 7 (19)], the right of establishing markets is referred to; as far as that case goes it recognizes the right of anybody to hold a market on his own land. Moreover there is in this case no finding that the defendant is damnified by the plaintiff's action. The existence of exclusive privilege in markets was sought to be upheld by analogy to the case of a ferry. But it is clear from the Regulation as to ferries, that the ferries were under the direct management of the Government, [464] and that the dues were collected by the Government, and that the farmers were officers of Government. The right under the Ferries Regulation does not approach a private proprietary right of franchise. There is nothing in any of the Ferries Regulations to show that the persons plying these ferries had any right against the Government or third persons. The cases cited by the other side of *Shishtee Dhur Ghose* v. *Shib Kishen Mitter* [S. D. A. (1852), 404], *Kishoree Lall Roy* v. *Gokul Monee Chowdhrain* (16 W. R., 281), *Narain Singh Roy* v. *Nurrendro Narain Roy* (22 W. R., 297), *Luchmessur Singh* v. *Lilanund Singh* (I. L. R., 4 Cal., 599), *Parmeshari Proshad Narain Singh* v. *Mahomed Syud* (I. L. R., 6 Cal., 608) are all cases of ferries, and have no analogy to the franchises [PETHERAM, C.J. You need not deal with those cases, I do not see what the ferry cases have to do with the question]. The *rubokari* shows that the plaintiff has received compensation on account of *sayer*, and that there is nothing to show that any *hat* was carried on by Government, what is referred to there is the *land* only. The table attached to the *rubokari* shows that this jumma is based on an estimate of rents paid by permanent tenants. The Government have clearly no monopoly, and therefore the plaintiffs are not entitled to an injunction.

Mr. *Evans* in reply.

The material portion of the **judgment** of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was as follows:—

Petheram, C. J. (after stating the facts and the decision of the Court on the question as to the effect of the sale on the two mourasi pottahs set up by the defendant) continued:—

Now comes the other question, and of course that is the important question in the case, namely, whether the plaintiff who has purchased this taluk, upon which this *hát* has been held for so many years, is entitled to an injunction to restrain the owners of the neighbouring land from holding a market upon it.

The argument for the plaintiff is that this is an ancient market which was at some time or other resumed by the Government, and that the Government had since re-settled the land with the [465] predecessor in title of the plaintiff; and that inasmuch as upon the re-settlement of the land the amount of the revenue which had to be paid for it to the Government was arrived at by taking into calculation the profits of the market (the profits which arose from the tolls properly so called), that is to say, a share of the articles sold in the market taken for the privilege of selling them in the market, therefore that must be taken as a grant from the Crown of a right to hold the market and take tolls in it, and if it amounts to that, such a grant must imply a monoply which will enable the holder of such a grant to restrain other persons from setting up a market anywhere close by.

The District Judge who heard the case came to the conclusion, upon the evidence before him, that this did not amount to any grant of tolls; that all that was granted were the lands included in the taluk; and that the only reason for looking at the tolls was to ascertain the value of the lands. We think that there is no difference between this market and any ordinary shop which, if it had a good-will and a large trade attached to it, would increase the value of the land and the amount of the revenue. Accordingly we think that the learned Judge is quite right in the view he has taken, and as to that it is only necessary for us to refer to the Regulations of 1793 which, to our mind, show clearly that the contention of the plaintiff cannot be correct. By those Regulations it was made illegal to take any tolls of this kind at all, and if the effect of those settlements was by implication to grant tolls, it was in fact for the Crown to be refusing to be bound by the Legislature or by the law of the country. We think it would be impossible for us to hold that where the two things are perfectly consistent and where this revenue may be payable for the use of the land (of course the person with whom it is settled putting it to the best use he can put it), and where it could be taken away, it would not be an illegal toll. Under these circumstances, and in the absence of any grant of any special privilege (without which it is admitted that any one may set up a market wherever he chooses, and may invite persons to come there for the purpose of selling goods), we think that the learned Judge was right in the conclusion at which he arrived with reference to these tolls.

[466] In the result then the appeal by the plaintiff, so far as the claim for an injunction is concerned, will be disallowed, and in so far as it relates to the refusal by the lower Court to set aside the second pottah, his appeal will be allowed, and the appeal by the defendant so far as regards the setting aside the first pottah will be allowed, and as regards everything else both appeals will be dismissed. The costs, I think, must be in proportion to the success of the parties.

Appeal as to injunction dismissed.

T. A. P. *In other respects in part allowed.*

[17 Cal. 466]

APPELLATE CIVIL.

The 3rd February, 1890.

PRESENT:

MR JUSTICE PRINSEP AND MR. JUSTICE BANERJEE.

Nilmoni Chuckerbutti and others.........Petitioners

versus

Bykant Nath Bera...........Opposite-Party.*

Bengal Tenancy Act (VIII of 1885), s. 120, sub-section 2 - Record of Proprietor's land as private land—Grounds for determining land to be private—Evidence.

In enacting sub-section 2 of s 120 of the Bengal Tenancy Act, the Legislature had before it the attempts which might be expected on the part of landlords to frustrate the intention of the Legislature, as asserted in the Draft Bill laid before the Council for consideration, to extend the occupancy-rights of tenants before the measures then declared to be in contemplation became law, and therefore the particular date, the 2nd day of March 1883, the date on which the Draft Bill was published in the Gazette, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which there should be free action on the part of zemindars to assert their private rights, so as to prevent the accrual of special tenant rights From the wording of that sub section, it was intended that, in determining whether land is the private land of the proprietor, regard should be had to any declaration made before, the 2nd March 1883 by the landlord, and communicated to the tenants, in respect to the reservation of the proprietor's right over the land as his private land. the words "any other evidence that may be produced" in that sub-section mean, therefore any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor and communicated to the tenant before that date.

[467] IN this case the petitioners applied, under s. 118 of the Bengal Tenancy Act, to the Collector to have certain lands recorded as their private lands, and the opposite-party filed a petition of objection to the grant of such application. The only material question was as to the kind of evidence admissible to show the land to be the private land of the petitioners For this, all necessary facts are sufficiently stated in the judgment of the Court.

The application was rejected by both the lower Courts, and the petitioners appealed to the High Court.

Baboo *Nilmadhub Bose* for the Appellants

Baboo *Dwarkanath Chuckerbutty* for the Respondents.

The **Judgment** of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

This is a matter under Chapter XI of the Bengal Tenancy Act in which the proprietor of certain *bromattar* lands sought to obtain from the revenue officer a record that the lands were his private lands.

The case in the lower Court was presented to the District Judge in appeal as coming within s. 120, sub-section 1 (*b*), and was so dealt with The District Judge found that no village usage was established, and he accordingly affirmed the order of the Deputy Collector rejecting the petitioners' application. In the appeal before us, it has been contended that the real character of the case has been misunderstood, and that the case should have been dealt

* Appeal from Appellate Decree No. 79 of 1889, against the decree of J. Pratt, Esq., Judge of Midnapore, dated the 6th of September 1888, affirming the decree of Baboo Chandi Das Ghose, Deputy Collector of Tumluk, dated the 9th of March 1888.

with under sub-section (2). Now under that sub-section, the law allows three matters to be taken into considertion in determining whether the land should be recorded as the proprietor's private land. The first is local custom; the second is whether the land was, before the 2nd day of March 1883, specifically let as the proprietor's private land; and the third is any other evidence that may be produced. It is contended that there is some other evidence to establish the proprietor's right to have it recorded as his private land. That evidence has been placed before us, and consists of proceedings in two matters in 1885 and 1886, relating to the settlement of certain *khas* mehals within which these lands were situate, and the recording of these **[468]** lands in the names of the appellants on claims being set up by them that the lands were their *nij jote bromattar* lands. On this assertion of title, it would seem that notices were issued on the tenants, and the lands were so recorded in the settlement proceedings. It is now contended that we should remand the case to the lower Appellate Court, in order that it may receive and consider this evidence as bearing on sub section 2, s. 120. The District Judge in dealing with the case under sub-section 1 (*b*) has held that that documentary evidence was irrelevant, and, in our opinion, he was right in so regarding it. Then, the question is whether it might properly be considered under sub-section 2, s. 120. It seems to us that in enacting that sub-section, the Legislature had before it the attempts which might be expected on the part of landlords to frustrate the intention of the Legislature, as asserted in the Draft Bill laid before the Council for consideration, to extend the occupancy-rights of tenants before the measures then declared to be in contemplation became law; and therefore the particular date, 2nd day of March 1883, the date on which the Draft Bill was published in the *Gazette*, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which there should be free action on the part of zamindars to assert their private rights, so as to prevent the accrual of special tenant rights. It was accordingly declared that it was a material point, in the consideration of such a matter as is now raised in appeal before us, whether the particular lands were, before the 2nd day of March 1883, specifically let as the proprietor's private lands. From this, we may take it, that it was intended that regard should be had to any declaration made before that date by the landlord, and communicated to the tenants in respect to the reservation of the proprietor's right over the land as his private land. In this view, we think that the following words in that sub-section "any other evidence that may be produced" must mean any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor, and communicated to the tenant before that date. But the documentary evidence on which the appellants' pleader relies in this case is of a much later date, and, therefore, in our opinion, can have no bearing on **[469]** a proper consideration of the matter now before us. The proceedings are all of dates not only later than that mentioned in sub-section 2, s. 120, but even later than that of the passing of the Bengal Tenancy Act. We think, therefore, that we should not be justified in remanding this case, so as to prolong these proceedings. The appeal must, therefore, be dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[This was followed in (1911) 13 I. C. 1 (Cal.) ; see also (1905) 1 C. L. J. 456 ; (1908) 13 C. W. N. 661.]

[17 Cal. 469]

APPELLATE CIVIL.

The 5th February, 1890.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Iswari Pershad Narain Sahi, Lunatic, represented by his mother, guardian and next friend Bhupeswar Koer............Plaintiff

versus

Crowdy and others............Defendants.*

Bengal Tenancy Act (VIII of 1885), Sch. III Art. (2)—Limitation for rent-suit—Rent payable under a lease—Registered lease.

The Bengal Tenancy Act (VIII of 1885) prescribes one period of limitation for all suits for rent brought under its provisions.

Article 2 of the third Schedule of that Act includes a suit to recover arrears of rent payable under a lease, and there is no distinction as to the form of the lease or as to whether it is registered or not.

Umesh Chunder Mondul v. *Adarmoni Dasi* (I. L. R., 15 Cal., 281), and *Vythilinga Pillai* v. *Thetchanamurti Pillai* (I. L. R., 3 Mad., 76) distinguished.

THIS was a suit to recover arrears of rent under a registered ticca kabuliyat.

Under the kabuliyat, which was executed on the 21st of September 1880, and duly registered, the proprietors of the Belsand Concern held in ticca the plaintiff's half-share in the 8 annas divided putti of Mouza Parsurampore, Pergunnah Mahila, in the District of Mozufferpore, for a term of seven years from 1288 to 1294 (1880-1886) inclusive at an annual *jumma* of Rs. 2,000, payable in three instalments of Rs. 1,000 in Kartick, Rs. 500 in Cheyt, and Rs. 500 in Joisto. It was also provided in the kabuliyat that upon the expiration of the said term of seven years the proprietors should pay rent up to the 10 annas instalment in 1295 for the *zerat* lands in the plaintiff's putti, on which there might be the indigo-plantation of the Belsand Concern, and that they should [470] give up the lands after cutting the first and second crops of indigo.

The rent for a portion of 1291 and the years 1292, 1293 and 1294, and also the rent on account of the 10 annas instalment for 1295 in respect of the *zerat* indigo lands having fallen due, the plaintiff, on the 2nd of April 1888, filed a suit for the recovery of the arrears for 1292, 1293 and 1294, alleging that the portion for 1291 was barred by limitation. He also sued for the sum of Rs. 203-2 on account of the 10 annas instalment of rent for the year 1295 in respect of 100 bigahs of *zerat* indigo lands: and for damages for non-payment of rent. Subsequently, on the 11th of May 1888, the plaintiff was allowed to amend his plaint by including a claim for the two sums of Rs. 500 each, which fell due on 13th Cheyt and 29th Jeyt 1291 respectively, subject to any objection the defendants might take.

The defendants contended that the plaintiff's claim in respect of the two sums of Rs. 500 each, which became due in 1291, was barred by limitation; that his claim for the rent of *zerat* indigo lands on account of the 10 annas instalment in 1295 was incorrect; and that the plaintiff was not entitled to more than

*Appeal from original decree No. 285 of 1888, against the decree of Baboo Grish Chunder Chatterjee, Subordinate Judge of Tirhoot, dated the 6th of July 1888.

Rs. 134-15-3, which was his proportionate share of the rent for the 89 bigahs of *zerat* lands in possession of the Belsand Concern.

It appeared that after the settlement of issues the plaintiff applied to the Subordinate Judge for an enquiry as to the area and the rate of rent of the *zerat* lands in the possession of the Belsand Concern, on the ground that he had no witnesses to prove the area or rate of rent. This application was refused by the Subordinate Judge: and the reason for his refusal was that the expenses of the enquiry would far exceed the amount in dispute between the parties, which was Rs. 68.

The Subordinate Judge held that the case of *Umesh Chunder Mundul* v. *Adarmoni Dasi* (I. L. R., 15 Cal., 221) was distinguishable, and that Art. 116,* Sch. II of Act XV of 1877 was not applicable to the present case; that Sch. III of the Bengal Tenency Act, 1885, applied to all suits for rent, and a suit for rent upon a registered kabuliyat was not excluded from its operation. He therefore held that the claim for 1291 was barred by limitation.

[471] As the plaintiff adduced no evidence, he allowed Rs. 134-15-3 only as rent for the *zerat* lands for 1295. He disallowed the plaintiff's claim for damages. Accordingly the Subordinate Judge passed a decree only partly allowing the plaintiff's claim.

The plaintiff appealed to the High Court for the portions of his claim which had been disallowed.

Baboo *Rajendra Nath Bose* and Baboo *Srinath Banerjee* for the Appellant.

Baboo *Sharoda Churn Mitter* for the Respondents.

The **judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

The first question argued before us in this case is whether the plaintiff's claim for the two sums of Rs. 500 each, which became due, one on the 13th Cheyt 1291 Fusli, and the other on the 29th Joisto 1291, is barred by limitation. The time from which limitation would run under the provisions of the Rent Law was the last day of Joisto 1291 Fusli, that is, the 8th of June 1884. The suit was brought on the 2nd of April 1888, that is to say, more than three years and less than six years after the period of limitation began to run. The contention before us is that, in the first place, the provisions of the Bengal Tenancy Act do not apply to this case, and secondly that, if they do apply, the fact that the rent is payable under a registered lease makes the period of limitation six years. As regards the first question, it is quite clear that the defendants would come within the definition of the word "tenure-holder" contained in s. 5 of the Bengal Tenancy Act, and there seems to be no reason why they should be excluded from the operation of that definition.

On the second question, which is the real question for decision in the case, the argument of the learned pleader is based upon a decision of this Court by O'KINEALY and GHOSE, JJ., in the case of *Umesh Chunder Mundul* v. *Adarmoni Dasi* (I. L. R., 15 Cal., 221) and on a decision of the Madras High

* [Art. 116 :—

Description of suit	Period of limitation.	Time from which period begins to run.
For compensation for the breach of a contract in writing registered.	Six years ...	When the period of limitation would begin to run against a suit brought on a similar contract not registered.]

Court in the case of *Vythilinga Pillai* v. *Thetchanamurti Pillai* (I. L. R., 3 Mad., 76). It seems to us quite clear that these decisions are inapplicable to the present case. The decision of this Court in *Umesh Chunder Mundul* v. *Adar-* [472] *moni Dasi* (I. L. R., 15 Cal., 221) is not a decision of any question under the Bengal Tenancy Act. Apparently the rent there claimed, if it be a rent at all, is not a rent to which the Tenancy Act is applicable; but whether that is so or not, there is no reference made in the judgment or in the case to the Bengal Tenancy Act, and the Judges treated the case as entirely governed by the Limitation Act XV of 1877. They held that, inasmuch as the lease under which rent was claimed was a registered lease, Art. 116 of Sch. II applied, and not Art. 110. The Madras decision does not carry the matter any further. There again this question could not have arisen, as the suit was a Small Cause Court suit, and the case was governed by Act XV of 1877, and no other Act. It seems to us quite clear that the Legislature in the Bengal Tenancy Act did not intend to make more than one period of limitation in suits for rent. Section 6 of the Limitation Act, which is by the Bengal Tenancy Act, s. 185, expressly applied to cases under that Act, provides that "when by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed." The Bengal Tenacy Act specially prescribes a period of limitation for rent suits brought in accordance with its provisions. It is clear that the 2nd Article of the 3rd Schedule of that Act is wide enough to include a suit of this description, viz., a suit to recover rent, and there is no distinction as to the form of the lease under which the rent is payable or as to whether it is registered or not. The learned pleader suggests that by parity of reasoning the cases to which we have referred apply; but we think it is clear that the Legislature never intended to make this distinction, and the form of the Schedule shows that they apparently intended to provide one period of limitation only with regard to all suits for rent. There is an additional argument to be found from the fact that the time from which the period of limitation begins to run is different in the Bengal Tenancy Act from that provided in the General Limitation Act; and, therefore, if the learned pleader's contention was right, we should not only have a different period, but also a different time from which that [473] would run according as the contract was registered or not. This period is a result which, we think, the Legislature never intended. It provided in the Rent Act for one period of limitation in all classes of suits for rent, and it is not possible to add to that a period of limitation not at all contemplated by the Legislature, viz., a period of six years. We think, therefore, that with regard to these two sums of Rs. 500, the plaintiff's claim is barred by limitation.

The other question raised before us is as to a small sum in difference between the parties. The complaint is that the learned Judge in the Court below did not make an inquiry asked for by the plaintiff with regard to the matters in difference between the plaintiff and defendants as to this sum. It appears that when the issues were settled, the plaintiff in this case said he had no witnesses to prove the area, and he applied for a measurement of the lands. His application was rejected, and the reason given by the Judge for rejecting it was that the expenses of the inquiry would be far more than the amount in dispute. The onus being on the plaintiff, if he had not his witnesses and evidence ready, he must run the risk of having an adjournment given him, or the inquiry asked for at the Judge's discretion. The Judge has refused the inquiry on the ground that the expenses of it would be greater than the amount in dispute, and this is a matter which the learned Judge might well take into consideration in determining whether he should or should not allow an adjournment. The

plaintiff as a matter of right was not entitled to an inquiry He should have had his witnesses ready We think that the plaintiff's contention fails as to that also, and the result is that the appeal must be dismissed with costs

C. D P *Appeal dismissed*

[474] APPELLATE CIVIL

The 31st January 1890

PRESENT

MR JUSTICE NORRIS AND MR JUSTICE MACPHERSON

Ahsanulla Khan Bahadoor ... Defendant

versus

Hurri Churn Mozoomdar ... Plaintiff

Sale for arrears of rent Regulation VIII of 1819, s 8 Service and publication of notice of sale Irregularities in preliminaries to sale Petition for sale—Certificate of Munsif when service is sworn to before him—Form of notice of sale in mid year sales for six months arrears

All the requirements in cl 2 s 8 of Regulation VIII of 1819 must be imported into cl 3 of that section *mutatis mutandis* Where therefore the zemindar is proceeding under cl 3 to obtain a mid year sale for six months arrear of rent the service of notice of sale is a condition precedent to the sale being held Such notice must show as provided by that clause, that the sale may be prevented by payment of the whole of the balance due *or of three fourths* of such balance In such a case a notice which stated that the sale would take place unless the whole of the balance was paid as if the zemindar was proceeding under cl 2 for the whole year arrears was held to be a bad notice and a non compliance with a substantial requirement of the Regulation such as to justify the reversal of the sale

The publication of the petition to the Collector containing a specification of the balance of rent due by sticking it up in some conspicuous part of the kutcherry as required by cl 2 s. 8 of the Regulation is not a substantial portion of the procedure to be observed by the zemindar previous to a sale for arrears of rent non compliance with that provision therefore, is not a ground for setting aside the sale

For the same reason the non presentation of the petition on the precise day (1st Kartick) specified in cl 3 s 8 affords no ground for setting aside the sale The presentation of the petition on the 2nd Kartick when the 1st was a Sunday was held to be a sufficient compliance with the section

The words certificate to which effect in the portion of cl 2 s 8 relating to the procedure in case of refusal by the village people to attest the publication of the notice of sale, mean a certificate to the effect that the peon did come before the Munsif or Police officer, as the case may be and did make voluntary oath as to the service of the notice Where the

---

* Appeal from Original Decree No 170 of 1888 against the decree of Baboo Karuna Das Bose, Subordinate Judge of Mymensingh dated the 28th of April 1888,

peon, after serving the notice, made an affidavit as to the mode of service, and took the affidavit before the Munsif, to whom it was read and who then signed it, there was held to be a sufficient certificate to satisfy the requirements of the section.

THIS suit was instituted by the plaintiff to set aside the sale of a putni held under the provisions of Regulation VIII of 1819. [475] The plaint alleged that the plaintiff's predecessor took from the defendant's predecessor "a putni-taluk at an annual rent of 212 rupees 8 annas in respect of an eight-annas share (excluding a *miras* of small bits of land) of the village of Kismut Duajani comprised in the share of 1 anna 15 gundas of Zemindari No. 5032 in Pergunnah Attia and others, being the defendant's zemindari." The plaint went on to state that the plaintiff having brought a suit against the defendant for having attempted to exact illegal cesses from him, and having gained the suit, the defendant "became displeased with the plaintiff; and that with a view to harass him and with the evil intention of depriving him of the taluk, contrary to practice and without any reasonable cause, the defendant made an application to the Collector for the sale of the plaintiff's putni-taluk for the realization of the arrears of rent in respect thereof for six months, namely, from Bysack to Assin 1293 (April to October 1886), while the plaintiff was away from his house; and, without his knowledge, illegally, irregularly and collusively, put it up to auction and himself purchased it for a nominal consideration on the 1st of Aughran 1293, a day when the Civil Courts were closed." The plaint further alleged that there was great illegality and irregularity in the sale and in the proceedings relating thereto; that no notices were really published at the Sudder kutchori, in the mofussil, in the mohal sold at auction, or in the Collectorate kutcheri; that the service of notice which is alleged in the rubakari for sale was not according to law. Then there was a statement in the plaint that the value of the property was Rs. 20,000, and that, owing to the absence of purchasers, it sold for only Rs. 125; and that the plaintiff had thereby sustained considerable loss. He prayed therefore that the sale might be set aside.

The defence so far as was material to this report was thus stated in the defendant's written statement: "As the plaintiff did not pay the rent payable by him in respect of the putni under claim, from Bysack to Assin 1293, the defendant, in order to realize the same on the 1st Kartick (15th October), made an application to the Collector of Zillah Mymensingh with an account of the arrears, and notice under Regulation VIII of 1819; and after causing the account of the arrears, notices, etc., to be really published under [476] the provisions of the said Regulation before the 15th Kartick 1293 in the said Collectorate, at the zemindari kutcheri of the defendant, at the residence of the plaintiff at Duajani, and at a conspicuous place in the mohal of which the arrears were due, and having caused an affidavit relating thereto to be made by the peon who published them in the Court of the Munsif of Chowki Atia, it was filed before the Collector on behalf of the defendant. As no one paid off the arrears of rent with interest of the mehal in question, and as the plaintiff's mookhtear and agent, although requested to pay them, did not pay them, the mehal, of which the arrears were due, was, on the 1st Aughran 1293, sold at a public auction according to law in the Collectorate openly, and in the presence of the plaintiff's mookhtear and agent, and the defendant purchased it at the highest price that was offered. There was no illegality, nor irregularity, nor fraud in the sale proceedings. All the acts that had to be done, and all the notices, etc., that were necessary to be published according to law on behalf of the defendant before the sale, were duly and regularly done and published according to law. The plaintiff having voluntarily let the rent fall into arrears, and being present by his mookhtear and agent at the time of the sale without

paying the arrears of rent, etc., allowed the property to be put up to auction: there is no reason why the said sale should be set aside." It appeared that the petition by the defendant to the Collector, which is necessary under cl. 3 of s. 8 of Regulation VIII of 1819, was filed on the 2nd Kartick 1293, the 1st Kartick being Sunday. It was found, moreover, on the evidence that the petition was not stuck up in the kutcheri as directed by the Regulation.

The notice which was given under cl. 3 of s. 8 of Regulation VIII of 1819, being that applicable to sales for arrears otherwise than for the whole year, was as follows:—

"To Hurri Churn Mozoomdar, &c. Within my Zemindari Mehal No. 5032, Pergunnah Atria, &c. . . . . Kismut Duajani . . . . . . is recorded as a putni-taluk at an annual rent of Rs. 212-8. On account of the aforesaid putni-taluk Rs. 110, the principal amount of rent for the Assar and Assin instalments of the year 1293, and Re. 1-9-7½ gundas, the interest on the same, in all Rs. 111-9-7½ gundas, in rent and interest, has fallen in arrear as due from you on account of the Assar and Assin instalments of the year 1293, and you have not [477] been paying off the same though repeatedly demanded. Therefore, under Regulation VIII of 1819, this notice is being given to you, and you are hereby informed that before the 1st of the coming Aughran you shall pay the aforesaid rent and interest into my zamindari kutcheri at Jamruki. If you fail to pay the aforesaid money within the time allowed, then the aforesaid money due to me will be realized by sale of the aforesaid putni taluk at a public auction before the Collector of the District of Mymensingh on the 1st day of the coming Aughran, and no objection to the same on your part will be listened to."

The affidavit of service and publication of the notice of sale was made by one Balu, who, after stating the mode of service and publication, alleged that he asked for a receipt from the principal tenants of Duajani and from the agent of the plaintiff, but they refused to grant a receipt. He named three persons whom he asked and of whom he stated "they did not consent to grant a certificate of service of notice."

This affidavit was drawn up by Shoshi Bhusan, a pleader, who took Balu with the affidavit to the Court of the Munsif of Tangail, where it was read in the presence of the Munsif, who signed it with the addition of the words "on solemn affirmation declared the above to be true."

The Subordinate Judge gave the plaintiff a decree, mainly on the ground that the evidence for the defendant, on whom he held lay the onus of proving it, did not shew that the notice of sale was duly served and published in accordance with Regulation VIII of 1819.

From this decision the defendant appealed.

Mr. *Evans*, Mr. *W. Garth*, Mr. *Peacock*, Dr. *Rash Behari Ghose*, and Baboo *Bussunt Coomar Bose* for the Appellant.

Mr. *Woodroffe*, Baboo *Jogesh Chunder Roy*, and Baboo *Mokund Nath Roy* for the Respondent.

Mr. *Evans*, for the appellant, contended that the evidence showed due service and publication of the notice of sale, and that within the Privy Council Rulings in the subject, there had been sufficient compliance with all the substantial requirements of the Regulation to support the sale. He referred to *Ram Sabuk Bose* v. *Kamini Koomaree Dassee* (14 B. L. R., 394; L. R., 2 I. A., 71), *Maharajah of Burdwan* [478] v. *Tarasundari Debi* (I. L. R., 9 Cal., 619; L. R., 10 I. A., 19), and *Maharani of Burdwan* v. *Krishna Kamini Dasi* (I. L. R., 14 Cal., 365; L. R., 14 I. A., 30).

Mr. *Woodroffe*, for the respondent, contended that the defendant on whom the onus lay [*Doorga Churn Surma Chowdhry* v. *Najunooddeen* (21 W. R., 397) and *Maharajah of Burdwan* v. *Tarasundari Debi* (I.L.R., 9 Cal., 619; L. R., 10 I. A., 19)] had not shown that the provisions of the Regulation had been strictly complied with, and that there had been a non-observance of its provisions in several instances relating to the preliminaries necessary to sale. Clause 3, s. 8 of the Regulation says that the petition for sale is to be presented on the 1st Kartick, here it was not presented until the 2nd Kartick. The petition should have been stuck up in some conspicuous part of the Kutcheri as directed by cl. 2, s. 8, but this was not done. There is no certificate of the Munsif which is necessary under the same clause when the village people refuse to attest the service of the notice; the necessary certificate is one to the effect that the notice has been duly published, the words being that in such a case the peon should "go to the kutcheri of the nearest Munsif and there make voluntary oath of the same having been duly published, certificate to which effect shall be signed and sealed by the said officer and delivered to the peon."

The learned Counsel then went into the evidence to show that the notice had not been duly served and published. But even if the Court came to the conclusion that sufficient publication of the notice was proved, the notice of sale in this case was a bad notice as being a notice suited to the case of a zamindar proceeding under cl. 2, s. 8, and not one in accordance with the intention to be gathered from cl. 3 of that section under which the sale could be stayed by payment of less than the whole balance due, namely, a sum practically equal to three-fourths of the balance. This was not stated in the notice, and those interested in preventing the sale were injuriously affected by such omission. It is submitted that the omission to serve a valid notice is a non-compliance with a substantial requirement of the Regulation [479] for which the sale should be set aside. Reference was made to the cases of *Baikantha Nath Sing* v. *Dhiraj Mahatab Chand* (9 B. L. R., 87; 17 W. R., 447), *Bhugwan Chunder Dass* v. *Sudder Ally* (I. L. R., 4 Cal., 41), *Maharajah of Burdwan* v. *Kristokamini Dasi* (I. L. R., 9 Cal., 931; s. c. on Ap., I. L. R., 14 Cal., 365; L. R., 14 I. A., 30).

Mr. *Evans*, in reply, contended that the objections as to the presentation of the petition, and as to its not being stuck up, were not sufficient ground for setting aside the sale. The certificate of the Munsif intended by the section is one relating to the appearance of the peon before the Munsif or other officer after he has served the notice, and to his making oath to that effect; it is not intended to be a certificate that the notice has been published. What has been done in this case was amply sufficient to satisfy the provisions of the section. The notice was a good notice and a sufficient compliance with the requirements of the Regulation; any defect in it was not a sufficient ground for setting aside the sale. The cases of *Sona Beebee* v. *Lal Chand Chowdhry* (9 W. R., 242), *Pitamber Panda* v. *Damoodur Dass* (24 W. R., 129), and the Privy Council cases already mentioned, were referred to.

The **Judgment** of the Court (NORRIS and MACPHERSON, JJ.) was as follows. (After shortly stating the facts the judgment proceeded):—

The Subordinate Judge upon a consideration of the whole of the evidence gave the plaintiff a decree setting aside the sale. And his judgment is based upon the ground that the notice required to be published in the mofussil upon the land or at the kutcheri of the defaulting putnidar was not, as a matter of fact duly published.

Against that decision the defendant has appealed to this Court. I shall presently consider the judgment of the Subordinate Judge and the evidence which has been given by the defendant to prove the due publication of the notice in the mofussil. But whilst we are of opinion that the view taken by the Subordinate Judge of that evidence is not correct, we are still obliged to arrive at the conclusion that this decree must be upheld. upon a ground to [480] which I shall presently refer. It will be convenient probably in the first place to deal with the points which were argued by the learned Counsel for the respondent, Mr. *Woodroffe*, in support of the judgment.

One objection of Mr. *Woodroffe* was that the petition which has to be presented to the Collector under cl. 2 of s. 8 of Regulation 8 of 1819 under which the sale was held, or rather under cl. 3 of s. 8 of that Regulation, that is, the petition containing a specification of the balance of arrears that may be due, ought to have been filed on the 1st Kartick, whereas, as a matter of fact, it was not filed until the 2nd of Kartick. We think that no force can be attached to this objection. The petition could not be received *before* the 1st of Kartick, because the rent which is in arrears and for which the putni is put up for sale has to be made up to the last day of Assin. We think that *that* portion of the section is directory merely. The Collector is put in force by the presentation of that petition. The 1st Kartick 1293 fell upon a Sunday, and we think that the petition was properly received on the 2nd Kartick. No injury, as it seems to us, could possibly ensue to the putnidar, or to the dur-putnidar or to the mortgagee, if there existed a durputni or mortgage, by the non-presentation of the petition on the exact day specified .

It was further urged by Mr. *Woodroffe* that non-compliance with the provisions of the Regulation which require that the petition shall be stuck up in some conspicuous part of the kutcheri was fatal to these proceedings. We think, to use the words of the Privy Council in the case of the *Maharani of Burdwan* v. *Krishna Kamini Dasi* (I. L. R., 14 Cal., 371), that this publication of the petition is not a substantial portion of the process to be observed by the zemindar No injury could result to the putnidar or any one holding under him by the non-publication of this petition, which, as I have already pointed out, is only the method prescribed by the Regulation for putting the executive machinery in force. Further, it is to be observed (though we are not inclined to lay very much stress upon this) that the provisions of clause 3, of s. 8 do not appear to be so stringent as those of cl. 2 of the same section.

[481] Another point urged by Mr. *Woodroffe* was that there was no certificate of the Munsif as required by this section of the Regulation. We think that this objection too fails. The section says:—"In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the kutcheri of the nearest Munsif or, if there should be no Munsif, to the nearest thana, and there make voluntary oath of the same having been duly published, certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." We think that "certificate to this effect" means a certificate to the effect that the peon did come before the Munsif or Police officer, as the case may be, and did make voluntary oath as to the service of the notice: and, as pointed out by Mr. *Evans* for the appellant, this provision of the section would be fully complied with if the peon went before the Munsif or Police officer and made a deposition upon oath, and if the Munsif appended at the foot of that deposition a statement to the effect that the deponent had that day made that deposition in his presence, that would have been, we think, a certificate within the meaning of cl. 2 of s. 8. And if, as in

this case, the peon went before the Munsif with an affidavit which had been prepared and sworn to, the *jurat* of the Munsif would have been as much a certificate as if the peon had made a deposition on oath and the Munsit had recorded the fact of his so having made the deposition on oath.

The next point taken by Mr. *Woodroffe* is that, supposing for the sake of argument, we should hold that notice was, as a matter of fact, served as required by the provisions of the Regulation in the mofussil, upon the land of the defaulting putnidar, and at the Collector's kutcheri, the notice in this case is a bad notice. This objection, we think, is well sustained. Clause 2 of s. 8 of the Regulation says: "On the first day of Bysack, that is, at the commencement of the following year from which the rent is due, the zemindar shall present a petition to the Collector, containing a specification of any balances that may be due to him on account of the expired year, from all or any talukdars or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the kutcheri, with a notice that, if the amount claimed be [482] not paid from the first of Jeth following, the tenures of the defaulters will on that day be sold by public sale in liquidation. Should, however, the first of Jeth fall on a Sunday or holiday, the next subsequent day, not a holiday, shall be selected instead; a similar notice shall be stuck up at the Sudder kutcheri of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kutcheri or at the principal town or village upon the land of the defaulter. The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter, or of his manager, for the same, or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot." Clause 2 having dealt with the case of bringing a putni to sale for arrears of rent extending over a whole year, cl. 3 deals with mid-year sales, and says:—"On the first day of Kartick, in the middle of the year, the zemindar shall be at liberty to present a similar petition, with a statement of any balances that may be due on account of the rent of the current year, up to the end of the month of Assin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the 1st of Aughran, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth or a four-anna proportion of the total demand of the zemindar, according to the kistbundi, calculated from the commencement of the year to the last day of Kartick."

Now it is apparent that there is a very wide difference between what is to be contained in a notice served under cl. 2, and what is to be contained in a notice served under cl. 3. Under cl. 2 the defaulting-putnidar and the dur-putnidar and all encumbrancers and the public are to learn from an inspection of the notice served upon the land of the defaulting-putnidar, and at the Collectorate kutcheri and on the kutcheri of the zemindar who is bringing the putni to sale, that the tenure will not be [483] released from sale unless the whole year's arrears are paid So that if any person wants to buy the putni as a speculation, or the putnidar wants to release it from sale, or the dur-putnidar or encumbrancer wants to release it from sale in order to preserve their respective securities, they know that none of them can do what he wishes to unless he is willing to pay the whole year's

arrears But the Legislature says that if the zemindar chooses to make use of the provisions of this, what I may call, highly penal regulation in respect of arrears of rent for six months, it will not deal so harshly with the defaulting-putnidar, as it does when the zemindar wishes to make use of the regulation in respect of a year's arrears of rent; for a putni may be released from sale on payment either of the whole arrears or of 75 per cent. of it, that is to say, 75 per cent. of the arrears due up to the end of Assin, and 75 per cent. of what has accrued due from the end of Assin to the end of Kartick, that is, 75 per cent. of another month's rent.

Now, the Privy Council have, as we think, distinctly laid down that a substantial compliance with the substantial portions of this Regulation is a condition precedent to the right of the zemindar to bring the tenure to sale under the provisions of the Regulation, and that non-compliance with any one of the substantial requirements is, in the words of s. 14, which allows the putnidar to sue to set aside the sale, a "sufficient plea."

The notice in this case is as follows:—(reads notice *ante* p. 476). As I have already pointed out the object of the publication of this notice is to give not only to the defaulting-putnidar but dur-putnidars, mortgagees and other encumbrancers notice of the sale. It may well be that the putnidar, dur-putnidar, mortgagees or other encumbrancers would have available for the purpose of saving the estate from sale 75 per cent. of the arrears due, but not the whole. Take an illustration; supposing the arrears amount to a lakh of rupees, a putnidar, or dur-putnidar, or mortgagee, or other encumbrancers, may have 75,000 rupees in his pocket, or lying with his bankers, or in Government Promissory notes on which he could raise a loan, and release the property from sale, but he may not have the whole amount. The object being to allow all persons interested in saving the [484] tenure from sale an opportunity of doing so, we are of opinion that if the zemindar chooses to bring into operation the provisions of cl. 3, s. 8, and to get a half-year's rent by means of this Regulation, he must strictly comply with the conditions laid down in the section. We think that all the requirements in cl. 2 of s 8 must be imported into cl. 3 of that section *mutatis mutandis*: and therefore we think that the service of the notice is a condition precedent to the sale being held, and that the notice so served must be a good notice, that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale in possession of the knowledge of what really they will have to do if they desire to save the tenure, and would-be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the property. We are therefore of opinion that this notice was not such a notice as ought to have been stuck up under the provisions of the Regulation: and therefore upon that ground the decree must stand. (The learned Judges then considered the evidence as to the publication of the notice, and came to the conclusion that the notice had been duly published, and continued):—

We therefore think that the ground upon which the Subordinate Judge has proceeded in setting aside the sale is an erroneous one. But as I have already said, we think that the ground that the notice was bad in law is a substantial ground, and that upon it the appeal must be dismissed with costs.

The result is that the decree must be affirmed, though not upon the ground on which the Subordinate Judge has based it.

The appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

NOTES.

[This case was affirmed by the Privy Council in (1892) 20 Cal., 86. See also 2 C. W. N., 459.]

---

[485] APPELLATE CRIMINAL.

The 28th January, 1890.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

In the Matter of the Petition of the Deputy Legal Remembrancer on behalf of the Government of Bengal.

The Queen-Empress

versus

Bibhuti Bhusan Bit.*

Appeal in criminal case--Appeal by Local Government from judgment of acquittal—Criminal Procedure Code (Act X of 1882), s. 417,

Under the Code of Criminal Procedure (Act X of 1882), the Local Government have the same right of appeal against an acquittal as a person convicted has of appealing against his conviction and sentence, and there is no distinction between the mode of procedure and the principles upon which both classes of appeals are to be decided.

THE respondent Bibhuti Bhusan Bit was charged with having committed an offence punishable under s. 326of the Indian Penal Code by causing grievous hurt to one Protap Madak.

The trial took place before the Sessions Judge of Bankura with the aid of Assessors. The opinion expressed by the latter was, that the accused was not guilty, the reasons given being the want of sufficient proof, and the existence of numerous discrepancies in the evidence adduced by the prosecution. The Sessions Judge, in an elaborate judgment, analysed the evidence for the prosecution, and came to the conclusion that a conviction on the evidence could not be sustained, and accordingly acquitted the accused, and directed his discharge.

Against that acquittal the Deputy Legal Remembrancer, at the instance of the Local Government, appealed.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

Mr. *R. Allen* and Baboo *Sridhar Dass* for the Respondent.

The Deputy Legal Remembrancer contended that, upon the evidence, the accused ought to have been convicted.

Mr. *Allen*, upon the facts, contended that the acquittal was correct; and he further contended that this was not a case in which the Court should interfere with the order of the lower Court. Upon this question his argument was as follows: —

This Court should not interfere in an appeal from an acquittal unless the judgment of the lower Court is manifestly absurd or perverse. The mere fact that this Court might, on the facts, have [486] come to a different conclusion

* Criminal Appeal No. 1 of 1889, against the order passed by G. W. Place, Esq., Sessions Judge of Bankura, dated the 10th of July 1889.

would not justify it in reversing the decision of the lower Court and convicting the accused. To justify its interference, there must be a miscarriage of justice of such an extraordinary nature and of such extraordinary importance, that the Court, in the interests of the public and of the administration of justice, would be bound to interfere. *Empress* v. *Gayadin* (I. L. R., 4 All., 148). *Anonymous, In the matter of the petition of the Government Pleader* (7 Mad., H. C., 339), *Queen* v. *Dukaran* (7 N.W.P., 196), *Reg.* v. *Ramajirav Jivbajirav* (12 Bom. H. C. 1, *Queen-Empress* v. *Chotu* (I. L. R., 9 All., 52), *Queen-Empress* v. *Balwant* (I. L. R. 9 All., 134), *Queen-Empress* v. *Gobardhan* (I. L. R., 9 All., 528) These cases show that a Court would be justified in interfering when, upon the facts as found, an offence was clearly disclosed, and when the acquittal was due to an erroneous application of the law. There is no case reported in which the Court has interfered merely because it would have come to a different conclusion on the evidence from that arrived at by the Court below. This Court has not the advantage of hearing the evidence and watching the demeanour of the witnesses, which must naturally have a great effect on the Judge and Assessors when they come to deal with the credibility of the witnesses. The right to appeal against an acquittal was first introduced in the Code of 1872. The Code of 1861 contained no such provision. The power is an arbitrary one, and should be most sparingly used. A second trial for the same offence after an acquittal is foreign to the fundamental principles of all criminal procedure. Should the Court, however, be of opinion that this case comes within the principles submitted, and that there has been a miscarriage of justice requiring its interference, a new trial should be directed, and this Court should not take upon itself the grave responsibility of deciding upon the evidence, as it appears on paper, after an acquittal by the Judge and Assessors in the Court below.

The *Deputy Legal Remembrancer* in reply.

The **judgment** of the Court (O'KINEALY, and TREVELYAN, JJ.) was as follows:--

In this case Bibhuti Bhusan Bit was charged before the **[487]** Sessions Judge of Bankura with having committed an offence punishable under s. 326 of the Indian Penal Code and was acquitted. Against that acquittal the Government have now appealed, and it remains for us to determine whether the judgment arrived at by the Court below ought to be reversed or not. Some cases have been cited before us by the learned Counsel who appeared for Bibhuti Bhusan Bit in this Court, and he has argued upon the strength of them, that this Court should not interfere with an acquittal by a lower Court unless the judgment of that Court was manifestly absurd or perverse.

Under the Code of Criminal Procedure the Government have the same right of appeal against an acquittal as a person convicted has to appeal against his conviction and sentence. There is no distinction made in that Code as to the mode of procedure which governs the two sorts of appeals, or as to the principles upon which they are to be decided. Both appeals are governed by the same rules, and are subject to the same limitations, and it appears to us that we are bound to decide this appeal, and that we have no discretion to refuse to interfere if we consider that the judgment of the Court below is wrong, and that Bibhuti Bhusan Bit should have been convicted.

No doubt, in all cases of appeals, the Judges of a Court of Appeal are naturally very cautious in interfering with the judgment of a Judge and Assessors before whom the witnesses were examined, both on the ground that a Court before whom witnesses are examined has superior advantages in estimating the value of their testimony, and also here on the additional ground that in all criminal cases the accused is entitled to have the advantage of any

doubt which may arise in the case; but, after giving the accused every benefit which he can derive from such a decision in his favour, if we are still of opinion that he is guilty of the offence with which he has been charged, we think there is no discretion left to us as to whether we should find him guilty or not.

[Their Lordships then proceeded to deal with the evidence in the case, and came to the conclusion that the judgment should be set aside. They accordingly convicted the prisoner and sentenced him to five years' rigorous imprisonment.]

H. T. H. *Appeal allowed.*

---

[488] FULL BENCH.

The 7th February, 1890.

PRESENT:

SIR COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY AND MR. JUSTICE GHOSE.

Asirun Bibi, Minor, by her next friend............Plaintiff

versus

Sharip Mondul and others............Defendants.*

Minor—Representative of Minor in suits—Married woman—Next friend—Civil Procedure Code, Act XIV of 1882, s. 445.

A married woman may act as the next friend of an infant plaintiff.

Guru Pershad Singh v. *Gossain Munraj Puri* (I. L. R., 11 Cal., 733), over-ruled.

THIS case was referred to a Full Bench by Mr. Justice TREVELYAN and Mr. Justice BANERJEE. The order of reference was as follows:—

"In this case the Munsif of Serajgunge gave the plaintiff a decree. On appeal the Subordinate Judge of Pubna and Bogra set aside that decree on the ground that the next friend of the plaintiff was a married woman. The Subordinate Judge relied upon the decision of a Division Bench of this Court (PRINSEP and GRANT, JJ.) in the case of *Guru Pershad Singh* v. *Gossain Munraj Puri* (I. L. R., 11 Cal., 733). We do not agree with that decision. In our opinion s. 457† of the Civil Procedure Code has no application to the case of a next friend. Section 445‡, we think, governs the case. We refer to

* Full Bench on Appeal from Appellate Decree No. 1317 of 1888, against the decree of the Subordinate Judge of Pubna and Bogra, dated 27th March 1888, modifying a decree of the Munsif of Serajgunge, dated the 25th November 1887.

† [Sec. 457:—A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor; but neither a plaintiff, nor a married woman, can be so appointed.] *(Margin: Who may be guardian ad litem.)*

‡ [Sec. 445:—Any person being of sound mind and full age may act as next friend of a minor, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit.] *(Margin: Who may be next friend.)*

a Full Bench the following question: 'Can a married woman act as next friend of an infant plaintiff?' Should this question be decided in the affirmative, it is admitted that the plaintiff is entitled to the decree which was given to her by the Munsif."

Baboo *Kishore Lall Sirkar*, for the Appellant, contended that under s. 445 a married woman might be a next friend. (The Court then called upon the other side).

Baboo *Jasoda Nundun Pramanick*, for the Respondent, relied on the decision of PRINSEP and GRANT, JJ., and contended that [489] the practice of the English Courts was in his favour (Judicial Act of 1875, Order 16, Rule 8). Under the rules of the Original Side of the High Court a married woman was held unqualified to act as next friend (Rule 574. Belchambers, p. 232).

Baboo *Kishore Lall Sircar* was not called on in reply.

The **opinion** of the Full Bench was expressed by PRINSEP, J., and with that view the remainder of the Court concurred.

Prinsep, J.—Upon reconsideration of this matter, I think that the view taken by the Division Bench which referred this case is correct. The plaintiff will therefore be entitled to a decree, the decree of the first Court being restored with costs.

T. A. P. *Appeal allowed.*

NOTES.

[*See* the C.P.C., 1908, O. 32 r. 4. As regards guardianship *ad litem*, the provisions in sec. 457, C.P.C., 1882, were not re-enacted; (1906) 29 Mad., 58; (1907) 6 C.L.J., 36; (1907) 29 All. 728 were decisions under it.

[17 Cal. 489]

FULL BENCH.

The 12th February, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY
AND MR. JUSTICE GHOSE.

Narain Mahton............Defendant
versus
Manofi Pattuk............Plaintiff.*

Bengal Tenancy Act (VIII of 1885) s. 153 (a)—Appeal from decree in rent suit under Rs. 100.

The words "amount of rent annually payable by a tenant" in s. 153 (*a*) of the Bengal Tenancy Act include the case of rent payable by a tenant to one of his co-sharer landlords who collects his share of the rent separately.

IN this case the plaintiff in the year 1293 F. E. sued the defendants to recover Rs. 24-11, as the bhouli rent of eight bighas of land, alleging that he had an

* Full Bench on appeal from Appellate Decree No. 1685 of 1888, against the decision of Baboo Krishna Chunder Dass, Officiating Subordinate Judge of Gya, dated the 28th July, 1888, reversing the decision of Moulvi Ata Hossein Khan, Munsif of Aurungabad, dated the 31st March, 1887.

eight-anna share in such rent. The defendants contended that the plaintiff had only an eight-pie share of the landlord's interest in the land. The Munsif held the defendant's contention to be correct, but on appeal to the Subordinate Judge the latter officer held that the plaintiff was entitled to an eight-anna interest in the rent and decreed the appeal.

One of the defendants appealed to the High Court. The amount claimed in the suit being less than Rs. 100, it was contended that under s. 153 (*a*) of the Bengal Tenancy Act no appeal **[490]** was allowed unless it could be held that the decision of the Courts below decided a question of the amount of rent annually payable by the tenant. Mr. Justice PIGOT and Mr. Justice RAMPINI before whom the case came having regard to the conflicting decisions of *Prasanna Kumar Bannerjee* v. *Sri Nath Dass* (I. L. R., 15 Cal., 231) and *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (I. L. R., 16 Cal., 155) referred to the Full Bench the following question:—Do the words "amount of rent annually payable by a tenant" in s. 153 of the Bengal Tenancy Act, mean "the total amount of rent annually payable by a tenant to the whole body of his landlords where there are more than one," or do they mean "the amount of rent payable by a tenant to one of his co-sharer landlords, who collects his share of the rent separately?"

Moulvi *Mahomed Yusuf* for the Appellant contended that there was an appeal; relying upon *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (I. L. R., 16 Cal., 155), and pointed out that the Subordinate Judge had not tried the proper issue between the parties, but the question whether the plaintiff was in possession and enjoyment of half the *hakimi* share.

No one appeared for the Respondent.

The **opinion** of the Full Bench (PETHERAM, C. J., PRINSEP, PIGOT, O'KINEALY and GHOSE, JJ.), was delivered by

Pigot, J.—In this case we agree with the decision come to by Mr. Justice MITTER, and Mr. Justice MACPHERSON, and referred to in the order of reference; and in answer to the question put to this Bench, we think that the words "amount of rent annually payable by a tenant" occurring in s. 153 of the Bengal Tenancy Act include the case of rent payable by a tenant to one of the co-sharer landlords who collects his rent separately.

T. A. P. *Appeal dismissed.*

NOTES.

[*See* the Notes to 17 Cal., 390 *supra*.]

[491] ORIGINAL CIVIL.

The 6th February, 1890.

PRESENT:

MR. JUSTICE WILSON.

Tincowrie Dawn

versus

Debendro Nath Mookerjee.*

Limitation Act (XV of 1877), Arts. 179, 180—Execution of decree—Civil Procedure Codes (Act VIII of 1859), ss. 287, 288: (Act XIV of 1882) ss. 227, 228.—Transfer of Decree to High Court for execution, period of limitation applicable.

Having regard to the provisions of ss. 227 and 228† of the Code of Civil Procedure (Act XIV of 1882), the period of limitation applicable to the execution of a decree, transmitted by one Court to another for execution, depends on the character of the Court which passed the decree, and not on the character of the Court executing it.

S., a judgment-creditor, who had obtained his decree in the Calcutta Court of Small Causes on the 29th July 1884 had it transferred to the High Court for execution, and took certain proceedings there to execute it, which resulted in an order passed on the 13th June 1885, for payment out to him of certain monies realised in the proceedings in part satisfaction of his decree. Payment was actually made on the 8th August 1885. The next step in execution was an application made on the 14th September 1888; the usual notice was issued, and no cause being shown by the judgment-debtor, an order was made on the 19th December for the attachment of certain monies in the hands of a Receiver belonging to the judgment-debtor. These monies were also attached by other judgment-creditors. The question was then referred to the Registrar to enquire and report, who under the provisions of s 295 of the Code of Civil Procedure were entitled to share in such monies, and in what proportion. It was objected that *S.* was not entitled to share on the ground that on the 14th September 1888 the right to execute his decree was barred by limitation. The question was referred by the Registrar to the Court

Held, that as under Art. 179 Sch. II of Act XV of 1877 the period applicable to decrees of the Small Cause Court was 3 years, the application of the 14th September 1888 was barred by limitation, and that *S.* was not entitled to share under the provisions of s. 295.

Held, further that the order of the 19th December 1888 having been made out of time, though on notice to the judgment-debtor, there was nothing to prevent a third party questioning its propriety. though the parties to the suit might be precluded from doing so.

Ashootosh Dutt v. *Doorga Churn Chatterjee* (I. L. R., 6 Cal., 504) doubted.

[492] THIS was a reference by the Registrar to the Court under the provisions of Rule 13 of the Rules of the 18th February 1888.

* Original Civil Reference, made by Mr. R. Belchambers, Registrar, Original Side, High Court.

† [Sec. 228:—The Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its orders in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.]

Powers of Court in executing transmitted decree.

Appeal from orders in executing such decrees.

By an order, dated the 15th April 1889, made in this suit it was *inter alia* referred to the Registrar to enquire and report which of certain judgment-creditors who had all attached certain monies in the hands of a Receiver in execution of their respective decrees were entitled under the provisions of s. 295 of the Civil Procedure Code to share in such monies, and in what proportions. Amongst such attaching creditors were Upendra Nath Sarkar and others, who had obtained their decree in the Calcutta Court of Small Causes on the 29th July 1884, and the question argued on the present reference was, whether they were entitled to share or whether their right to execute their decree was not barred by limitation. No questions to the right of the other attaching creditors to share was raised before the Registrar.

The various steps taken by the decree-holders Upendra Nath Sarkar and others to execute their decree were as follows. After the decree was passed by the Small Cause Court on the 29th July 1884 it was transmitted to the High Court for execution, and on the 23rd August 1884 an application was made for execution by attaching certain property, which was granted, and on the 26th August 1884 the property was attached. On the 13th June 1885 an order was made for payment of the amount realized to the attaching creditors in part satisfaction of their claim under their decree, and on the 8th August following the amount so realized was paid to them. On the 14th September 1888 another application was made for execution, and the usual notice was issued to the judgment-debtors, as the decree was more than a year old. On the 19th December 1888 no cause having been shown by the judgment-debtors, an attachment was issued against the fund the distribution of which was the subject of the reference. This fund was in the hands of a Receiver appointed in Suit No. 351 of 1889, which was a suit brought for dissolution of a partnership between the judgment-debtors. It appeared from the Registrar's Report that on the 21st July 1888 notice of an application was given in that suit by these judgment-creditors for payment of their claims out of the partnership assets, but that application was refused on the 2nd [493] August 1888, and it was contended before the Registrar, that it must be treated as an application for execution. With regard to this, however, the Registrar considered that the only effect of that application could be to exclude the time between the 21st July 1888 and the 2nd August 1888, in computing the period of limitation to be applied to the application made on the 14th September 1888, and that, allowing for that time, the latter application would still be barred if three years was the period to apply.

The material portion of the Registrar's report on the question subsequently argued in Court was as follows: --

The note in the Court Minute Book with regard to that application (14th September 1888) made on the 19th December 1888 is as follows :—

" Mr. Chuckerbutty applies for attachment of money in the hands of the Receiver in *Debendro Nath Mookerjee* v. *Rojoni Kanta Chatterjee*. Notice has been served, as the decree is more than a year old."

So far as appears from that note it was not suggested that there was any question of limitation.

It was further contended that the order made upon that application, whether made with the full knowledge of the facts or not, precludes me as a referee from considering any question which would affect its validity. That order, if made after time, could not affect the law of limitation. If, therefore, the claim of these creditors was previously barred it continues barred notwithstanding that order, and is inadmissible in law.

It was finally contended on the authority of *Leake* v. *Daniel* (B.L.R., Sup. Vol., 970) that the claim has not been barred inasmuch as the Law of Limitation applicable to proceedings in execution should be the Law of Limitation in force in the Court to which the decree has been transmitted for execution. Although the opinion expressed in that case was purely *obiter dictum*, and had not authority of a judicial dictum, I should not think of questioning its authority if it is as applicable to proceedings in execution now as it then was. But that opinion refers expressly to the intention of the Legislature under s. 287 of Act VIII of 1859, which provides that a decree or order transmitted to another Court for execution when filed in that Court "shall for that purpose *have the same effect*, as a decree or order for execution made by such Court." The Code of Civil Procedure has since been materially altered. Act XIV of 1882 contains no provision as to the effect of a decree transmitted to another Court for execution, such as was contained in s. 287 of the former Code. Section 227 of Act XIV of 1882 says that a decree transmitted for execution to a High Court "shall be executed by such Court *in the same manner* as if it had been made by such Court in **[494]** the exercise of its ordinary Original Civil Jurisdiction," and s. 228 gives to the Court executing a decree the same power in executing such decree as if it had been passed by itself.

An opinion founded on the special provisions of s. 287 of Act VIII of 1859 cannot now be referred to as authoritative having regard to the altered provisions of the law.

The question is at the request of Mr. Newgee, (the attorney for the creditors) referred to the Judge in Chambers under rule 13 of the Rules of 18th February 1888.

Mr. *M. P. Gasper* for the judgment-creditors, Upendra Nath Sarkar and others.—The reference to the Registrar was made in the presence of all the attaching creditors and no contention was then raised that the right to the execution of this decree was barred by limitation. It was not therefore open to the Registrar to go into this question.

WILSON, J.—The order directs the Registrar to enquire who are entitled to share and in what proportions.

Mr. *Gasper*.—My next point is that the decree having been transferred to this Court for execution, the period of limitation to be applied is that governing decrees of this Court. This was so decided in *Leake* v. *Daniel* (B. L. R., Sup. Vol., 970), by PEACOCK, C.J.

WILSON, J.—That case was decided when Act VIII of 1859 was in force, the provisions of which on this subject differ from those of the present Civil Procedure Code.

Mr. *Gasper*.—The provisions of the old Code on the matter are embodied in ss. 287 and 288, and I submit that the effect of ss. 227* and 228 of Act XIV of 1882 is to make no change in the law in this respect. I rely on the words "The Court executing a decree sent to it under this Chapter shall have the same powers in executing such decree as if it had been passed by itself." One of those powers is to execute a decree provided 12 years have not elapsed since it was passed. I also rely on the decision in *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (I.L.R,. 6 Cal., 504). In this case the decree was revived when the Court issued notice to show cause why it should not be executed.

WILSON, J.—In that case the notice was to the judgment-debtor, and no question as to the rights of third parties arose as it does in this.

[495] Mr. *Gasper*.—If the principle in that case be sound that element would make no difference, as a decree which is in existence and force against a judgment-debtor can be executed against any of his property.

Execution by High Court of decree transmitted by other Court.

*[Sec. 227 :—If the court to which the decree is sent for execution be a High Court, the decree shall be executed by such Court in the same manner as if it had been made by such Court in the exercise of its ordinary original civil jurisdiction.]

No one appeared for the other attaching creditors or for the judgment-debtor.

The **judgment** of the Court was as follows:—

Wilson, J.—The point raised in this case is a short one. It arises out of a reference to the Registrar, of a very usual kind, to enquire who were entitled to take a share of the sale proceeds of property attached in execution, and that depends upon what valid attachments upon the property were in force or had been ordered.

In the course of that reference it became necessary to determine whether Mr. *Gasper's* client, who is one of the attaching creditors, is entitled to share in the proceeds of sale. The dates, which are important, are the following:— The claimant obtained his decree on the 29th of July 1884. The decree was transmitted to this Court for execution, and on the 23rd of August he applied for execution. On the 26th of that month the property was attached. On the 13th June 1885 an order was made for payment out to the creditor of what had been realised, towards satisfaction of his claim, and on the 8th August 1885 payment was actually made. The next step was an application for execution, the validity of which is in question. The application was made on the 14th September 1888; notice issued on the ground that the decree was more than a year old, and on the 19th December, no cause being shown, attachment issued; more than three years had thus elapsed after anything had been done, when the present attachment was applied for in 1888.

The question is whether that attachment is valid or whether it is barred by limitation. Under the former Procedure Code provision was made for the execution of decrees, transmitted to Courts other than those which passed the same, contained in ss. 287 and 288 of Act VIII of 1859. These sections are as follows:—

"The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the [496] purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such Court, and may, if the Court be the principal Civil Court of original jurisdiction in the district, be executed by such Court, or any Court subordinate thereto, to which it may entrust the execution of the same."

"When application shall be made to any Court to execute the decree of any other Court as aforesaid, the Court to which the application shall be made or referred shall proceed to execute the same according to its own rules in the like cases; provided that such Court shall have no power to inquire into the validity of the decree unless it appear from the face of the decree that the Court by which it was made had no jurisdiction to make the same."

On these provisions an opinion was expressed by PEACOCK, C.J., in *Leake* v. *Daniel* (B.L.R., F.B.R., 970). "A question was raised in argument as to what law of limitation would apply, if the Court in which the decree was obtained, and that to which it was transmitted, were governed by different laws of limitation. It is unnecessary for us to determine what would be the law applicable to such a case; but, speaking for myself only, I would say that it appears to have been the intention of the Legislature under s. 287 that the law of limitation by which the Court to which the decree was transmitted was bound should be the law. It is a general rule that Statutes of Limitation affect the remedy, and not the law." That opinion was expressed upon a section which said that the copy transmitted should have the effect of a decree of the Court to which it was transmitted to be executed. Then turning to the provisions of the Limitation Act XIV of 1859, ss. 19 and 20, they shewed what the effect

of a decree of the High Court was in point of limitation, and what the effect of a decree of another Court was. Those are the provisions of the law then in force.

Now we have to see what the effect of the present law is, ss. 227 and 228 of Act XIV of 1882. There is not a word about the effect of a decree in s. 227, but simply directions as to the manner of execution ; and the next section goes on: "The Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself. **[497]** All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself." That again says nothing about the effect of any decree, but deals simply with the manner of execution, and leaves the matter of limitation to be governed by the Limitation Act. Articles 179 and 180 of the second schedule to that Act provide what the period of limitation shall be in each of the two cases, and the difference is made to depend solely on the character of the Court which passed the decree. There is one period for decrees of High Courts and another for decrees of other Courts. The law depends not on the character of the Court which executes the decree, but of the Court which passed it, though the manner of execution is that of the Court which executes the decree.

Another case cited was *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (I. L. R., 6 Cal., 504), before Mr. Justice WHITE, in which the learned Judge held that, where a notice issued from this Court to show cause why a decree should not be executed, and after the notice an order for execution was made, that order had the effect of reviving the decree, in the same manner as in former days when a decree was revived by *scire facias*, and gave a new period of limitation. It is not necessary to discuss that question, as in this case the order, which is said to have had the effect of reviving the decree, was itself made out of time, and there is nothing to prevent a third person questioning the propriety of that order, though the parties to the suit might be precluded from doing so. I must add that if it had been necessary to consider the correctness of that decision, I should have hesitated about following it. I think it is a decision which may have to be reconsidered.

The result is that by the law of limitation the claim of the claimant represented by Mr. *Gasper* is barred, and his client is not entitled to share in the proceeds of execution

Attorney for the judgment-creditors : Baboo *N. G. Newgee*.

H. T. H.

NOTES.

[As regards '*revivor*' this case was **dissented** from by Mookerjee and Carnduff, JJ. in **36 Cal. 543** where previous cases like 30 Cal., 979 ; 20 Cal. 551 ; 26 All., 361, were discussed.

As regards the rule of limitation being dependent on the Court which *passed* the decree, *see* also **(1896) 24 Cal., 473** ; (1907) 31 Mad., 24 ; (1911) 21 M.L.J. 777.]

[498] PRIVY COUNCIL.

The 25th, 26th, 27th, and 30th July and 9th November, 1889.

PRESENT:

LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

Mahomed Ahsanulla Chowdhry............Plaintiff

versus

Amarchand Kundu and others.. . ...Defendants

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Endowment—An appropriation not within the principle of wakf*—Property settled on members of grantor's family with a charge upon it for religious and charitable purposes—Effect of appropriation where the charge was not a substantial one.*

Although the making provision for the grantor's family out of property dedicated to religious or charitable purposes may be consistent with the property being constituted *wakf*, yet in order to render it *wakf* the property must have been substantially, and not merely colourably, dedicated to such purposes.

Although an instrument purporting to dedicate property as "*fisabilillah wakf*," and vesting it in members of the grantor's family in succession, "to carry on the affairs in connection with the *wakf*," might include provisions for the benefit of the grantor's family without its operation as a *wakf* being annulled, yet, on the other hand, it would not operate to establish *wakf*, as it did not devote a substantial part of the property to religious or charitable purposes.

Without determining how far provisions for the grantor's family might form part of a settlement for religious or charitable purposes, and yet not deprive it of its character as establishing *wakf*, the Committee approved the decision in *Muzhurool Huq* v. *Puhraj Dilarey Mohapattur* (13 W. R., 235) to the effect that the mere charge upon the profits of the estates of certain items which must in the course of time have ceased, being for the benefit of one family, did not render an endowment invalid as a *wakf*.

In the present case, however, there being no authority for holding a gift to be good as a *wakf* without there being a substantial dedication of the property to charitable or religious uses at some time or other; and the uses prescribed involving only an outlay suitable for such a family to make in charity, the gift was held not to be a substantial, or *bona fide*, dedication of the property as *wakf*. The use of this expression, and others, being only to cover arrangements for the benefit of the family and to make their property inalienable, the property was not constituted *wakf*, nor was it freed from liability to attachment in execution of a decree against one of the grantees.

[499] APPEAL from a decree (11th May 1885) of the High Court, reversing a decree (26th July 1883) of the Subordinate Judge of zilla Chittagong.

The question now raised was whether a valid dedication had been effected by the plaintiff's father by an instrument which he executed on the 5th December 1864 of land in Chittagong, so as to constitute it *wakf*, or whether the instrument, though nominally dedicating property to religious and charitable purposes, established only a charge on the property in the hands of the members of the grantor's family, the property remaining liable to attachment in execution of a decree against one of them.

The suit, in which the present appellant sued as *mutwali* of *wakf*, or dedicated, property, was brought to obtain a declaration that four *taluks* in the Chittagong district, which had been attached by Krishnadas Kundu in execution of a money decree against Shaikh Mahomed Rahimula Chowdhry, brother of the plaintiff, had been made *wakf* by their father, and were consequently not liable to be attached in execution. Rahimula had been joined with Krishnadas Kundu as defendant. Ahsanulla alleged that Ahmedulla Chowdhry, their father, who died in 1866, had executed the above-mentioned deed of 5th December 1864, by which he purported to dedicate all his property, moveable and immoveable, in the Chittagong district as "*fisabilillah wakf*," for defraying the expense of a *musjid* at his family dwelling-house, and of two *madrassas* at Chittagong, also of lodging strangers; and also had provided for the superintendence of this endowment by his two sons.

The principal clauses are set forth in their Lordships' judgment.

Krishnadas Kundu being now dead, he was represented by the respondents Amarchand Kundu and others.

Part of the property dealt with having been attached by Krishnadas in execution of a decree which he held against Rahimula, an application was made by Ahsanulla under section 278, Civil Procedure Code, for its release. This was refused on the 31st December 1881 by the Subordinate Judge, who after considering the terms of the deed of 5th December 1864, and the absence of any directions fixing what share of the income of the property, then said to [500] amount to Rs. 17,000 annually, was to be appropriated to religious and charitable purposes; and after referring to the condition of the *musjid* and *madrassas*, made the following order:—" It appears to me as very probable from the aforesaid circumstances that the real object of the appropriator was neither religion nor charity, but the perpetuation of the properties in his family, so that his male descendants may enjoy their profits without alienating it to stangers. That the appropriator had such an intention in view may also be gathered from the provision in the 5th paragraph of the deed, by which he tried to restrict even the power of the so-called *mutwalis* to sell or mortgage the allowances granted to them. I do not think a Mahomedan can lawfully make such a disposition of his property under the disguise of a *wakf*, and it appears to me that the disposition is invalid. The claim is dismissed accordingly with costs."

This suit was then, under section 283, Civil Procedure Code, instituted to have the above order set aside, and to have it declared that the property had been validly dedicated, and made *wakf*, so that it was not liable to attachment. The plaintiff alleged that he and his brother were only salaried servants, having no ownership in the property. The Subordinate Judge considered that the validity of the instrument of 5th December 1864 had been established, and that the property was *wakf* and inalienable. He made a decree in favour of the plaintiff to that effect.

On an appeal by the defendant to the High Court, a division bench (MACDONELL and MACPHERSON, JJ.) gave the following judgment:—

"The only question which we have to consider is, whether the *wakfnama*, upon which the plaintiff relies, makes the *taluks*, which are the subject of this suit, valid *wakf* under the Mahomedan law. These are not the only properties affected by the deed, for the maker professed to appropriate his entire properties, moveable and immoveable, as *wakf*. The plaintiff has carefully withheld all evidence of the income of the properties so dealt with; but he admits that the annual profit derived from them was Rs. 12,000 or Rs. 13,000, though he says that it has become less since the inundation. We think that there is every reason to believe that it is much more than that sum.

"If the first clause of the deed stood alone there would be a valid dedication, for the properties are dedicated as *wakf* for defraying the [501] expenses of the brick-built *musjid* at the dedicator's family dwelling house, and of the two *madrassas* at his ancestral homestead and his lodging-house in the town of Chittagong and for '*sadir warid.*' This would, as far as words go, sufficiently satisfy the requirements of Mahomedan law according to the strictest construction which has been put upon it by the Courts in this country. But the dedication is qualified by the words 'in the manner provided in the paragraphs mentioned below.' These paragraphs, which are thirteen in number, contain only one short allusion to the object of the endowment. This is to be found in the second paragraph where the *mutwali* is directed to 'continue to perform the stated religious works according to custom.' The whole of the rest of the deed consists of minute provisions for the management of the property, the appointment of his three sons as *mutwali* and *naib-mutwalis*, the succession to those offices which are to be filled by the sons of the *mutwalis*, or, in their default, by 'sons born of the same family in nearest descent,' and for the maintenance and support of all other members of the family. The *mutwalis* are to get salaries of Rs. 100, 90 and 80 a month, respectively. If the sons of the *mutwalis* exceed three in number, the *mutwalis* can give to those who cannot get one of the three appointments any monthly allowance they like. Provision is also made for wives and daughters, and for birth, marriage, and funeral expenses of both sons and daughters. Lastly, it is left to the *mutwalis* to increase their own salaries or those of other salaried persons, having regard to the income and expenditure of the *wakf* properties. The only provisions regarding a surplus are contained in paragraphs 2 and 4, which direct that the surplus after meeting all the expenses is to be kept in a safe place under the supervision and management of all the *mutwalis*, and that all properties acquired out of this surplus are to be part of the *wakf* properties.

"The effect, therefore, of the deed as a whole is, that, while it professes to dedicate as *wakf* properties bringing in a very large annual income, it leaves it to the members of the family, who are as *mutwalis* to retain the control and management, to spend as little as they like beyond what is customary on the objects of the endowment, and to take as much as they like for themselves and the members of the family for all time on account of salary as maintenance. There is nothing whatever in the deed to indicate that the dedicator contemplated any increased expenditure in maintaining the *musjid*, *madrassas* and *sadir warid*. The maintenance of the members of the family, however numerous, is well provided for; but the stated religious works are to be performed according to custom. It is quite clear that the customary mode of performing them would involve an expenditure which in no way approached the annual income, and that there would remain a large annual surplus which would be entirely at the disposal of the *mutwalis*, and from which all the members of the family would have to be maintained.

[502] "Although, therefore, the deed nominally dedicates the properties for purposes in themselves good and valid according to Mahomedan law, the dedication clause is subject to the subsequent provisions; and these, while giving the smallest possible prominence to the objects of the endowment, and limiting, as we should construe the deed, the expenditure on them, would operate to create a perpetuity for the benefit of the members of the family, and at the same time place the properties beyond the reach of the law. That this was the object of the dedicator there can, we think, from the terms of the deed, be little doubt.

"On a proper construction of the whole deed it seems to us that though all the properties are nominally made *wakf* for proper and legitimate objects, there is a surplus which is to be enjoyed by the members of the family, and as to which there is no ultimate trust in favour of any pious or charitable purpose.

"It has been argued that a settlement of this nature is recognized by Mahomedan law, and that a person can make a *wakf* in favour of himself, his children and children's children etc. The Subordinate Judge appears to have adopted this view, and has cited in support of

it certain passages from Baillie's Mahomedan Law and the case of *Luchmiput Singh* v. *Amir Alum* (I. L. R., 9 Cal., 176), decided by TOTTENHAM and BOSE, JJ. It seems to us unnecessary to go into the point, because the settlement as made is not one of that character. If the properties had been made *wakf* in favour of the founder's children and children's children with an ultimate trust in favour of the poor and needy, we should undoubtedly have had to consider whether such settlement created a valid *wakf*. The decision of NORRIS and TOTTENHAM, JJ., in *Hamidulla Khan* v. *Lutful Huq* (I. L. R., 6 Cal., 744) renders it extremely doubtful whether it would be valid. It was not considered so in that case. Here the dedication purports to be for religious and charitable purposes alone, and we have only to see whether this was the real intention of the donor and whether the deed as a whole supports such a dedication. It is clear that a person cannot do indirectly that which he cannot do directly. But putting this consideration aside, if the dedication in part fails as regards the avowed objects for which it was made, we are not, we think, bound to consider whether it will hold good as regards other objects for which there was no express dedication. It is clear that it was not the intention that in this case anything like the income should be spent on the objects designated, and I think the settlement should only hold good to the extent of the intention of the donor as regards the special objects in support of which the settlement was made.

"In the case referred to as decided by TOTTENHAM and BOSE, JJ., it was held that the objects of the *wakf* being religious and charitable, the dedication [503] was complete, and that a subsequent direction that the manager should maintain the future male descendants of the maker of the *wakf*, did not necessarily alter its character. It was not decided whether such a direction could be lawfully carried out. That was a conclusion arrived at on the construction of the particular deed propounded in that case, and we must suppose that there was found to be an intention to create a *bonâ fide* *wakf* of all the properties, though this was coupled with a condition which might or might not be enforceable. Here, we think, there was no such *bonâ fide* intention as regards all the properties, and we should only give effect to the intention so far as it existed.

"We hold then that the deed, construed as a whole, did not create a valid and entire *wakf* of these properties, and that consequently the plaintiff is not entitled to get the properties released from attachment as *wakf*. It did, however, create a charge on the properties for the maintenance and support in the customary manner of the objects designated in the opening clause of the deed. We cannot, however, determine in this case what that charge is, in what proportion it should be borne by the different properties affected, or what part of the properties should be set aside to meet it, as this case relates to only a few of the properties subjected to the charge.

"The plaintiff's claim, so far as it seeks to get the properties declared to be *wakf* and to get them released from attachment as such, must be dismissed, and in lieu of the decree of the Subordinate Judge, there will be a decree to the effect that the properties in suit are subject to the charge specified above, the extent of which has yet to be determined. The appellant will get his costs in both Courts."

From this decision the plaintiff appealed.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellant, argued that the instrument of 5th December 1864 had not been correctly construed with reference to the law of *wakf*, and had not received its due effect in the judgment of the High Court. An appropriation for religious or charitable purposes gave to the estate the quality of *wakf* of which it was not deprived merely by reason of the reservation of part for the maintenance of the donor's family. A *wakf* might lawfully contain provisions for the benefit of the grantor's family. Moreover, the law contemplated the payment of the *mutwali*, or superintendent, and trustee. The appointment of some one to take charge of the property

appropriated was essential, and he was entitled to participate in the benefit of the appropriation. They referred to—

Baillie's Digest of Muhammadan Law, Hanifeea, Chapter IX.

Hamilton's Hedaya, Vol. II. of *Wakf.*

[504] Macnaghten's Principles and Precedents of Muhammadan Law, Endowments, case VIII.

Appropriations, in the nature of settlements of property upon descendants, had been treated as appropriations under the name of *wakf*, where there was the use of that term, and an ultimate trust for the poor. The legal effect of *wakf* was said to be an abatement of the appropriator's right of property; but it was consistent with a detaining of it in his ownership, without the power of alienation; and the poor were deemed to be an inextinguishable class of beneficiaries. The establishment of a *wakf* might be inferred from the general character of a grant; *Kulb Ali Hossein* v. *Syf Ali* (1 Select Rep., 110), *Jan Bibee* v. *Abdoolah* (Fulton, 345), *Jiwan Das Sahoo* v. *Shaik Kubeer-ooddeen* (2 Moore's I. A., 390). They also referred to Mr. Amir Ali's Tagore Lectures for 1884, lecture IX, section II, and to lecture X.

Luchmiput Singh v. *Amir Alum* (I. L. R., 9 Cal., 176) showed that, notwithstanding provisions for debts and maintenance, a *wakf* was valid. And although it was questioned in *Phate Saheb Bibi* v. *Damodur Premji* (I. L. R., 3 Bom., 84), whether a *wakf* could be created merely for the purpose of conferring a perpetual estate on a particular family, without any ultimate use to the poor, it was afterwards decided that, if the condition of an ultimate dedication to a pious and unfailing purpose had been satisfied, a *wakf* was not invalidated by an intermediate settlement on the founder's children, and their descendants, in *Fatma Bibi* v. *The Advocate-General of Bombay* (I. L. R., 6 Bom., 42). They also referred to *Mahomed Hamidulla Khan* v. *Lutful Huq* (I. L. R., 6 Cal., 744) and to *Abdul Ganne Kasam* v. *Hossein Mirza Rahimtulla* (10 Bom. H. C., 7). Although there might be no trace in these cases that a man's mere gift to his own family was in itself a pious use, yet the ultimate trust for religious, or charitable, objects, or for the poor generally, was in itself a pious use. And there was a discretionary power to the *mutwali* to allow what might be suitable to maintain the family.

[505] They also referred to *Doyal Chand Mullick* v. *Saiyud Keramut Ali* (16 W. R., 116), *Amritlal Kalidas* v. *Shaik Hossein* (I. L. R., 11 Bom., 492), *Muzhurool Huq* v *Puhraj Ditarey Mohapattur* (13 W. R., 235), *Bischenchand Basawat* v. *Nadir Hossein* (I. L. R., 15 Cal., 329; L. R., 15 I. A., 1).

Under another system of law, the principle being apparently applicable to all, provisions inconsistent with the trust, which a will established for pious purposes, were rejected—see *Ashotosh Dutt* v. *Durgachurn Chatterjee* (I. L. R., 5 Cal., 438).

The decision of the High Court that the charge on the properties for the maintenance and support of the charitable objects, designated in the opening clause, had been created, and yet that the properties were not constituted *wakf* was inconsistent with the course of decision of the Courts.

Reference was also made to *Kuneez Fatima* v. *Saheba Jan* (8 W. R., 313).

Mr. *T. H. Cowie*, Q C., and Mr. *J. H. A. Branson*, for the respondents, argued that the deed of 1864 did not validly and effectually dedicate the property in question, so as to constitute it *wakf*. It appeared from the deed itself, as well as from the evidence as to the subsequent dealing with the property, that there had been nothing more than an attempt to create, under colour of a *wakf*, a perpetuity for the benefit of the family of Ahmedulla Chowdhry. The

trusts declared were far from absorbing a substantial part of the properties. As to the document, it was insufficient that there should only be an insertion of the term *wakf*: there must be a clear intention shown to devote to religious or charitable purposes; and, instead of this intention being shown, the question arose whether the primary object was of that character at all. The real purpose in view was to provide for the family, and only a small part of the estate was to be applied to the charity. They referred to the Tagore Lectures, 1884, p. 230, comparing an expression of opinion therein with what was said by WEST, J., in *Fatma Bibi* v. *The Advocate-General of Bombay* (I.L.R., 6 Bom., 42). They also cited *Khaja Hossein Ali* v. *Shahzada Hazara Begum* (12 W. R., 344), *Futtoo Bibi* v. *Bhurrut Lal Bhukat* (10 W.R., 299), Baillie's Digest, 557, [506] Hedaya, II, 349. They distinguished the case in which the judgment was given by KEMP, J., *Muzhurool Huq* v. *Puhraj Ditarcy Mohapattur* (13 W. R., 235).

Mr. *R. V. Doyne* replied, referring to Macnaghten's Principles and Precedents, as giving all the true conditions of *wakf*, and contending that they were satisfied in this case.

Afterwards, on 6th November 1889, their Lordships' **judgment** was delivered by

Lord Hobhouse.—The plaintiff in this suit, who is also the appellant, is one of the sons of Sheik Ahmedulla Chowdhry; the second defendant is another son; the first defendant is a judgment-creditor of the second defendant, and in that character obtained an attachment against the property now in dispute. The plaintiff contends that the property is *wakf* and that he is the *mutwali* and that his brother has no interest therein which can be taken in execution. He accordingly made a claim in the execution proceedings which on the 31st December 1881 was rejected by the Court on the ground that no genuine *wakf* had been created.

The plaintiff then brought the present suit. In his plaint he states that the properties mentioned in the schedule were owned by his father Ahmedulla; that Ahmedulla by a *wakfnama* of the 5th December 1864 made a *wakf* of them, which ever since has continued in force; and that he and his brother are simply salaried servants, for the purpose of performing the work specified in the *wakfnama*. He prays for a declaration that the specified properties are *wakf*, and that the order of the 31st December 1881 may be set aside.

The only substantial issue throughout the litigation has been whether the intention of the deed of 5th December 1864 was to turn the properties in question into *wakf* property. If it was, the plaintiff is entitled to succeed; and if not, he must fail. The Subordinate Judge decided in his favour. On appeal the High Court thought that the intention of the deed was not to create an entire *wakf* of the properties, but only to create a charge on them for the maintenance in the customary manner of objects designated in the opening clause of the deed. They reversed the decree of [507] the lower Court, dismissed the suit so far as it seeks to have the properties declared *wakf* and released from attachment, and declared "that the said properties are subject to the charge (the extent whereof has to be hereafter determined) specified in paragraph 1 of the *wakfnama* dated the 5th December 1864, that is to say, of defraying the expenses, in the customary manner, of the brick-built *masjid* of Jorip Mahomed Chowdhry in Paragulpore, and of two *madrassas* and *sadir warid* (travellers) as mentioned in the said clause."

From that decree the plaintiff appeals, and his appeal must be decided entirely by the construction put upon the deed.

At the outset of the deed the grantor adverts to his age and his coming death, and says —" I hereby appropriate and dedicate as '*fisabilillah wakf,*' in the manner provided in the paragraphs mentioned below,"—the properties now in question and other property there described,—" for defraying the expenses of the brick-built *musjid* of my grandfather Jorip Mahomed Chowdhry at my own family dwelling-house in the village of Paragulpore, and of the two *madrassas* at my own ancestral homestead, and my lodging house in the town of Chittagong and *sadir warid* (persons coming and going), and I pray to God that he may in his mercy accept and preserve the same for ever for being applied to those purposes."

The "paragraphs mentioned below" are 13 in number.

Paragraph 1 appoints the grantor's three sons to be *mutwalis* of the *wakf* properties in a gradation of rank, and it contains some very elaborate instructions respecting the management of the property.

Paragraph 2 runs as follows:—

"The *mutwali*, after payment of the proper exponses of the *mosaref* and the necessary costs of collections of the zamindari and the salaries of mookhtars and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurrence of any peril or emergency, out of all kinds of income and profits of the endowed properties according to the long standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the *naib-mutwali* and *naib-ul-maniab* and my daughters as specified in the schedule, and continue to perform the stated religious works [508] according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the *mosaref*, and not commit extravagance and waste or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses shall be kept in a proper, that is to say, a safe place, under the supervision and management of all the three persons."

The schedule provides Rs. 100 per month for the first *mutwali*, Rs. 90 for the second, Rs. 80 for the third, and Rs. 30 for the daughters.

Paragraph 3 provides for the succession of *mutwalis* in case of retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed it is sufficient for their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as *mutwalis*, to be appointed either by existing *mutwalis*, or by a committee or by an officer of Government.

Paragraph 4 provides for the addition to the *wakf* of surpluses occurring under paragraph 2.

Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

Paragraph 7 declares that, if "the *mutwalis*" have sons exceeding three in number, for those who are not *mutwalis*, the *mutwalis* shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades, or service; but when any one becomes a *mutwali* he is to bring into the *wakf* all the property he has got.

Paragraph 8 provides that if "any one" dies leaving no sons, his wife and daughter shall receive allowances. It then continues—" It shall be competent to the *mutwalis*, having regard to the income and expenditure of the *wakf* properties, to proportionately increase or decrease these allowances as well as

their own salaries, and those of other salaried persons, and no one shall be able to raise any objections to the same."

The other paragraphs have no material bearing on the present question.

[509] The case has been very elaborately argued at the Bar, and numerous text-books and decisions have been cited: on the plaintiff's side to show that a *wakf* may lawfully embrace provisions for the family of the grantor; and on the defendant's side to show that there can be no *wakf* unless the whole property is substantially and primarily dedicated to charitable uses.

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice KEMP in one of the cited cases *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (13 W. R., 235). After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says:--"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law."

On the other hand, they have not been referred to, nor can they find, any authority showing that, according to Mahomedan law, a gift is [not ?] good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. *Arathoon* indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the Tagore Lectures delivered in 1884 by a learned Mahomedan [510] lawyer (see p. 230). But no authority has been adduced for that proposition. The observations of Mr. Justice WEST, which are relied on by the learned lecturer, do not go that length; and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses.

The leading clause of the deed contains no charitable gift except "in the manner provided by the paragraphs mentioned below," and we must search those paragraphs to find the real nature of the gift. Now as regards the grantor's moveable property he was advised that there would be legal difficulty if he did not then define the objects on which it was to be spent. So he expressly mentions that it is to be spent in pious and virtuous works, and it is not necessary to decide whether the terms which he uses constitute a separate absolute gift to such purposes, or are controlled by the other paragraphs. As regards the immoveables he uses different language; and the only direction creating a trust for the objects mentioned in the opening sentence is that which is contained in the second paragraph. That trust is (after payment of '*mosaref*,' expenses, and salaries) "to perform the stated religious works according to custom."

There is a great deal in the deed which is designed for the aggrandisement of the family property, and for keeping it perpetually in the hands of the family. The provisions for accumulation in paragraph 4; the attempt to save salaries from alienations and from creditors in paragraph 5; the provisions for appointment of male issue as *mutwalis* in paragraph 3, coupled with the allowances to other male issue, and to wives and daughters of such issue in paragraphs 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in paragraph 7 that new *mutwalis* should bring all their private acquisitions into settlement;—all these things point to the same end, the increase of property available for the family. In paragraph 8 the grantor allows increases of salaries and allowances to members of the family, so that as the property increases, the family may grow richer. There is not a word said about increasing the amount spent **[511]** on charitable uses beyond the expenditure which was according to custom. Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he had himself been accustomed to perform them.

If, indeed, it were shown that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court, in the execution proceedings, considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the plaintiff has carefully withheld evidence as to value, and believes that it was much more than he represented. For all that appears there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Mahomedan gentleman might find it becoming to spend n that way.

Under these circumstances their Lordships agree with the High Court that the gift in question is not a *bona fide* dedication of the property, and that the use of the expressions "*fisabilillah wakf*," and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

The result is that in their judgment this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondents: Messrs. *Watkins and Lattey.*

NOTES.

[This decision was followed in a number of cases several of them being Privy Council decisions:—(1890) 13 All., 261; (1891) 18 Cal., 399; (1892) 19 Cal. 412; (1892) 20 Cal., 116; (1892) 17 Bom., 1; (1892) 14 All., 375; (1894) 22 Cal., 619; (1894) 18 Mad., 201; (1896) 19 All., 211; (1899) 21 All., 329; (1902) 4 C.L.J., 442; (1903) 30 Cal., 666; (1903) 5 Bom. L.R., 624; (1904) 2 A.L.J., 519; (1905) 8 Bom. L.R., 245; (1905) 8 O.C., 379; (1906) 28 All., 633; (1907) 11 O.C., 48;

In 1913 the Imperial Legislature passed the Mussulman Wakf Validating Act, VI of 1913, whereby doubts have been removed as to the validity of wakfs created in favour of the donors, their families, children and descendants with ultimate benefit to the poor or for other religious, pious, charitable purposes.

In the '*statement of objects and reasons*' this case with **17 Bom., 1; 22 Cal., 619** was quoted among decisions which gave rise to uncertainty by emphasising '*substantial dedication*' etc.]

[512] PRIVY COUNCIL.

The 15th November, 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Badri Narain............Plaintiff

versus

Sheo Koer............Defendant.

[On appeal from the High Court at Calcutta.]

Security for costs—Civil Procedure, section 549—Power of Appellate Court to extend the time for furnishing security—Costs.

Where the High Court, under section 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired; and may nevertheless reject the appeal, under that section, if the security is not in the end furnished. *Haidri Bai* v. *The East Indian Railway Company* (I. L. R., 1 All., 687) over-ruled.

In this case, the Registrar was directed to allow only the costs applicable to the question argued and decided.

APPEAL from a decree (2nd June 1885) of the High Court (I.L.R. 11 Cal. 716) made under section 549 of the Civil Procedure Code, rejecting the appellant's appeal from a decree (19th December 1882) of the Subordinate Judge of Patna.

This suit (which was to establish an adoption and title to an estate valued at nearly twelve lakhs of rupees) brought by Mussmat Manki Koer on behalf of Badri Narain, a minor, having been dismissed, an appeal to the High Court was filed on 12th March 1883. Security under section 549 was demanded on 26th August 1884. This was followed by an order on 12th February 1885, directing that the appellant should furnish security for Rs. 5,000, in respect of the costs of the appeal, and the hearing below, within two months. The orders which are set forth in their Lordships' judgment having then been made, the appeal was dismissed on 2nd June 1885 by a divisional Bench, GARTH, C.J., and MITTER, J., (I. L. R., 11 Cal., 716).

On this Appeal

Mr. *J. H. A. Branson*, for the Appellant, argued that the High Court had wrongly construed section 549, and was not bound to reject the suit. He referred to *Balwant Singh* v. *Dowlat Singh* (L. R., 13 I. A., 57; I. L. R., 8 All., 315) and to *Rajab Ali* v. *Amir Hossein* (I. L. R., 17 Cal., 1).

Mr. *C. W. Arathoon*, for the Respondent, referred to the cases in which it had been held that the security demanded must be furnished [513] within the time first prescribed, and cited *Haidri Bai* v. *The East Indian Railway Company* (I. L. R., 1 All., 687).

Mr. *J. H. A. Branson* was not called upon to reply.

Their Lordships' **judgment** was delivered by

Sir R. Couch.—This is an appeal from a decree of the High Court of Calcutta, made on the 2nd of June 1885.

On the 12th of February 1885, an order was made by that Court, directing that the appellant should within two months furnish security to the extent of Rs. 5,000 in respect of the costs of the appeal before it, and

of the original suit. It appears that on the 10th April, two days before the expiration of the period of two months, the appellant offered as security a bond by two parties of two sets of properties, and on the 13th April the pleader of the respondent asked that the matter might stand over, and that it should be referred to the Registrar to inquire whether the security was sufficient, that being the day after the expiration of the two months. The matter went to the Registrar. There was first an extension of time until the 20th April, and on the 18th of April a further extension until the 27th. On the 28th of April the Registrar submitted a report in which he stated that each of the two sets of properties included in the security bond, which had been executed on the 24th March 1885, and registered on the 1st April, was of sufficient value, but he submitted for the judgment of the High Court questions of law which had been raised before him with regard to the power of the parties executing the bond to deal with properties. On the 2nd of June the High Court, on the matter coming before them, made a decree by which they said : " It is ordered, under the provisions of section 549 of the Code of Civil Procedure, that this appeal be and the same is hereby dismissed." Their reason for dismissing it appears in their judgment, in which they say : " We find that it has been decided by the Allahabad High Court in the case of *Haidri Bai* v. *The East Indian Railway Company* (I.L R., 1 All., 687), that where the High Court orders an appellant to give security for costs, the Court may extend the time within which it orders the security to be furnished, if an application is made within that time, but if the security is not given within the time ordered [514] by the Court, and no application is made within that time to extend the time for giving security, the Court is bound, by section 549 of the Civil Procedure Code, to reject the appeal." It is contended before their Lordships that the effect of that section is that the security which was tendered on the 10th April is the only security which can be looked at, and if, upon the inquiry which was afterwards made, it turns out to be insufficient, the Court has no power under the Act to extend the time for giving security so as to enable the appellant to do what, when it appeared that there was this doubt about the right of the parties to pledge the property included in the bond, he was willing to do, namely, deposit the sum of Rs. 5,000. In the present case this observation arises, that in fact the Court did give an extension of time beyond the 12th April, and if the appellant is right the proceedings by which the matter was referred to the report of the Registrar on the 13th, on the application of the respondent's pleader, would be altogether nugatory and idle. The Court, up to the time of the Registrar making his report, did give time for inquiry, and substantially did give an extension of time up to that period. The question is this : Is the Act so framed as to make it imperative upon the Court to reject the appeal if it turns out, upon the inquiry, that the security is insufficient ? The words do not seem to be such as to require that conclusion. The section says : "That the Appellate Court may, at its discretion, either before the respondent is called upon to appear and answer, or afterwards, on the application of the respondent, demand from the appellant security for the costs of the appeal, and if such security be not furnished within such time as the Court orders, the Court shall reject the appeal." Those words appear to be consistent with the Court having power to make fresh orders with regard to the time within which the secuirty should be furnished, and not to fetter it in the way that is contended for by the learned counsel, that having once made an order and fixed a time they can make no alteration in it, no matter what circumstances might occur which would render it impossible for that order to be complied with That would not be a reasonable construction of the Act. The other construction is a reasonable one, that the application to the Court to enlarge the time for giving security may be made either

[515] before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so. If ultimately the order is not complied with, and the security is not furnished, the appeal may be dismissed. That agrees with the view which their Lordships have taken of the section in a case in which judgment was delivered on the 3rd of April last of *Rajab Ali* v. *Amir Hossein* (I. L. R., 17 Cal., 1).

In the present case it appears to their Lordships that the High Court were wrong in holding that they had no power to extend the time for giving the security, and that they were bound, by the section 549, to reject the appeal. It was certainly a case in which they might properly have considered whether they should not allow the appeal to be heard. There was an application for review after the order of the 2nd of June was passed, and it then appeared that the party was ready to give the security by deposit of the Rs. 5,000. It is to be regretted that the Court did not allow that to be done, but adhered to its view of section 549 which appears to their Lordships to be erroneous.

With regard to what should be done in the present case, the decree of the High Court of the 2nd June 1885 should be reversed, and an order similar to that which was made in the case of *Balwant Singh* v. *Dowlut Singh* (L. R., 13 I. A 57 ; I. L. R., 8 All., 315) should be made. That was : "That the appellant may give security for the costs mentioned in the order of the 3rd of June 1882"—in this case it will be the order of the 12th February 1885—"of such nature as shall be satisfactory to the High Court, and within such reasonable time as shall be fixed by that Court, and that upon his giving such security his appeal shall be restored to the files of that Court." The appeal will then be heard by the High Court. It should be also ordered that the respondent should pay the costs of the petition of the 2nd July 1885, and the hearing thereon. Their Lordships will humbly advise Her Majesty to that effect.

The respondent will pay the costs of the present appeal, but when those costs are taxed it will be proper for the Registrar, in [516] considering what should be allowed for the cost of perusal of the record, to allow only so much as is applicable to the question which has been argued before their Lordships and now decided.

Appeal allowed.

Solicitors for the Appellant : Messrs. *Watkins and Lattey.*

Solicitors for the Respondent : Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[In the C. P. C., 1908, by sec. 148 power is expressly given to enlarge the time originally given even if it should have expired. *See* also (1891) 16 Bom., 263 ; (1892) 15 Mad., 384 ; (1897) 19 All., 240 ; (1897) 21 Bom., 576 ; (1901) 4 O. C., 108 ; (1905) 8 O. C., 241 ; (1907) 6 C. L. J., 490 ; (1908) 30 All., 143, where the decisions were to the same effect even before this Code.]

[17 Cal. 516]

PRIVY COUNCIL

The 15th November, 1889.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, AND SIR R. COUCH.

Modhusudan Das............Plaintiff

versus

Adhikari Prapanna and another ....Defendants

[On appeal from the High Court at Calcutta.]

Security for costs—Civil Procedure, section 549—Rejection of appeal—Discretion of Court.

The security for the respondents' costs which the High Court had demanded under section 549 not having been furnished within the time fixed, and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected under that section. *Held*, that this was not a case for interference.

APPEAL from two orders and a decree (8th December 1885) of the High Court, the latter rejecting, under section 549 of the Civil Procedure Code, an appeal from a decree (8th December 1884) of the Subordinate Judge of Cuttack.

The first Court dismissed the suit between the parties (relating to a claim to succeed as Mohant of a religious institution in Puri, valued at Rs. 35,18,333) and ordered costs, Rs. 2,816, to be paid by the plaintiff to the defendants. On the plaintiff's appealing to the High Court, the defendants made an application under section 549, on which it was ordered (3rd July 1885) that cause be shown; and an order followed that the plaintiff should within three weeks from that date furnish adequate security for the costs both in the original and the appellate Courts. This order was not obeyed, and the plaintiff (24th November 1885) applied for an extension of the period after its expiration. This the High Court (WILSON and FIELD, JJ.) refused (8th December 1885), observing that "though the Court might have power to extend the time for furnishing the security demanded, after the time [517] allowed by the order had elapsed, still in this case there were no good grounds for so doing. Three months had been allowed, and that was ample. On the plaintiff's own statement it was clear that he had not taken such steps as with reasonable probability would have enabled him to furnish the security in time."

The plaintiff now appealed from the orders of 21st August and 24th November, and from the decree of 8th December 1885.

Mr. *C. W. Arathoon* for the appellant, argued that the High Court should not, in the exercise of a judicial discretion, have rejected the appeal. He referred to *Rajab Ali* v. *Amir Hossein* (I. L. R., 17 Cal., 1), *Badri Narain* v. *Sheo Koer* (I. L. R., 11 Cal., 716) *Balwant Singh* v. *Dowlut Singh* (I. L. R., 8 All., 315; L.R., 13 I. A., 57).

Mr. *H. Cowell*, for the respondents, was not called upon.

Their Lordships' **judgment** was delivered by

Sir B. Peacock.—Their Lordships are of opinion that this appeal ought to be dismissed. The Court exercised their discretion on the 20th November as to whether they would enlarge the time for giving security for costs.

Having considered the evidence and all the facts which were brought before them at that time, they exercised their discretion, and thought it was a case in which they ought not to enlarge the time. Their Lordships think that this is not a case with which they ought to interfere. The appeal upon the merits of the case was under the circumstances properly dismissed under section 549 of the Civil Code of Procedure.

Their Lordships will therefore humbly recommend Her Majesty that this appeal be dismissed, and dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant : Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents : Messrs. *Sanderson, Holland & Adkin.*

C. B.

---

[518] APPELLATE CIVIL.

The 19th December, 1889.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE BEVERLEY.

Manik Chand Golecha............Plaintiff

versus

Jagat Settani Pran Kumari Bibi and others............Defendants.*

Hindu Law—Inheritance—Sapinda—Daughter's son and son's son of two first cousins—Custom—Adoption without express or implied authority by Jain widow of the Oswal caste—Laws and customs regulating personal rights and status of a family—Conversion from one sect of Hinduism to another, effect of.

The sapinda relationship exists between the daughter's son and the son's son of two first cousins.

Uma Sunker Moitra v. *Kali Komul Mozumdar* (I. L. R., 6 Cal., 256 ; 7 C. L. R., 145 ; affirmed on appeal by the Privy Council; I. L. R., 10 Cal. 232 ; 13 C. L. R., 379 ; and L.R., 10 I. A., 138) and *Padmakumari Debi Chowdhrani* v. *Court of Wards* (I. L. R,. 8 Cal., 302 ; L. R., 8 I. A., 29), relied on.

A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband.

Govind Nath Roy v. *Gulal Chand* (5 Select Rep., 276), *Bhagvandas Tejmal* v. *Rajmal* (10 Bom. H. C. Rep., 241), and *Sheo Singh Rai* v. *Dakho* (6 N. W. P. H. C. Rep., 382, on appeal I. L. R., 1 All., 688 ; L. R., 5 I. A., 87) referred to.

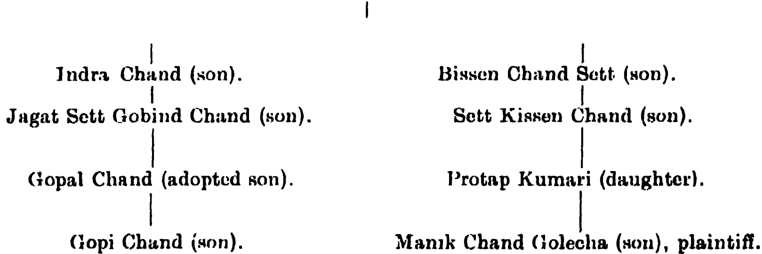
The adoption of the tenets of another sect of Hinduism will not necessarily affect the laws and customs by which the personal rights and status of the family were originally governed : therefore, in the absence of evidence to the contrary, the custom which

* Appeal from original decree No. 223 of 1888, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Moorshedabad, dated the 31st of July 1888.

enables a Jain widow of the Oswal caste to adopt a son without the express or implied authority of her husband will not be affected by the conversion of the family to Vaishnavism. *Padmakumari Debi Chowdhrani* v. *Court of Wards* (I. L. R., 8 Cal., 302 ; L. R., 8 I. A., 229) distinguished, *Bhoobun Moyee Debia* v. *Ramkishore Acharjee* (3 W. R., P. C., 15 ; 10 Moore's I. A., 279), and *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (I. L. R., 5 Cal., 615) referred to.

[519] THIS was a suit to set aside an adoption. The plaintiff, Manik Chand Golecha, who claimed to be the reversionary heir to the estate left by one Gopi Chand upon the death of Gopi Chand's grandmother, Jagat Settani Pran Kumari (defendant No. 1), brought this suit for a declaration that Jibun Mull Kuthari, called Golab Chand (defendant No. 2), was not adopted by the defendant Pran Kumari ; that even if he were adopted, the adoption was invalid ; and that a will, dated the 27th November 1883, and purporting to have been executed by the defendant Pran Kumari was not duly executed by her, and that it was not binding on the plaintiff.

One Jagat Sett Harek Chand died, leaving him surviving two sons, Indra Chand and Bissen Chand Sett. Indra Chand died in 1235 (1828), leaving him surviving a son, Jagat Sett Gobind Chand, who died in 1272 (1865), leaving him surviving a widow, Pran Kumari (defendant No. 1), and an adopted son, Gopal Chand Gopal Chand died in 1275 (1868), leaving him surviving a son, Gopi Chand and Gopi Chand died, a minor and unmarried, on 27th Aughran 1285 (12th December 1878), leaving him surviving his grandmother Pran Kumari (defendant No. 1). Bissen Chand Sett died, leaving him surviving a son, Sett Kissen Chand, who died on 14th Jeit 1289 (27th May 1882), leaving him surviving a daughter, Protap Kumari. Protap Kumari died in Bhadro 1276 (August-September 1869), leaving her surviving a son, Manik Chand Golecha, the plaintiff. The following genealogical table shows the position of the parties to the suit :—



The family of Jagat Sett Harek Chand belonged to the Oswal caste, and followed the Jain religion. Many years ago the family migrated from the city of Nagore, in the district of Jodhpore in the North-Western Provinces, first to Dacca ; and subsequently settled in Mohimapore in the district of Moorshedabad. **[520]** In the early part of the present century Jagat Sett Harek Chand adopted Vaishnavism ; and ever since, the members of his family followed that form of worship, observing at the same time the rites and customs of the Jains.

Subsequent to the death of Gopi Chand, his grandmother, the defendant Pran Kumari, filed a petition, dated the 28th Falgoon 1285 (11th March 1879), intimating to the authorities her intention of taking a second son in adoption on the following day, the 29th Falgoon (12th March), " in conformity with the permission given her by her deceased husband, as well as according to the precepts of the Hindu Shasters." Accordingly in Bysakh 1286 (April 1879) Pran Kumari adopted Jibun Mull Kuthari (defendant No. 2) in accordance with the practice of the Oswal community ; and about 2½ years later a second ceremony of

adoption took place when a deed of gift (Ex. I), dated the 19th Pous 1288 (2nd January 1882), was executed by the natural mother of Jibun Mull Kuthari, making a gift of the boy to Pran Kumari, and the Hindu religious rites of adoption were observed. Jibun Mull on being adopted received the name of Golab Chand.

On the 30th May 1887 the plaintiff instituted this suit. The plaintiff alleged that upon the death of Gopi Chand, the defendant Pran Kumari, Gopi Chand's paternal grandmother, became entitled by right of inheritance to a life-interest in all the immoveable and moveable properties left by Gopi Chand, and that she was in possession of the same; that he was the only grandson (daughter's son) of Sett Kissen Chand, the grandson (son's son) of Jagat Sett Harek Chand, who was the great great paternal grandfather of Gopi Chand that there was no other nearer male reversionary heir living in the family of Jagat Sett Gobind Chand, and that therefore he was the only surviving preferential reversionary heir to the estate left by Gopi Chand, deceased, upon the death of the defendant Pran Kumari: that having obtained a copy of a registered will, dated 27th November 1883, and purporting to have been executed by the defendant Pran Kumari, he for the first time on 2nd May 1887 came to learn that the defendant Pran Kumari had set up an adoption by stating that she had adopted Golab Chand (defendant No. 2) with her husband's permission; and that she had by her said will given to Golab Chand the [521] properties which she had inherited from Gopi Chand: that the defendant Pran Kumari had no permission from her husband to adopt, and that she did not adopt the defendant Golab Chand according to law: and submitted that even if the adoption took place it was illegal and invalid, inasmuch as no adoption could take place under the permission of her husband after the death of her son and grandson Golap Chand and Gopi Chand. The plaintiff however did not state when the adoption took place. There was a further allegation in the plaint that the defendant Pran Kumari was physically and legally incapable of making a will. The plaintiff accordingly prayed for a declaration that Golab Chand (defendant No. 2) was not in fact adopted by Pran Kumari (defendant No. 1); that even if he were adopted, the adoption was invalid: and that the will of 27th November 1883 was not duly executed by Pran Kumari, and that it was not binding on him.

The defendant Pran Kumari denied the correctness of the genealogical table filed with the plaint. She contended that the plaintiff was not the reversionary heir of Gopi Chand, deceased, and that therefore he had no cause of action. She denied that the plaintiff first became aware of the adoption of Golab Chand (defendant No. 2) on seeing a copy of her will, and pleaded that he knew of it more than six years before the institution of the suit, and that the suit was therefore barred by limitation. She alleged that on the 15th Bysack 1258 (27th April 1851), her husband Jagat Sett Gobind Chand gave her a written authority to adopt three sons in succession if the adopted son Gopal Chand or his son died without issue, and that there was also a verbal permission to adopt; that in accordance with this authority she had adopted Golab Chand (defendant No. 2) "according to the custom which prevails among the Oswal caste and in the family of Jagat Sett at Mohimapore;" that Golab Chand was "treated and respected everywhere" by the men of their caste as well as by other people as the adopted son of Jagat Sett Gobind Chand and as a member of the Jagat Sett family; that ever since his adoption he had been discharging his duties as a member of the family, and that with her consent his name had been registered in respect of some of the properties left by the late Gopi Chand. She submitted that "according to the rules, manners and customs prevailing [522] among the men of the Oswal caste and in Jagat Sett's

family, and according to law and the Shasters," the defendant Golab Chand was her validly adopted son, and that on her death he, Golab Chand, would be the preferential heir of Gopi Chand, deceased. She also alleged that the plaintiff's maternal grandfather, Sett Kissen Chand, himself had selected Golab Chand as her adopted son, and that when he left Mohimapore for Benares he had given Golab Chand *salami* "according to the custom prevailing in the caste and family." She submitted that by both these acts Sett Kissen Chand had recognized the adoption of Golab Chand as valid "according to the custom among the Oswals and in the family;" and that the plaintiff was therefore estopped from questioning the validity of the adoption. She further alleged that she had executed the will of 27th November 1883, with a full knowledge and understanding of its purport and contents, and submitted that it was a valid will. There was no allegation in the written statement as to the date of the adoption, nor did it distinctly set up any custom under which Pran Kumari was entitled to adopt without the permission of her husband.

The issues so far as they are material to this report were as follows:—

"2. Is the suit barred by limitation? When did the plaintiff become aware of the adoption sought to be set aside?

"3. Is the genealogical table given by the plaintiff with the plaint correct, and is the plaintiff the grandson and the only reversionary heir of Sett Kissen Chand and Harek Chand and Gopi Chand Jagat Sett? Has the plaintiff any cause of action?

"4. Had defendant No. 1 authority from her husband to adopt three sons in succession? What is the effect of the second adoption after the death of the first adopted child and the heirs of his body?

"5. Did defendant No. 1 adopt defendant No. 2 according to the Shasters and according to the custom prevailing with the Oswals and in the family of the Jagat Setts? Is the adoption valid? Is defendant No. 2 the only heir of Gopi Chand and Gobind Chand Sett?

"7. Did plaintiff's grandfather acknowledge defendant No. 2 as the adopted son of Gobind Chand, and is the plaintiff thereby estopped from denying the adoption?"

[523] On the second issue the lower Court held that the suit was barred by limitation, inasmuch as the plaintiff had failed to prove that he had only become aware of the fact of the adoption within six years before suit. On the third issue the Subordinate Judge found that the genealogical table filed with the plaint was correct. He held that it had not been proved that the Jains had a separate law of inheritance of their own, and that, upon the authority of *Lalla Mohabeer Pershad* v. *Kundun Koowar* (8 W. R., 116), *Bachebi* v. *Makham Lal* (I. L. R., 3 All., 55), *Chotay Lall* v. *Chunnoo Lall* (I. L. R., 4 Cal., 744), and *Sheo Singh Rai* v. *Dakho* (I. L. R., 1 All., 688; L. R., 5 I. A., 87) in the absence of custom or usage varying the ordinary Hindu law of inheritance, that law must be applied to the Jains. He was also of opinion that inasmuch as it had been admitted on both sides that Jagat Sett Harek Chand, the ancestor of the parties, had come from Nagore in Jodhpur in the North-Western Provinces, where the Mitakshara law prevailed, it must be presumed that he had carried with him his own laws, and that when he adopted Vaishnavism he did not abandon them nor the religious rites and ceremonies of the Jains. He further held "that as the family of Jagat Sett adhered to their ancient ceremonial rites and customs of the west, and had those ceremonies performed by western Brahmins, they ought to be governed by the Mitakshara law, although they renounced their Jain religion and adopted Vaishnavism." As regards the defendant's contention that even if the Mitakshara law applied,

still the plaintiff was not the reversionary heir of Gopi Chand, he held, upon the authority of the Mitakshara, Chapter II, s. 5, clause 3, verse 6, and the cases of *Gridhari Lall Roy* v. *The Bengal Government* (12 Moore's I. A., 448; 1 B. L. R. P. C., 44), *Umaid Bahadur* v. *Udoi Chand* (I. L. R., 6 Cal., 119), and *Lallubhai Bapubhai* v. *Mankuvarbai* (I. L. R., 2 Bom., 388), that the plaintiff was a Bhundhu of Gopi Chand, and therefore a reversionary heir, there being neither agnates nor gentiles. Accordingly, the Subordinate Judge held that the plaintiff was the reversionary heir of Gopi Chand, and therefore entitled to bring the suit.

[524] On the 4th and 5th issues the Subordinate Judge came to the conclusion that the written authority set up was a forgery, but that under a custom prevalent among the Oswals, whether Jains or Vaishnabs, a widow could adopt without the permission of her husband, and that the adoption was not invalid on this or any other ground.

On the 7th issue the Subordinate Judge found that Sett Kissen Chand had assented to the adoption of defendant No. 2.

The material portions of the judgment of the lower Court regarding the 4th and 5th issues were as follows :—

"The defendants in the next place contend that defendant No. 2 was adopted by defendant No. 1, both according to the custom prevailing with the Oswals and in the family of the Jagat Setts and according to the Shasters. Thereupon the following issue was raised—Did defendant No. 1 adopt defendant No. 2 according to the Shasters and according to the custom prevailing with the Oswals and in the family of the Jagat Setts?

"I find it proved by witnesses examined on both sides that defendant No. 1 adopted defendant No. 2, both according to the Hindu Shasters and according to the custom of the Oswals. I find no good reasons for disbelieving the witnesses in this suit. I have no doubt, therefore, that the defendant No. 2 was adopted by defendant No. 1, both according to the Hindu Shasters and according to the custom prevailing among the Oswals. Then the plaintiff contends that the adoption is invalid on two grounds, viz , (1) because there was no permission to adopt given by Jagat Sett Gobind Chand, and (2) because even if there were such permission, still it is invalid, as the first adopted child died leaving a son and widow. The defendants, on the other hand, contend that there was a permission given by Jagat Sett Gobind Chand to adopt three sons in succession, that no permission was necessary according to Shasters and according to the custom of the Oswals, and that the adoption is valid both according to law and according to the custom of the Oswals. Therefore, the principal question for determination is—Is the adoption valid? In order to decide this question, it is necessary in the first place to see whether or no a permission by the husband is [525] necessary for the adoption of a child by a widow according to the custom of the Oswals and according to Hindu Shasters prevailing in countries governed by the Mitakshara Law of Inheritance. That the permission is not necessary according to the custom of the Oswals has been proved by defendant's witnesses Nos. 1, 2, 6, 9, 10, 12, 13, 16, 18, 19 and 20, and by witnesses examined under commission—Boodh Singh, Amrita Kumari Bibi, Mina Kumari Bibi in this district, and several others in Jeypore and Jodhpur. The fact is also proved by plaintiff's own witnesses, Nos. 10, 15 and 17. They prove the existence of the custom, and several cases of adoption by widows without their husbands' permission. Although, as to the existence of custom, they speak from hearsay, still in such matters hearsay evidence is admissible. Then as to the cases, although many witnesses state that they heard the fact of the

want of permission from the near relatives of the adoptive mother, still some of them state that from their relation to the family in which the adoption was made they would have known the fact of the permission if there was any. It is very difficult to prove a negative fact. The plaintiff did not prove that there was permission in those cases. Again, by an adoptive mother it has been proved that she adopted a child after her husband's death without his permission. She of course knew whether or no her husband had authorized her to adopt. Another witness, who is an adopted child, states that he was adopted by a widow, and that he did not know that his adoptive mother had any permission from his father to adopt a child. He was very likely to know whether or no his adoptive mother had permission to adopt a child. I have therefore no doubt that in these two cases there was no permission given by the husband. Then in the other cases also I am of opinion that there was no permission. If there was any, they would most likely have known it, and the plaintiff would have proved its existence by citing the adoptive mother or child as witnesses. The instances of adoption by a widow without her husband's permission are, therefore, many. Is it at all probable that in all these cases the natural father or mother gave their sons in adoption if such a custom did not exist? Did they throw away their children without any hope of securing them any happiness? Again, is it at all probable that the heirs of the husband did not contest the validity [626] of the adoption, if there was no such custom? These cases therefore are very strong proof of the existence of the custom. Then we have the cases of *Govindnath Roy* v. *Gulal Chand* (5 Select Rep., 276) and *Sheo Singh Rai* v. *Dakho* (I. L. R., 1 All., 688; L. R., 5 I. A., 87). Although the second case applies to Saraogis, still it has been proved in this case that the Saraogis are merely a sect of the Jains, that they differ from other Jains, the Sitambari Jains, only in the form of worship, and that in civil rights they are equal.

"Next I find it proved by two Jain pandits that according to their Shasters a widow is entitled to adopt without her husband's permission. I see no good grounds for disbelieving them on this point. * * I have no doubt, therefore, that by Jain law and custom a Jain widow is entitled to take a son in adoption without the permission of her husband.

"The pleader for the plaintiff contends that the family of Jagat Sett lost this right by their conversion to Hinduism, by their becoming Vaishnabs. I cannot agree with plaintiff's pleader in this opinion on several grounds. In the first place, I find it proved by witnesses examined on both sides that the custom is not religious but tribal. They state that the custom exists with the Oswals and not with the Jains alone. Then I find it proved by defendant's witnesses that the Oswal widows of Jeypur and Jodhpur, whether Jains or Vaishnabs, adopt children without the permission of their husbands. * * I do, therefore, find that the custom is not confined to the followers of the Jain religion, and that it is peculiar to the Oswals. As the family of Jagat Setts are Oswals, I am of opinion that they did not lose their customary tribal rights by their change of religion. * *

"Besides, in the present case it has been shown before that the family did not completely change their religion. Although they worshipped Hindu gods, still they worshipped Jain gods also. Hinduism does not allow the worship of such gods. The worship of those gods is incompatible with the Hindu religion. On the other hand, I find that the Jains allow greater freedom of worship. It has been proved in this case that the Jains of Azimgunge [627] worship many Hindu gods and goddesses, and still they are reckoned as Jains. Therefore, strictly speaking, the family of Jagat Sett cannot be said to be Hindus; they are rather Jains. In that case there can be no doubt that

Jagat Settani Pran Kumari Bibi was entitled to adopt a son without the permission of her husband. If the family was not strictly Hindu or Jain, then they would be governed by the principles of equity and good conscience [*Raj Bahadur* v. *Bishen Dayal* (I. L. R., 4 All. 343)]. In equity and good conscience they cannot lose their tribal customary rights of adoption, which appears to have no connection with their old religion. Again, they would be entitled to select their own laws of inheritance, etc.—*Raj Bahadur* v. *Bishen Dayal* (I. L. R., 4 All., 343) and *Abraham* v. *Abraham* (9 Moore's I. A., 195).

"In the present case we find that Jagat Sett Gobind Chand adopted Gopal Chand according to the Oswal custom of adoption merely by taking the child and distributing cocoanuts. He did not go through the ceremonies prescribed by the Hindu religion of adoption. This fact is an express declaration on his part that he intended to adhere to the customary law of adoption as prevalent amongst the Jains, more properly amongst the Oswals, and not to adopt the Hindu law of adoption. I am therefore of opinion that Jagat Settani Pran Kumari Bibi was entitled to take defendant No. 2 in adoption without the permission of her husband, according to the custom of the Jains, or more properly of the Oswals.

"Then I am of opinion that, according to the Hindu law prevalent in Jeypur and Jodhpur, it appears that a Hindu widow is authorized to take a child in adoption without the consent of her husband. There we find that Hindus take a child in adoption without the permission of their husbands. Very probably the fact is owing to the great weight being attached to the opinion of Vira Mitrodaya in those districts. That Vira Mitrodaya is a book of great weight in the Benares school which is governed by the Mitakshara appears from the rulings in the cases of *Rajundur Kiswur Sing Bahadur* v. *Sheopursun Misser* (10 Moore's I. A., 438) and *Ranjit Sing* v *Jagannath Prosad Gupta* (I. L. R., 12 Cal., 375). * * On the whole I am of opinion that the adoption of defendant No. 2 by defendant No. 1 is valid, [323] notwithstanding that Jagat Sett Gobind Chand did not authorize defendant No. 1 to adopt a child after the death of the first adopted child. * *

"Then it is said that the adoption is invalid, as of the four sons left by the natural father of defendant No. 2, one had been given in adoption, and the other two died before the defendant was adopted. I am of opinion that the contention is not valid. * * Lastly, I find that the Oswal community of this place recognized the adoption as valid. * * On the whole, therefore, I find that the adoption of defendant No. 2 by defendant No. 1 is valid, and that it ought not to be set aside on the grounds stated above. "The principal contention of the plaintiff is that the adoption is invalid, inasmuch as Gopal Chand left a son Gopi Chand, and the rulings in the cases of *Padmakumari Debi Chowdhrani* v. *Court of Wards* (I. L. R., 8 Cal., 302; L. R., 8 I. A., 229) and *Thayammal* v. *Venkatarama* (I. L. R., 10 Mad., 205), are cited in support of this contention. The wording of the decision in both the cases appear to favour plaintiff's contention. But the facts of the present case are clearly distinguishable from those of the cases cited. There the adoptions were made when the estate was vested in the heir of the last proprietor; but in the present case it was made at a time when the heir of the last proprietor was dead, and the estate had again vested in the widow of the original proprietor. The present case resembles the hypothetical case assumed in *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee* (10 Moore's I. A., 279; 3 W. R., P. C., 15) and the case of *Ram Soondur Singh* v. *Surbanee Dossee* (22 W. R., 121). * * I am therefore of opinion that the adoption in the present case is valid according to the principles laid down in the cases cited above.

"I am of opinion that it should be upheld, and not set aside."

Accordingly the Subordinate Judge dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. *Woodroffe*, Baboo *Sharoda Churn Mitter*, Baboo *Omer Nath Bose*, and Baboo *Atul Chunder Ghose* for the Appellant.

Mr. *Evans*, Baboo *Srinath Das*, Baboo *Golap Chunder Sircar*, and Baboo *Nobodeep Chunder Roy* for the Respondents.

[529] The **judgment** of the High Court (MITTER and BEVERLEY, JJ.) after stating the facts proceeded as follows :—

The respondents filed cross-objections as regards the findings on the third and fourth issues, but Mr. *Evans* candidly admitted before us that he could not contest the accuracy of the lower Court's conclusion as to the written authority set up. Mr. *Woodroffe*, on behalf of the appellant, contended that the allegation made in the written statement to the effect that the adoption was made in pursuance of an authority derived from Gobind Chand not having been made out, the defendants should not have been allowed to set up a new case which is not to be found in their written statement, namely, that by a special custom of the tribe and family, the widow was entitled to adopt without permission. We are of opinion that the written statement is sufficiently broad in its terms to include the plea referred to. The existence of the custom in question is not inconsistent with an express permission or authority to adopt in particular cases; and we think that the fifth issue in general terms raised the question as to the validity of the adoption according to the custom prevalent among the Oswal caste and in the family of Jagat Sett. Several objections were taken in the lower Court, and although no specific issues were framed in respect of them, they appear to have been fully tried and discussed, and we are unable to say that the appellant has in any way been prejudiced. The questions, therefore, that have been laid before us for our consideration in this appeal are the following :—

1. Is the plaintiff a reversionary heir and entitled to bring the present action?
2. Is the suit brought within time as provided by Article 118* of the Limitation Act?
3. Is it proved that by any special custom, prevalent among the tribe and family to which the parties belong, a widow can adopt a son without having obtained permission to do so from her late husband?
4. Supposing that the adoption was good and valid according to Jain usage, how is the matter affected by the fact that this particular family has embraced Vaishnavism?

[530] 5. Is the adoption in this case invalid by reason of the adopted son being the only surviving son of his natural parents?

6. Is the adoption invalid by reason of the estate having vested in Gopal Chand, and after him in his son Gopi Chand?

* [Art. 118 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To obtain a declaration that an alleged adoption is invalid, or never in fact took place.	Six years	When the alleged adoption becomes known to the plaintiff.]

1. On the first point it has been contended before us that the plaintiff has no status as a reversionary heir, inasmuch as the *sapinda* relationship does not exist between him and the late owner Gopi Chand. The argument that has been addressed to us is opposed to the decision of the Full Bench in the case of *Uma Sunker Moitra* v. *Kali Komal Mozumdar* (I. L. R., 6 Cal., 256; 7 C. L. R., 145 affirmed on appeal by P. C.; I. L. R., 10 Cal., 232; 13 C. L. R., 379; and L. R., 10 I. A., 138), as well as to that of the Privy Council in the case of *Padmakumari Debi Chowdhurani* v. *Court of Wards* (L. R., 8 I. A., 229; I. L. R., 8 Cal., 302). Upon the authority of these cases, therefore, we think the lower Court was right in overruling this objection to the suit.

2. As regards the question of limitation, the first point we have to decide is, when did the alleged adoption take place? If, as the plaintiff contends, the adoption did not take place till Magh 1938 Sumbut or the beginning of 1882 A. D., the question of limitation will not arise, as in that case the adoption itself took place within six years before suit. If, on the other hand, it took place in Bysakh 1936 (April 1879), then we have to consider whether the plaintiff knew of it more than six years before suit, or whether Sett Kissen Chand knew of it, and whether plaintiff is bound by his knowledge. Now it has been pressed upon us in argument, (and we think there is a good deal of evidence in support of the theory), that there were in fact two adoptions—that in 1879 the boy Golab Chand was adopted in accordance with the practice of the Oswal community, and that some 2½ years later there was a second ceremony of adoption when the deed of gift (Ex. I) was executed and the Hindu religious rites were observed. Several of the plaintiff's witnesses, who speak to this later adoption, admit that there was a transaction of some nature or other having reference to an adoption some three years earlier. Prem [531] Chand Pipara (p. 30) says that he and all the Oswals attended on that occasion, that they gave *salami*, and that cocoanuts were distributed. Mukund Lall Pundit (p. 37) speaks of a feast that took place some two years before the Jag ceremony. Sourid Mull Lorha (p 39) says he sent his son to the adoption about the year 1936 (Sumbut). Sookul Chund Doogar (p. 43) speaks to the same effect. Harek Chand Goleecha (p. 48) speaks of Golab Chand being driven out for two or three years, and then taken in again. So also Hulas Chand Singhi (pp. 53, 56): and compare the evidence in cross-examination of Rai Boodhoo Singh Dodhuria at pp. 160-61. From this evidence we think it clear that even on the plaintiff's own showing the boy Golab Chand was adopted in accordance with the practice of the Oswal community so far back as 1879. This evidence is corroborated by the petition (Ex. F. 1) at p. 178. Gopi Chand, it seems, died on 27th Aghran 1285, corresponding with the 12th December 1878, and on the 28th Falgoon following, corresponding with the 11th March 1879, the defendant No. 1 intimated to the authorities her intention of taking a second son in adoption. It has been contended before us, that the transaction which took place in 1879 was merely a consultation as to the person who should be taken in adoption. In the lower Court the difficulty appears to have been attempted to be met by the supposition that after his adoption in 1879 Golab Chand was turned out and retaken in adoption in 1882. We think that upon the evidence we must hold that there was an adoption according to the Oswal practice in 1879; and that this was followed nearly three years later by another ceremony performed in accordance with Hindu rites. Was the plaintiff then aware of this adoption more than six years before suit? He has sworn that he was not aware of it till a few days before instituting this suit. He deposes that he was living in Calcutta and elsewhere, and only on one occasion visited Mohimapur, where Pran Kumari resides. He has adduced some evidence in support of this statement. The defendants on the

other hand have adduced evidence to show that the plaintiff was constantly at Mohimapur. We are not prepared to accept that evidence. The statements of Surbessur Mazumdar (p. 98) contradict those of the other witnesses. But although we are unable to agree with the lower Court in the view it takes of the [532] defendants' evidence on this point, we cannot accept the plaintiff's statement that he only became aware of the adoption on 2nd May 1887. The family of Jagat Sett is an important one among the Oswals of Moorshedabad, and the plaintiff is related to the family through his mother. He admittedly came from time to time between 1883 and 1887 to Azimgunge, which is only four miles from Mohimapur; and on one occasion (November 1881) he says he saw the defendant No. 2 in the Jagat Sett's house at Mohimapur. We think it is impossible to believe that at a time when the boy was being recognized by the entire Oswal community of that neighbourhood as Pran Kumari's adopted son, the plaintiff was the only person who was not aware of the fact. It seems to us, therefore, that he has failed to show that he only became aware of the adoption on 2nd May 1887, or within six years before suit. The suit is therefore barred by limitation.

In connection with this matter it has been contended that even if the plaintiff himself did not know of the adoption, the evidence shows that his maternal grandfather, Sett Kissen Chand, knew of it; and that by the definition of the word "plaintiff" in the Limitation Act, Kissen Chand's knowledge would have the effect of barring the suit. We are unable to agree with the lower Court's conclusions on this point. There is no satisfactory evidence of Kissen Chand's knowledge of the adoption of defendant No. 2. It is curious to notice the manner in which this story grew, as the witnesses who deposed to it were successively examined. The first witness who deposed to this matter, Dinobundho Sen (p. 86), stated that at the time Sett Kissen Chand was consulted, it was not settled who was to be adopted. The next witness (p. 88) makes Kissen Chand refer to the deed of permission. Har Proshad Dabar (p. 95) states that the deed was got out and shown to Kissen Chand; while the next witness, Surbessur Mazumdar, (p. 97) goes still further and deposes that Kissen Chand approved of the defendant No. 2 and paid him a *salami*. Most of these witnesses have been discredited in the matter of the written authority, and we think they cannot be believed on this point either.

3. The next question is whether by any custom or usage, prevalent among the Oswal Jains, a widow can adopt a son to her husband without an authority express or implied from him to do [533] so. On this question we are of opinion that due weight must be given to the decisions of the Courts in analogous cases; and we therefore proceed first to examine these cases.

In the case of *Gobind Nath Roy* v. *Gulal Chand* (5 Select Rep., 276), (which was a suit between Jains of this very district of Moorshedabad), the facts were these:--One Uttam Chand by a will authorized his widow to adopt a son who was to be selected by his executor, Moti Chand. Moti Chand died without making a selection, and the widow subsequently adopted Gulal Chand. The suit was instituted by Gulal Chand to recover possession of the estate as the adopted son; and it was held by the late Sudder Court that the adoption of Gulal Chand was a good and valid adoption, although it had not taken place in accordance with the authority given by the husband. In that case several pundits appear to have been consulted, and although there was a difference of opinion as to whether the widow could depose a son after being once adopted, they seem to have been unanimous in the opinion that according to the Jain Shasters "a sonless widow may adopt a son, just as may her husband, for the performance of rites. The sanction of her

husband or the direction of the yatis or priests is not essential." It is not stated in the report to what caste Uttam Chand Nahar belonged, but it appears from the evidence of plaintiff's witness Hulas Chand Singhi at page 59 of the paper book that Gulal Chand was an Oswal. This case then is in our opinion an important piece of evidence, being as it is a judicial decision so far back as 1833, that among the Oswal Jains of Moorshedabad a widow can validly adopt a son without the permission of her husband.

The case of *Bhagvandas Tejmal* v. *Rajmal* (10 Bom. H. C., 241) was one between Jains of Marwari origin residing in the district of Ahmednagar. In that case the widow had died without making an adoption; and the question before the Court was whether under Jain law or custom a son could be adopted to the deceased widow and her husband by other members of the caste. The Court held that the alleged custom was not proved; but it seems to be assumed throughout the judgment that, if the adoption had been made by the widow before her death, it would have been valid. This assumption is based, however, not upon any custom peculiar to the Jains, but [534] upon the general principles of Hindu law according to the Maratha school. At page 257, WESTROPP, C.J., says:—"The Maratha school of Hindu law permits the widow to adopt a son on behalf of her husband without any express authority from him to that effect, provided he has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when *in articulo mortis* to adopt. It has even been held here that the consent of the kinsmen of the husband is not essential to adoption by a widow, if the act be done in the *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

In *Sheo Singh Rai* v. *Dakho* (6 N.-W. P. Rep. 382: on appeal I. L. R. 1 All., 688; L. R. 5 I. A., 87) it was held that among the Saraogi (or Jain Agarwalas of the Meerut district, according to the custom of the sect, a sonless widow could adopt a son without any permission from her husband or the consent of his heirs, and this decision was affirmed by the Privy Council. It is contended by Mr. *Woodroffe* that this decision is not in point, inasmuch as the parties were Saraogi Agarwalas and not as in this case Jain Oswals. But the term Saraogi appears to be synonymous with Jain (*Sheo Singh Rai* v. *Dakho* (6 N.-W. P. Rep. 382; on appeal I. L. R. 1 All., 688; L R. 5 I. A., 87) page 395, and *Bhagvandas Tejmal* v. *Rajmal* (10 Bom., H. C., 241 page 251,) and the decision in this case, as in that in *Govind Nath Roy* v. *Gulal Chand* (5 Select Rep., 276), appears to be based on a custom prevalent among the Jains and not as being peculiar to any tribe or caste. This appears clear from the analysis, which is given in the judgment of the High Court, of the evidence upon which they found the custom proved. The parties in the present case admittedly came from the North-Western Provinces, and we think, therefore, that this case, like *Govind Nath Roy* v. *Gulal Chand* (5 Select Rep., 276), constitutes strong evidence in favour of the custom pleaded by the respondents.

Turning to the oral evidence taken in this case, we are unable to say that the lower Court was wrong in holding that it sufficiently establishes the custom alleged. A large number of witnesses [535] (including several called by the plaintiff himself) have deposed that among the Jain Oswals the husband's permission is not a necessary condition to the validity of an adoption by the widow. It is no answer to this evidence to say that in some cases, as the witnesses admit, the husband does authorize or enjoin the widow to adopt. The question is not whether the widow may adopt with the husband's permission—that is the ordinary Hindu law in this part of India; and the special deviation

from that law, which has to be proved in this case, is that even when no permission has been granted the widow as the representative of her husband is entitled to adopt. A large number of instances have been cited by the witnesses in which this power is said to have been exercised by the widow. Some of these instances no doubt may be open to criticism; and as regards others the evidence is possibly not the strongest that might have been adduced. But some of the instances cited do certainly go to bear out the statements of the witnesses as to the alleged custom, and the plaintiff has not attempted to show that in any of the instances given there was an authority granted by the husband.

We think, then, that the oral evidence taken in this case, coupled with the judicial decisions in *Govind Nath Roy* v. *Gulal Chand* (5 Select Rep., 276) and *Sheo Singh Rai* v. *Dakho* (6 N.-W P. Rep., 382; on appeal I. L. R., 1 All., 688; L. R. 5 I. A., 87) establishes the existence of a custom among the Jain Oswals, under which a widow may adopt a son to her husband even in cases where he has not conferred upon her an express authority to adopt.

4. Then it is contended that, even supposing it proved that according to Jain usage a widow can adopt a son to her husband without any authority derived from him, the family in this case had adopted Vaishnavism, and would not, therefore, be governed by Jain usage.

We think it is satisfactorily proved upon the evidence that the family of Jagat Sett Gobind Chand originally belonged to the Jain sect of Hindus, and that they embraced Vaishnavism in the time of Harek Chand about the beginning of the present century. But we are clearly of opinion that the adoption of the tenets [536] of another sect of Hinduism would not affect the laws and customs by which the personal rights and status of the members of the family were governed. The custom in question is not shown to have been in its origin in any way connected with the peculiar tenets of the Jain religion, and in our opinion it would not be affected by the particular creed or religion which a family or an individual governed by it may profess to follow. Moreover, in the present case the oral evidence clearly shows that the custom in question prevails among members of the Oswal caste, whether they are Jains or Vaisnabs. We are of opinion, therefore, that the fact that the family have turned Vaisnabs in recent times will not affect the question whether they would still be governed by the customary law, which, in our opinion, is well established on the evidence.

5. The next question we have to determine is whether the adoption is invalid by reason of defendant No. 2 being at the time the only son of his natural father. It appears from the deposition of Amrita Kumari Bibi, the mother of defendant No. 2, that although both her living sons (Manik Chand Kuthari and defendant No. 2) have been given in adoption, the widow of one of her deceased sons has adopted a son. The reason for the rule forbidding the adoption of an only son does not therefore exist in this case; and even if we thought that rule imperative, it would not apply in the present case. We are of opinion that the adoption is not valid on this ground.

6. The next objection urged is that the adoption is invalid because Jagat Sett Gobind Chand left a son Gopal Chand, who again left a son Gopi Chand, in whom the estate vested on his father's death. In support of this objection Mr. *Woodroffe* relies on the decision of the Privy Council in the case of *Padmakumari Debi Chowdhrani* v. *Court of Wards* (L. R. 8, I. A. 229; I. L. R., 8. Cal., 302). In that case one Gour Kishore executed a deed of permission to adopt in favour of his wife Chandrabali. Gour Kishore died leaving, besides his widow, a natural son, Bhowani Kishore, who succeeded to his property, and on Bhowani's death the estate vested in his widow Bhoobun

Moyi. Chandrabali then adopted a son to her husband Gour Kishore; but the Privy Council held that the adoption was invalid on the ground that "upon the vesting of the estate in the widow of Bhowani, the power of adoption was at an [537] end and incapable of execution." We think, however, that that decision will not apply to the facts of the present case. In the case referred to the authority to adopt was sought to be exercised at a time when the estate had vested in Bhowani's widow; and the Privy Council held that it could not then be exercised so as to divest the widow of the estate which had devolved upon her. In the present case the adoption was made at a time when the estate had vested in Pran Kumari as heir to Gopi Chand; and the real question is whether it was not competent to her to divest herself of the estate by the adoption of a son. In the case of *Bhoobun Moyi Debea* v. *Ram Kishore Acharj Chowdhry* (10 Moore's I. A., 279) their Lordships of the Privy Council say (p. 311) with reference to the case under consideration:—"If Bhowani Kishore had died unmarried, his mother Chandrabali Debia would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the rule." And in the judgment of this Court in the case of *Paddo Kumaree Debi* v. *Juggut Kishore Acharjee* (I. L. R. 5 Cal. 615) occurs the following passage in which a similar opinion is expressed (p. 642):—"If, therefore, Chandrabali immediately on the death of Bhoobun Moyi had made an adoption and so divested her own estate, there would have been nothing in the judgment of the Privy Council, and nothing that we are aware of in the law, to prevent her doing that which her husband had authorised her to do, and which would certainly be for his spiritual benefit and for that of his ancestors and even of Bhowani Kishore." It is true that in their later judgment in that case the Privy Council decided that "upon the vesting of the estate in the widow of Bhowani, the power of adoption was *at an end* and incapable of execution." But the power in that case was a power given by the husband, and the decision referred to lays down the limit of time within which such a power should be exercised. But in this case, as we have found, no power from the husband was necessary to the validity of the adoption, and it seems to us, therefore, that the decision in Paddo Kumaree's case does not apply: and that the [538] estate having vested in Pran Kumari she was at liberty to divest herself of it if she chose to do so, and that the adoption is not invalid on that ground.

For these reasons we are of opinion that the plaintiff's suit was properly dismissed in the lower Court, and we accordingly dismiss this appeal with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[As regards the termination of power to adopt, upon the estate vesting on the death of the son, in some person other than the adopter, in the first instance, this decision does not appear to be correct, see (1896) 22 Bom., 416; (1902) 26 Bom., 526; (1904) 28 Bom., 461; (1892) 17 Bom., 164; (1906) 33 Cal., 1306; (1909) 7 M. L. T., 236; Mayne's criticism of this case.

As regards the law governing the Jains, see also 14 C. W. N., 545; 22 Bom., 416; 16 Mad., 182; 23 Bom., 157.

As regards the *jain* widow's right to adopt, see also (1908) 30 All., 197: (1899) 27 Cal., 379; 16 Mad., 182.

As regards *onus* of proving adoption in reversionary suits, see (1910) 9 M.L.T., 303.

As regards *Sapindaship*, see the Privy Council decision of *Ramachandra* v. *Vinayak* (1914) 16 Bom. L.R., 863.]

[17 Cal. 538]

APPELLATE CIVIL.

The 4th February, 1890.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE BEVERLEY.

Moheeb Ali *alias* Dummur and another.......... Petitioners

versus

Ameer Rai and others............Opposite party.*

Bengal Tenancy Act, 1885, ss. 158 and 188 Joint-landlords Application under s. 158 by one of several joint-landlords--Refusal by joint-landlords to join in such application, effect of.

An application under section 158 of the Bengal Tenancy Act, 1885, cannot be made by one of several joint-landlords. Section 188 of the Act requires that such an application should be made by all the landlords acting together, and it is not a sufficient compliance with its provisions to make the landlords, who refuse to join, parties to the proceedings under section 158.

Chuni Singh v. *Hera Mahto* (I. L. R., 7 Cal., 633); *Kali Chandra Singh* v. *Rajkishore Bhuddro* (I.L. R., 11 Cal., 615); *Rashbehari Mukherji* v. *Sakhti Sundari Dasi* I.L.R., 11 Cal. 644); *Abool Hossein* v. *Lall Chand Mohtan* (I. L. R., 10 Cal., 36); *Prem Chand Nuskur* v. *Mokshoda Debi* (I. L. R., 14 Cal., 201), and *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (I. L. R., 15 Cal., 47) referred to.

THIS appeal arose out of an application under section 158 of the Bengal Tenancy Act, 1885, by two, out of four joint-landlords.

The appellants, Moheeb Ali and another, who were two of four joint-landlords collecting the rents jointly, made an application under section 158 of the Bengal Tenancy Act, 1885, for the determination of the incidents of the tenure of their tenants.

[539] The application was resisted by the tenants on the ground that it was barred by section 188 of the Act, inasmuch as all the landlords had not joined in making it. The appellants endeavoured to meet this objection by making their co-sharers, who had refused to join them, parties to the proceedings, alleging that they had colluded with the tenants. They also contended that this was a sufficient compliance with the provisions of section 188, and cited the ruling in *Abdool Hossein* v. *Lall Chand Mohtan* (I. L. R., 10 Cal., 36) in support of their contention. The Munsif was of opinion that this ruling was not applicable; that as, upon their own allegation, their co-sharers had not joined them, their proper course was to have proceeded under section 93 of the Act; and that therefore the application was barred by section 188. Accordingly the Munsif dismissed the application.

An appeal from the order of the Munsif rejecting the application was dismissed by the District Judge, who held that it could not be said that making a joint-landlord a defendant is to "act together" with him within the meaning of section 188 of the Bengal Tenancy Act.

---

* Appeal from order No. 347 of 1889 against the order of B. G. Geidt, Esq., Judge of Sarun, dated the 6th of August 1889, affirming the order of Baboo Dauda Dhari Biswas, Munsif of Chupra, dated the 7th of March 1889.

The landlords appealed to the High Court.

Baboo *Saligram Singh*, for the Appellants.

Baboo *Akhoy Coomar Banerjee*, for the Respondents.

The **judgment** of the High Court (GHOSE and BEVERLEY, JJ.) was as follows :—

This appeal arises out of an application made under s. 158 of the Bengal Tenancy Act by two out of four joint landlords, and the application has been rejected by both the lower Courts as being barred by s. 188 of the same Act. There is no question whatever that upon the allegations of the parties the landlords in this case are joint; they are undivided co-sharers apparently collecting the rents jointly. Now s. 188 of the Act runs as follows:—" Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them." An application by a landlord under s. 158 is a thing **[540]** which the landlord is authorized to do under the Bengal Tenancy Act and under that Act alone; there is no other law that authorizes him to make such an application to the Court. It follows that when there are two or more joint landlords, the application must be made by all of them acting together.

In the present case two of the four co-sharers, it is alleged, refused to act with the others in making the application, and the applicants have endeavoured to meet the requirements of s. 188 by making them parties to the proceeding. But this, we think, is not a sufficient compliance with the provisions of the section; the four co-sharers are not acting together in making the application. Unless they all unite in making the application, we think it is not a legal application under s. 158 which the Court is competent to act upon. No doubt under the law as it existed prior to the passing of the Tenancy Act, and as it was expounded by the decisions of this Court, one of several co-sharers could, under certain circumstances, sue to enhance the rent—*Chuni Singh* v. *Hera Mahto* (I. L. R., 7 Cal., 633), *Kali Chandra Singh* v. *Rajkishore Bhuddro* (I. L. R., 11 Cal., 615), *Rash Behari Mukerji* v. *Sakhi Sundari Dasi* (I. L. R,, 11 Cal., 644)—or could apply for a measurement of the lands—*Abdool Hossein* v. *Lall Chand Mohtan* (I. L. R., 10 Cal., 36). But it is extremely doubtful whether after the passing of the Bengal Tenancy Act, and in view of s. 188 of that Act, these things may now be done by a joint co-sharer. But whether this is so or not, it seems to us that no argument can be drawn from it that under the present law an application for the determination of the incidents of a tenure may be made by a joint shareholder. Section 188 is an entirely new provision in the law of landlord and tenant in Bengal, and we cannot suppose that it was introduced without a deliberate intention on the part of the Legislature. An argument was also sought to be drawn from the fact that a suit may be brought, notwithstanding the provisions of s. 188, by a co-sharer for his share of the rent of an undivided tenure. But this stands, as has been explained in the cases of *Prem Chand Nuskur* v. *Mokshoda Debi* (I. L. R., 14 Cal., 201) and *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (I. L. R., 15 Cal., 47), upon a wholly different ground. It has **[541]** been argued before us that, in the view we take of the law, great injustice may be done in certain cases; as, for instance, if an auction-purchaser of an undivided share in an estate, who is unable to obtain information regarding the property either from the tenants or from his co-sharers, is debarred from applying for a determination of the particulars of the property under s. 158. It is pointed out that such cases may occur even where no dispute exists as to the management of the property such as would enable

a co-sharer to apply for the appointment of a common manager under s. 93 of the Act. This may be so, but the language of s. 188 seems to us to be clear and explicit, and we do not feel ourselves at liberty to overlook its provisions or to strain it in any way.

The appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[*See* also (1909) 10 C.L.J., 458.]

[17 Cal. 541]

CIVIL REFERENCE.

The 5th February, 1890.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE ALI.

Makhan Lall Datta...............Plaintiff

versus

Goribullah Sardar...............Defendant.*

Mofussil Small Cause Court—Jurisdiction—Suit for the recovery of damages for the use and occupation of land.

A suit for the recovery of damages for the use and occupation of land is within the jurisdiction of the Mofussil Small Cause Courts.

THIS was a reference from the Judge of the Court of Small Causes at Sealdah.

The reference was as follows :—"The plaintiff sues for Rs. 20 in the shape of damages for use and occupation of land at the rate of Rs. 7 a month from Falgoon 1295 (February-March 1889) to Bysack 1296 (April-May 1889). It is alleged that the defendant occupied the land for the aforesaid period without the plaintiff's consent, and used its earth for making well sidings.

"The defendant contests the plaintiff's title to the land, alleging that he has leased it from one Peary Mohun Sur, the purchaser; [542] and contends that this Court has no jurisdiction to entertain this suit, inasmuch as it comes under clauses 4 and 11 of Schedule II of the Provincial Small Cause Courts Act.

"Clause 4 of Schedule II relates to a suit for the possession of immoveable property or for the recovery of an interest in such property. I don't think by the words "interest in such property" the Legislature meant the proceeds of immoveable property. In the mofussil, suits for damages for misappropriation of crops are generally brought in the Small Cause Courts without any objection. If the Small Cause Courts have jurisdiction to entertain suits for damages for forcible appropriation of crops, I see no reason why suits for "wasilat" and suits for damages for use and occupation of land should be excluded from the jurisdiction of the Small Cause Court.

* Civil Reference No. 1A of 1890 made by Baboo K. N. Mukerjee, Judge of the Court of Small Causes, Sealdah, dated the 11th of December 1899.

"Clause 11 provides for suits for the determination or enforcement of any other rights to or interest in immoveable property. I think suits for easements, etc., arising from immoveable property are meant by this clause. I don't think it is in the contemplation of the Legislature that suits for damages for use and occupation of land, suits for wasilat, and suits for damages for wrongful appropriation of crops, are to be brought in the ordinary Civil Courts under this clause. Clause 35, which relates to suits for compensation, does not exclude such cases from the jurisdiction of the Small Cause Courts.

"It appears in evidence that the defendant had previously held this identical land under the plaintiff and paid him rent. He has utterly failed to prove that Peary Mohun Sur had purchased the land. The contention as to plaintiff's title is simply groundless. The determination of this case does not depend upon the proof or disproof of a title to immoveable property or other title which this Court cannot finally determine. I am therefore of opinion that the Small Cause Court has jurisdiction to entertain this suit. But as I am doubtful as to whether the view I have taken is correct, I have thought it proper to refer the following point for an authoritative ruling of the High Court:—

"Whether the Small Cause Courts in the mofussil have jurisdiction to entertain suits for damages for use and occupation of lands."

[543] No one appeared on the reference.

The **opinion** of the High Court (TOTTENHAM and ALI, JJ.) was as follows:—

We are of opinion that the Small Cause Court has jurisdiction in this case. Clearly neither Article 4 nor Article 11 of the Schedule excludes it, nor does Article 35.

C. D. P.

NOTES.

[This was approved in (1898) 22 Mad., 149; (1894) P.R., 119; (1896) 23 Cal., 884 overruling (1891) 18 Cal., 316; see also (1894) P.R., 1.]

[17 Cal. 543]

FULL BENCH.

The 7th February, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY AND MR. JUSTICE GHOSE.

Rujjub Ali Chopedar............Plaintiff

versus

Chundi Churn Bhadra and others............Defendants.*

Mahomedan Law—Pre-emption—Ceremonies of "immediate demand" and "demand with invocation."

When a person claiming a right of pre-emption has performed the *talab-i-mawasibat* in the presence of witnesses, but not in the presence either of the seller or of the purchaser, or on the premises, it is necessary that, when performing the *talab-i-ishad*, he should declare that he has made the *talab-i-mawasibat*, and at the same time should invoke witnesses to attest it.

Jadunandun Singh v. *Dulput Singh* (I. L. R., 10 Cal., 581) affirmed. *Nundo Pershad Thakur* v. *Gopal Thakur* (I. L. R., 10 Cal., 1008) overruled.

THIS was a suit claiming a right of pre-emption. The plaintiff on hearing of the sale had performed the ceremony of *talab-i-mawasibat*, or immediate demand, in the presence of witnesses, but not in the presence either of the seller or of the purchaser, or on the land itself. He then proceeded to perform the ceremony of *talab-i-ishad*, or affirmation, in the presence of the vendor and purchaser, but did not at the same time declare that he had [544] performed the *talab-i-mawasibat*, and he did not invoke witnesses to attest his immediate demand. It was argued for the defendants, respondents, before a Division Bench on the authority of the case of *Jadunandun Singh* v. *Dulput Singh* (I. L. R., 10 Cal., 581) that these omissions invalidated the plaintiff's claim. The plaintiff, appellant, however, relied upon the case of *Nundo Pershad Thakur* v *Gopal Thakur* (I. L. R., 10 Cal., 1008) as showing that as he had performed the ceremony of *talab-i-mawasibat* in the presence of witnesses, it was unnecessary for him when performing the ceremony of *talab-i-ishad* to say in the presence of the same witnesses, that he had already asserted his claim.

The Division Bench (PETHERAM, C. J., and GORDON, J.) referred the case to a Full Bench with the following opinion:—

"This is a suit for pre-emption, and the question raised before us in second appeal whether the ceremony of *talab-i-ishad*, that is, the demand with invocation of witnesses, was properly performed by the plaintiff in accordance with the provisions of the Mahomedan law. The Lower Appellate Court is of opinion that it was not. It appears that when the plaintiff heard of the sale he at once performed the ceremony of *talab-i-nawasibat*, that is, he asserted his right of pre-emption, and he also then and there called upon two persons who were present at the time to bear witness to his assertion. He then proceeded

* Full Bench Reference on appeal from Appellate Decree No. 902 of 1888 against the decree of Babu Trailukhya Nath Mitter, Subordinate Judge of Furridpur, dated the 31st January 1888, reversing the decree of Babu Khetter Nath Dutt, Second Munsif of Chikandi, dated the 24th September 1886.

with these witnesses to the house of the vendor, where the purchaser was also present, and where the deed of sale was being written, and said to the vendor: 'you said at that time that you would not sell the *howla*, but now you are selling' They said: 'go, we shall give the *howla* to the dogs.' The plaintiff then standing there cried '*dohai* Moharani,' and said 'my *hakshafa* right, no one else than myself shall be able to purchase. I shall purchase the *howla*. It must be given to me for the price it has been sold for, and I shall pay the same price. It is my right of *hakshafa*. I pay Rs. 100, it is my father's and grandfather's property, give it to me.' He did not, however, then declare that he had performed the *talab-i-mawasibat*, that is, that he had asserted his right of pre-emption on being informed of the sale, and he did not also invoke witnesses to attest his immediate demand. The Subordinate Judge thinks that these omissions [545] invalidate the plaintiff's claim, and, in support of his view, he relies on a ruling of a Division Bench of this Court (MITTER and MACLEAN, JJ.,) in the case of *Jadunandun Singh* v. *Dulput Singh* (I. L. R., 10 Cal., 581). In that case it was held that when a person claiming a right of pre-emption performs the *talab-i-mawasibat* in the presence of witnesses but when doing so, was neither at the place, the subject of the right of pre-emption, nor was he in the presence of the vendor or vendee, and it was not proved that the demand with invocation of witnesses (*talab-i-ishad*) had been duly made, the right of pre-emption could not be claimed. The defect was the same as in the present case, that is, the pre-emptor did not prove that he told the vendor or vendee that he had performed the *talab-i-mawasibat*, and that he had called upon the bystanders to bear witness. The contention before us, on behalf of the plaintiff, appellant, is, that as the plaintiff had performed the *talab-i-mawasibat* in the presence of witnesses, it was unnecessary for him, when performing the *talab-i-ishad* in the presence of the vendors and purchaser, to say in the presence of the same witnesses that he had asserted his claim, and to call upon witnesses to attest it. And in support of this contention we have been referred to the case of *Nundo Pershad Thakur* v. *Gopal Thakur* (I. L. R., 10 Cal., 1008), in which it was held by another Division Bench of this Court (GARTH, C.J., and BEVERLEY, J.) that when a person seeking pre-emption had performed the *talab-i-mawasibat* in the presence of witnesses, and as soon as possible on the same day in the presence of the same witnesses demanded his right from the vendors and the purchaser, it was unnecessary that he should again state, when making his demand, that he had declared his right as soon as he heard of the sale, or in the words of the judgment that it was unnecessary for him to 'go through the form of reminding the witnesses' that he had claimed his right as soon as he heard of the sale.

"This case is on all fours with the present case. Now it seems to us that according to the case first cited and according to the general principles of Mahomedan law, in order to give validity to the *talab-i-ishad*, it is essential that the pre-emptor should say in the presence of the purchaser or seller or on the premises the subject of the sale, that he had already claimed his right of [546] pre-emption, and should also invoke witnesses to attest his claim. Mr. Baillie in his Digest of Mahomedan law says: —'By *talab-i-ishad* or demand with invocation of witnesses, is meant a person calling on witnesses to attest his *talab-i-mawasibat* or immediate demand;' and again 'to give validity to the *talab-i-ishad*, it is required that it be made in the presence of the purchaser or seller, or on the premises which are the subject of sale.' It would appear, therefore, that when performing the *talab-i-shad*, the pre-emptor must say in the presence of the seller or purchaser, or on the premises, that he has performed the *talab-i-mawasibat*, that is, made the immediate demand, otherwise

he could not call upon witnesses to attest that demand; and moreover, unless he does so, the purchaser or vendor would not know that he had legally asserted his right—See Baillie's Digest of Mahomedan Law, Sec. VII, Chap. 3, page 489, and for form of Claim by affirmation and taking to witness (*talab-i-ishad*), see Hamilton's Hedaya, Volume III, Book 38, Chap. II, pages 571-572.

"But as the two authorities we have above alluded to appear to us to be in conflict on this point, we refer the following question to the Full Bench:—

"When the person claiming a right of pre-emption has performed the *talab-i-mawasibat*, that is, has made the immediate demand in the presence of witnesses, but not in the presence either of the seller or of the purchaser, or on the premises, is it necessary, when performing the *talab-i-ishad*, that he should declare that he has made the immediate demand, and at the same time should invoke witnesses to attest it?"

Baboo *Debendro Nath Sen*, for the Appellant, referred to the following authorities:—

Hamilton's Hedaya, Vol. III, pp. 568-69; Baillie's Digest (ed. 1875), p. 489; *Nundo Pershad Thakur* v. *Gopal Thakur* (I. L. R., 10 Cal., 1008, at p. 1012); *Jhootee Sing* v. *Komul Roy* (10 W. R., 119); *Zamir Husain* v. *Daulat Ram* (I. L. R., 5 All., 110 at p. 115); *Gobind Dayal* v. *Inayatulla* (I. L. R., 7 All., 775 at p. 811).

[547] Baboo *Mohini Mohun Roy* and Baboo *Baikant Nath Dass*, for the Respondents, were not called upon.

The **opinion** of the Full Bench (PETHERAM, C. J., and PRINSEP, PIGOT, O'KINEALY and GHOSE, JJ.) was as follows:—

The question referred for the decision of the Full Bench is, "when the person claiming a right of pre-emption has performed the *talab-i-mawasibat* in the presence of witnesses, but not in the presence either of the seller or of the purchaser, or on the premises, is it necessary, when performing the *talab-i-ishad*, that he should declare that he has made the *talab-i-mawasibat*, and at the same time should invoke witnesses to attest it?"

According to Mahomedan law, if the claimant neglects to perform the legal forms necessary to be observed in asserting the right of pre-emption, his claim is null and void. The ordinary forms are as follows:—He must make an immediate claim or *talab-i-mawasibat* and subsequently an affirmation with witnesses called the *talab-i-ishad*. The latter consists in the party going upon the lands the right of pre-emption to which he claims, or to the seller or purchaser, and saying that he is a claimant of pre-emption, that he has already asserted his claim, and that he continues to do so, and at the same time calling witnesses to the fact of his having made it. One essential portion of these forms is the attesting the immediate demand, and this is not only the view put forward in Baillie's Digest, but also the view expressed in Hamilton's Hedaya and in Macnaghten's Precedents. Moreover, it is the view held by this Court, with the exception of the case of *Nundo Pershad Thakur* v. *Gopal Thakur* (I. L. R., 10 Cal., 1008). We think the view expressed in that case is not correct, and we answer the question in the affirmative.

The result, so far as this appeal is concerned, is that the appeal will be dismissed with costs.

A. A. C. ***Appeal dismissed.***

NOTES.

[This was followed in (1894) 16 All., 383; (1896) 20 All., 457; (1898) 20 All., 499; (1904) 27 All., 160; (1908) 35 Cal., 575; (1911) 10 I.C., 852 (Cal.); see also (1907) 6 C.L.J., 40.]

[548] ORIGINAL CIVIL.

The 3rd and 5th March, 1890.

PRESENT:

MR. JUSTICE TREVELYAN.

A. C. Boyd............Plaintiff

versus

A. Kreig............Defendant.*

Registration Act (III of 1877), Section 17, Clause (d)—Lease for one year—Lease exceeding one year—Option of renewal—Correspondence, when stamping necessary—Stamping correspondence containing agreement to lease.

A lease for one year, containing an option of renewal for a further period of one year, is not a lease for a term exceeding one year within the meaning of clause (*d*), section 17 of the Registration Act, so as to render registration thereof compulsory.

Certain correspondence passed between the plaintiff and the defendant relating to a lease of a flat in premises in occupation of the plaintiff, which admittedly contained an agreement for a lease for one year with an option of renewal for another year. The terms in which the option was given were as follows:—The defendant in one letter wrote:—"So I expect you will give me the option of renewal for another year, respectively five months, on same terms." To which the plaintiff replied—"You may have the option of retaining it (the flat) for another year on the same terms, but not for a shorter period." In pursuance of an arrangement the defendant had a draft lease prepared embodying the terms agreed on, which he sent to the plaintiff for approval, and which was in due course returned by him "approved." The defendant then had the lease engrossed and properly stamped, but the plaintiff eventually refused to execute it, and it was never signed by the defendant. The option of renewal was given in the unexecuted lease in the following terms:—"Also with option to renew for another twelve months certain."

The defendant having entered into possession and disputes having arisen, the plaintiff gave him notice to quit and sued to eject him, alleging that at the most he was a mere monthly tenant. The defendant pleaded that under the lease he was entitled to hold for a year. The year expired before the suit came on to be heard, and the defendant not having exercised the option to renew, vacated the premises. At the hearing the defendant in support of his case, tendered the correspondence and the stamped unexecuted lease. It was objected that the correspondence was inadmissible in evidence—

(1) because the option to renew made the period for which the lease was to run exceed one year, and therefore rendered registration compulsory;

(2) because the correspondence was unstamped.

[549] On behalf of the defendant it was urged that registration was unnecessary, as the option did not make the lease one for a longer period than one year, and that the stamped unexecuted lease must be treated as part of the correspondence, and as it was properly stamped, no further stamping was required.

Held, following *Hand* v. *Hall* (L. R., 2 Ex. D., 355), that the existence of the option did not create a lease for a term exceeding one year within the meaning of clause (*d*), section 17 of the Registration Act, and that consequently the correspondence did not require registration.

---

* Original Civil Suit No. 338 of 1889.

Held, further, that as the correspondence contained a complete agreement independently of the draft and engrossed lease, the latter could not be treated as part of the correspondence, and that consequently the correspondence must be stamped and the penalty paid before it could be admitted in evidence.

Bhobani Mahto v. *Shibnath Para* (I. L. R., 13 Cal., 113) dissented from.

THE plaintiff instituted this suit to eject the defendant from the top flat of the premises No. 3, Middleton Row, and to recover such sum as the Court might think fit to allow for the use and occupation of the flat from the 1st July 1889 up to the date of recovery of possession. The plaintiff, who was the lessee of the premises, alleged that he had permitted the defendant to use and occupy the top flat from the 1st November 1888 at a monthly rent of Rs. 130, and that on the 30th May 1889 he gave the defendant notice to quit and deliver up possession on the 30th June, but that the defendant had failed to do so. This notice to quit treated the defendant as a monthly tenant. The defendant in his written statement denied that he was a monthly tenant, and alleged that the plaintiff had let him the flat for one year certain from the 1st November 1888 at a monthly rent of Rs. 130; that being under the impression that the lease was valid and binding on the plaintiff he had gone to some expense in repairing the flat; that he had paid the rent up to the month of June 1889, and tendered the rent for July which the plaintiff had refused to accept. He therefore contended that he was entitled to remain in possession till the end of October. Previous to the case coming on for hearing, the defendant on the 31st October gave up possession of the flat, and it was admitted at the hearing that there must be a decree for Rs. 520, being Rs. 130 a month for the period from July to October. The only question [550] remaining to be decided in the case therefore was one of costs, and that turned upon the question whether the defendant had a lease for a year or not.

It appeared, on the admitted facts in the case, that in the month of October 1888 certain correspondence took place between the parties with reference to the demise of the flat, the material portion of which was as follows:- On the 21st October 1888, the defendant wrote to the plaintiff as follows:—

"I beg to inform you that I accept your firm offer of the third floor of No. 3, Middleton Row, together with three horse stalls * * * * from the first of next month (1st November) at Rs. 130 per month for twelve months with option for me to terminate the arrangement after five months on payment of Rs 100. I believe you told me you had the house for two years, so I expect you will give me the option of renewal for another year, respectively five months, on same terms. * * * I shall have the usual agreement written out on stamped paper, copy of which I shall send you first for approval. Meanwhile please confirm the above * *."

On the 22nd October the plaintiff replied as follows:—" I agree to let you the third flat of No. 3, Middleton Row, with the out-offices named by you, from the 1st November next, on the terms stated in your letter of yesterday's date with one exception, viz., that if you continue occupancy of the house for one year, you may have the option of retaining it for another year on the same terms, but not for a shorter period * * *."

On the same day the defendant replied as follows: —

"As arranged, I beg to send you herewith the usual draft agreement. The clause about the second five months to which you objected has been left out. Can you tell me what stamp is required * * *."

On the same day the plaintiff wrote informing the defendant that he could not say what value of stamp was required, and he subsequently returned the

draft agreement with a pencil note signed, intimating his approval thereof. Subsequently the defendant had the agreement engrossed and stamped with a 10 rupee stamp and sent it to the plaintiff for his signature. The plaintiff subsequently returned it to the defendant unsigned, after the defendant had entered into possession of the flat.

[551] The material portion of the agreement was as follows:—"I hereby agree and engage to rent of you the third floor of No. 3, Middleton Row, together with three horse stalls * * * for twelve months from the first of this month (1st November 1888) at Rs. 130 free of all taxes existing and forthcoming, payable monthly on the first day of every month * * * with option for me to terminate the arrangement after five months, subject to 15 days' notice on payment of Rs. 100, also with option to renew for another twelve months certain from the 1st November 1889 up to 31st October 1890 * * *."

Mr. *Graham* for the Plaintiff.

Mr. *M. P. Gasper* and Mr. *Leith* for the Defendant.

Upon the case being called on, TREVELYAN, J., intimated that on the admitted facts the case reduced itself to a question of costs, and that the onus was on the defendant.

Mr. *Gasper* submitted not, as the plaintiff's case was that the defendant was either merely allowed to reside in the flat as alleged in the plaint, or a monthly tenant as stated in the notice to quit, neither of which propositions he admitted.

TREVELYAN, J., referred to section 106 of the Transfer of Property Act, and stated that he must presume the tenancy to be from month to month, and that, as the defendant set up a lease for a year, it was for him to prove his case, so he must begin.

Mr. *Gasper* then proceeded to open the case, and whilst referring to the letters above set out, Mr. *Graham* stated that he admitted the letters, but objected to their being admitted in evidence, on the ground that they contained an agreement which required to be stamped, and they were not stamped.

Mr. *Gasper* contended that the correspondence did not require stamping, as it ended in the agreement or lease which was properly stamped with a 10-rupee stamp, and which must be taken as part of the correspondence. All through the correspondence the agreement was referred to, and it must be treated as part of the correspondence, and if any portion of the correspondence was stamped, it would be sufficient. No further stamp was required

[TREVELYAN, J.—How do you show that the agreement which bears a stamp, but is not signed by either party, is the contract?]

[552] Mr. *Gasper.*—I submit it must be treated as part of the correspondence which evidences the contract, but, if necessary, I am quite prepared to pay the stamp required now and the penalty.

Mr. *Graham* then objected that the correspondence could not be put in evidence, as it disclosed an agreement for a term of more than a year by reason of its being for a term of one year with an option of renewal for a further period of a year, and consequently required to be registered, and referred to section 107 of the Transfer of Property Act and section 17 of the Registration Act.

Mr. *Gasper.*— The correspondence does not require registration. A lease for one year with an option of renewal for a further period is not a lease for a term exceeding a year.

It has been held so in this country as well as in England—see *Apa Budgavda* v. *Narhari Annajee* (I. L. R., 3 Bom., 21), *Mohunto Southo Pursad Dass*

v. *Parasu Padhan* (26 W. R., 98), *Hand* v. *Hall* (L. R., 2 Ex. D., 355). The option of renewal, to use the words of Lord CAIRNS, C., must be exercised by the defendant before it can be said any interest has passed to him, and until the option is exercised it is impossible to tell whether a tenancy for more than a year is to come into force or not. This agreement is divisible into two parts. In the first place it operates as a lease for a year, and secondly, it gives the tenant the right at the end of that year on proper notice of demanding a renewal of the lease for another year. This case is therefore precisely similar to the case of *Hand* v. *Hall*.

Mr. *Graham.*—The case of *Hand* v. *Hall* differs from the present, as in that case the tenant was required to do something before the lease was renewed, viz., to give a month's notice. Here there is nothing of the kind, but merely an option to renew; that is to say, he has only to remain in possession, and do nothing.

[TREVELYAN, J.—But he must "renew."]

Mr. *Graham.*—If the meaning of "renewing" is to be taken as doing something before he acquires the interest, I must admit that *Hand* v. *Hall* is an authority against me, but it has not been followed in this Court.

[TREVELYAN, J.,—The Madras High Court has approved it.]

[563] Mr. *Graham.*—*Bhobani Mahto* v. *Shibnath Para* (I. L. R., 13 Cal., 113) decided in 1886 is an authority in my favour—see also *Ram Kumar Mandal* v. *Brajahari Mridha* (2 B. L. R., A. C., 75). *Kisto Kalee Moonshee* v. *Agemona Bewa* (15 W. R., 170) is also in my favour.

As to the question of the correspondence requiring to be stamped, there is nothing to connect the stamped agreement with it, and the correspondence contains a complete agreement in itself. I submit it must therefore be stamped before it can be admitted in evidence.

Mr. *Gasper* in reply.—*Kisto Kalee Moonshee* v. *Agemona Bewa* (15 W. R., 170) is so badly reported as to be worthless, as it cannot even be gathered from the report what the document was, nor does it appear what was even decided. The case of *Bhobani Mahto* v. *Shibnath Para* (I. L. R., 13 Cal., 113) is in the same condition, no cases being referred to or arguments given, and it does not appear if the attention of the Court was drawn to *Hand* v. *Hall* (L. R. 2 Ex., D., 355). Besides, that case refers to a *zur-i-peshgi* lease which is a mortgage. This case is even stronger than *Hand* v. *Hall*, as here there is an option "to renew," the plain meaning of which is to the right to demand a fresh lease, whereas in *Hand* v. *Hall* the tenant had merely the right at the end of the term, on giving a month's previous notice, "to remain on for three years and a half more."

The following was the **judgment** of the Court delivered on March 5th :—

Trevelyan, J.—The only questions argued before me and which I have to decide in this case are whether the documents which create the tenancy of the defendant are admissible in evidence. It is conceded that if they are admitted in evidence there must be a decree for the defendant except as I shall mention hereafter, and that if they are not so admitted the plaintiff must succeed. The contention between the parties is as to the payment of the costs. The plaintiff is entitled to a decree for Rs. 520, the rent for the months of July, August, September and October 1889.

The rent for July was offered to him, but he refused to accept it, so that the tender of the rent for the subsequent months would have been an empty form, and as the rent for these months **[564]** accrued due after the suit was brought, the tender or non-tender of the rent could not affect the costs of the suit.

The defendant has vacated the premises since the suit was brought.

The admissibility of the documents depends in the first place upon whether they require registration, and in the second place upon whether the lease which was tendered for execution and was properly stamped can be treated as a part of the correspondence which created the tenancy.

As to the registration, a series of cases* shows that where correspondence constitutes a contract leasing premises for more than a year, that correspondence must be registered, although a formal document may be contemplated. There is no doubt that by the correspondence in this case the plaintiff leased, and the defendant accepted the lease of, the premises.

The lease was for a year, but it was provided that the tenant should have the option of renewal for a second year.

I have to decide whether the existence of this option creates a lease for a term exceeding one year within the meaning of section 17, clause (*d*) of the Registration Act (III of 1877).

After careful consideration I have come to the conclusion that the documents do not require registration. A number of cases have been cited and have been referred to by me.

Of the cases which are in point the result is that on the one hand we have decisions of the Bombay, Madras, and Allahabad High Courts accepting as applicable to the determination of this question the decision of the Court of Appeal in England in *Hand* v. *Hall* (L. R., 2 Ex. D., 355). On the other hand, there are some decisions of Division Benches of this Court on appeals from the mofussil, the last of which, *Bhobani Mahto* v. *Shibnath Para* (I. L. R., 13 Cal., 113), is in point. The value of the report of that case and of the other cases of this Court which have been cited is much diminished by the absence of notes of the argument or of the cases cited. In determining whether I ought to act upon this decision, it is all important to know whether the case of *Hand* v. *Hall* was cited to the learned Judges who tried the case in this Court. The report is silent, and both the Judges have since left this Court, so I have no means of [556] referring to them as to that fact. I think it is pretty clear that *Hand* v. *Hall* was not cited. It is so much in point that if it had been, the learned Judges of this Court would probably have distinguished it in their judgment.

In *Hand* v. *Hall* the question was, it is true, as to the construction of English statutes, but the question there was, as the question is here, whether a lease giving an option to renew was a lease for more than the original term of the demise.

The reasoning in *Hand* v. *Hall* seems to apply equally here.

Lord CAIRNS there says:—"The document we have to construe in this case runs thus:—'Hand agrees to let, and Hall agrees to take, the large room on the south end of the Exchange, Wolverhampton, from the 14th February next until the following mid-summer twelve months.' Stopping there, there can be no doubt that those words are words of present demise, and if the document had contained those words only, the defendant would have become tenant from the 14th of February to the following mid-summer twelve months. The document, however, goes on:—'With right at the end of that term for the tenant, by a previous month's notice, to remain on for three years and a half more.' By this latter part of the agreement an option is given to the defendant, and must be exercised by him before it can be said that any interest has passed to him. It is a stipulation that at his option, on a notice given to the plaintiff, he shall not be disturbed for three years and a half. Whereas there is not anything to be done by the tenant in the first part of the agreement to

create a demise, in the second part something has to be done by him before that part takes effect, and until that is done it is impossible to tell whether a tenancy shall come into force or not. I think, therefore, that it is absolutely necessary to divide the contract into two parts. I think the agreement is an actual demise, with a stipulation superadded that if at his option the tenant gives the landlord a notice of his intention to remain, he shall have a renewal of his tenancy for three years and a half."

On the same reasoning there is in this case merely a demise for a year.

I am justified in my view that the reasoning in *Hand* v. *Hall* applies to the construction of the Registration Act by the decision of [836] the Bombay High Court in *Apu Budgavda* v. *Narhari Annajee* (I. L. R., 3 Bom., 21), by the decision of the Allahabad High Court in *Khayali* v. *Husain Bakhsh* (I. L. R., 8 All., 198), and by the decision of the Madras High Court in *Virammal* v. *Kasturi Rangayyangar* (I. L. R., 4 Mad., 381). Speaking with every respect for the decision of this Court to which I have referred, I think I should apply the reasoning of *Hand* v. *Hall* to the construction of the Registration Act. I have no doubt that if *Hand* v. *Hall* and the decisions to which I have referred had been cited to the Judges of this Court, they would have come to a different conclusion.

I hold that the documents in question do not require registration.

There can, I think, be no doubt that the correspondence required stamping. It was complete in itself before the lease was tendered for execution. It is only on the ground that it was so complete that the defendant can succeed. If I were to accede to Mr. *Gasper's* argument, I should have to hold that the revenue law could be evaded by stamping a subsequent letter after the contract had been completed.

If the penalty (Rs. 110) is paid, the documents tendered can be marked as exhibits. [The penalty was here paid.]

The penalty having been paid, the documents may be admitted in evidence, and there will be a decree for the plaintiff for Rs. 520. In other respects the suit is dismissed.

The plaintiff must pay the defendant's costs on scale No. 2.

Attorneys for Plaintiffs: Messrs. *Bonnerjee and Chatterjee.*

Attorney for Defendant: Baboo *Gonesh Chunder Chunder.*

H. T. H.

NOTES.

[A similar decision was given in (1901) 25 Mad., 3 with regard to stamp of a lease containing covenant for renewal.]

T. A. P.

[557] APPELLATE CIVIL.

The 13th March, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Khetter Chunder Ghose and others............Defendants

versus

Hari Das Bundopadhya............Plaintiff.*

Hindu Law—Endowment—Gift of idol and debutter land—Private Endowment—Benefit of idol—Sebaits—Debutter property.

A gift of an idol and of the lands with which it is endowed (being a private endowment) made with the concurrence of the whole family to another family for the purpose of carrying on the regular worship of the idol, if made for the benefit of the idol, is not invalid, and is one binding on succeeding *sebaits*.

THE plaintiff in this suit sought to recover possession of certain lands, alleging that a portion of this land was his ancestral property, and that the remainder, which formed the debutter land of an idol originally belonging to the defendants' family (the Ghoses), had been made over together with the idol to the grandfather and the granduncle of the plaintiff by a deed of gift executed in the year 1847 by defendant No. 4 and the father of defendants Nos. 1, 2 and 3, they being at that time unable to carry on the worship of the idol out of the profits arising out of the debutter lands; and that the plaintiff's predecessors, and subsequently the plaintiff, had ever since held the land in question, and had performed the worship of the idol until he was dispossessed therefrom in 1884 by the defendants. The defendants pleaded limitation, questioned the validity of the deed of gift, and claimed the land as their own.

The Subordinate Judge found that the plaintiff had made out his title, and was entitled to possession. This decision was upheld on appeal by the District Judge, who, however, was of opinion that the plaintiff was also entitled to recover on another ground, viz., that he had acquired an indefeasible title to the land by 12 years' adverse possession.

[558] The defendants appealed to the High Court.

Baboo *Rash Behari Ghose*, for the Appellants, contended that the deed of gift was invalid, it purporting to be a gift of an idol, and land endowed for that idol's worship; and that such a gift could not bind subsequent *sebaits*, referring to the *Padma Purana, Patalakhanda*, Chapter 79; *Dayabhaga*, ch. vi. s. ii, 26; *Durga Bibi* v. *Chanchal Ram* (I. L. R., 4 All., 81); *Narasimma Thatha Acharya* v. *Anantha Bhatta* (I. L. R., 4 Mad., 391); *Kuppa Gurukal* v. *Dorasami Gurukal* (I. L. R., 6 Mad., 76); *Ukoor Doss* v. *Chunder Sekhur Doss* (3 W. R., 152); *Rup Narain Singh* v. *Junko Bye* (3 C. L. R., 112); *Varmah Valia* v. *Varmah Kunhi Kutty* (I. L. R., 1 Mad., 235); *Mancharam* v. *Pranshankar* (I. L. R., 6 Bom., 298).

Baboo *Mohini Mohun Roy* for the Respondent.—The authorities cited are clearly distinguishable from, and somewhat wide of, the present case. This

* Appeal from Appellate Decree No. 63 of 1889, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 26th of November 1888, affirming the decree of Baboo Amrito Lal Pal, Subordinate Judge of 24-Pergunnahs, dated the 15th of September 1887.

was a case of a private or family endowment, and it has been found as a fact that the transfer was for the benefit of the family idol, *i. e.*, for the better carrying on of its worship. A *sebait* has power to alienate property for the benefit of the idol—*Prosunno Kumari Debya* v. *Golab Chand Baboo* (14 B. L. R., 400) and *Doorga Nath Roy* v. *Ram Chunder Sen* (I. L. R., 2 Cal., 341). In this last case the Privy Council held also that in the case of land dedicated to a family idol, "the consensus of the whole family might give the estate another direction." Here all the members of the family, male and female, had either joined in the gift or expressed their consent by attesting it.

Baboo *Rash Behari Ghose* in reply.

The **Judgment** of the Court (PETHERAM, C. J., and BANERJEE, J.) was delivered by

Banerjee, J.—This appeal arises out of a suit by the respondent to recover possession of some land. The plaintiff alleged that a portion of the disputed land was his ancestral property; that the remainder, which formed the *debutter* land of an idol named Sridhar, originally belonging to the defendants' family called the Ghoses, was made over along with the idol to the grandfather and the [559] granduncle of the plaintiff by a deed of gift executed by defendant No. 4 and the father of defendants Nos. 1, 2 and 3 in 1254, or 1847, owing to their inability to carry on the worship with the profits of the endowed land; and that the plaintiff's predecessors, and after them the plaintiff, had ever since been holding the land and performing the worship until 1291, or 1884, when the plaintiff was dispossessed by the defendants.

The defendants pleaded limitation, questioned the genuineness and the validity of the deed of gift set up by the plaintiff, and claimed the land in suit as their own.

The Courts below have found in favour of the plaintiff's title and possession, and the Lower Appellate Court has further held that, even if the deed of gift was invalid, the plaintiff had acquired a title by twelve years' possession.

In second appeal the grounds urged on behalf of the defendants are—*first*, that the deed of gift set up by the plaintiff is not valid in law, and *secondly*, that the plaintiff's possession being admittedly that of a *sebait* or trustee, he could not acquire any title by adverse possession.

Upon the first ground it is argued, first, that the deed is invalid as it purports to give away an idol, which cannot be the subject of transfer; and secondly, that in no case can the transfer be valid beyond the lifetime of the grantors, who were merely entitled to the management of the endowed property as *sebaits* or trustees for the time being, and who had no power to bind their successors.

It is true that the Hindu law prohibits the sale of an idol (see the *Padma Purana, Patalakhanda*, Chapter 79), and also the partition of it (see *Dayabhaga* Chapter VI, s. II 26), though when there are several idols, partition is recognized by custom (see *West and Buhler's Digest of Hindu Law*, 2nd edition, page 396). But there is no absolute prohibition against the gift of an idol. An idol is not mentioned as an unfit subject of gift by Hindu lawyers in their enumeration of what are, and what are not, fit subjects of gift (See *Colebrooke's Digest*, Book II, Chapter IV); but on the contrary the gift of an idol under certain circumstances is considered a laudable act (see the *Varaha Purana*, Chapter 185; see also *Hemadris, Chaturvarga Chintamani, Danakhanda*, Chapter II). But having regard to the view we take of the deed in question, we do [560] not think it necessary to examine this point much further. That deed, though it nominally professes to be a deed of gift of the idol and its land, is

in reality a deed of arrangement for carrying on the worship of the idol. The fact, as the Courts below have found it, was that the Ghoses were unable to carry on the worship of the idol Sridhar with the income of the *debutter* land, and the plaintiff's predecessors being found able and willing to carry on the same, the Ghoses, with the concurrence of the whole family, made over to them the idol and its lands for the purpose of performing its worship regularly from generation to generation. It has been expressly found by the Courts below that the arrangement was for the benefit of the idol; and the real question in this case is whether such an arrangement is valid in law and binding upon succeeding *sebaits*.

We are of opinion that it is. It has been held in several cases that a *sebait* has authority to do what may be required for the service of the idol and for the benefit and preservation of its property. In *Prosunno Kumari Debya* v. *Golab Chand Baboo* (14 B. L. R, 450) the Judicial Committee observe:—"It is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must, in the nature of things, be entrusted to some person as *sebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them." And the same view is affirmed by their Lordships in *Doorga Nath Roy* v. *Ram Chunder Sen* (I. L. R, 2 Cal., 341), in which it has been further observed that in the case of land dedicated to a family idol, 'the consensus of the whole family might give the estate another direction.' If that is so, we see no sufficient reason why the arrangement made in this case in 1254 by the *sebaits* who were all the then members of the Ghose family, for the purpose of preserving the property of the idol and preventing the discontinuance of its worship, should not be held to be valid. It was said that the effect of the arrangement was to convert an endowment for the spiritual [561] benefit of the original founder's family into one for the benefit of the family of the plaintiff. We do not think that that was so. Having regard to the terms of the deed of 1254, and to the fact that the idol with its endowed property was made over to the plaintiff's predecessors, we think that according to Hindu notions the worship of the idol would still be for the benefit of the original founder's family from a spiritual point of view. And if the worship of the idol is at any time neglected, it will be open to the representatives of that family to enforce its performance; for under the deed of 1254 it was upon the express condition of the regular performance of the worship that the idol and its properties were made over to the predecessors of the plaintiff. It has been found that the plaintiff has been duly performing the worship of the idol, and no question has been raised as to his fitness to do so.

It remains now to consider the cases that were cited in support of the appellants' contention. They are all distinguishable from the present in one material respect. In none of them was it found or even alleged that the alienation that was called in question was for the benefit of the endowment.

In one of the cases cited, *Durga Bibi* v. *Chanchal Ram* (I.L.R., 4 All., 81), all that was held was that the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings made at the shrine, could not be sold in execution of a decree against the manager. In *Narasimma Thatha Acharya* v. *Anantha Bhatta* (I.L.R., 4 Mad., 391) and *Kuppa Gurukal* v. *Dorasami Gurukal* (I. L. R., 6 Mad., 76) the sale of the priestly office for the

benefit of the *sebait* was held to be illegal. In *Ukoor Doss* v. *Chunder Sekhur Doss* (3 W. R., 152) the gratuitous transfer of the right of management by one of several joint *sebaits* of a family idol was held to be invalid beyond the lifetime of the transferor, on the ground of its involving an intrusion by a stranger into the management of a family endowment, and in *Rup Narain Singh* v. *Junko Rye* (3 C. L. R., 112), the general proposition is affirmed that a person who is himself nominated a trustee has no right to transfer his trust to any other person.

[562] In the case of *Varmah Valia* v. *Varmah Kunhi Kutty* (I. L. R., 1 Mad., 235) which was a case of a public endowment, the transfer of the office of trustees at the mere will of the trustees for the time being was held to be invalid as being in contravention of the special arrangements made by the founder, and as involving apprehended inconvenience in the carrying out of the trust. The case of *Mancharam* v. *Pranshankar* (I. L. R., 6 Bom., 298), whilst affirming the invalidity of an alienation of the office of *sebait* to a stranger, supports the respondent's case so far, that it upholds an alienation made in favour of a member of the founder's family.

These cases therefore do not militate against the view that in the case of a private endowment an alienation of the *sebait's* office, made with the concurrence of the whole family, and, for the benefit of the endowment, would be valid.

Upon reason and upon authority therefore we think that the deed of 1254 is a valid document, and that the plaintiff is entitled to succeed in this suit.

In this view of the case it is unnecessary to consider the question whether the plaintiff has acquired a title by twelve years' possession.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

NOTES.

[See the explanation of this case in (1909) 36 Cal., 975; 13 C. W. N., 1084; (1898) 23 Bom., 131; (1907) 35 Cal., 226; see also (1909) 10 C. L. J., 610 where the rule in this case was treated as settled.]

[17 Cal. 562]

CRIMINAL REFERENCE.

The 17th March, 1890.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Queen-Empress

versus

Bissessur Sahu and another.*

Criminal Procedure Code (Act X of 1882), Section 133—Removal of obstruction in public way—Question of title—Bonâ fides of claim of title—Right of Magistrate to enquire into—Jurisdiction.

In a proceeding under section 133 of the Criminal Procedure Code for the purpose of compelling the removal of an obstruction from a public **[563]** way where a *bonâ*

* Criminal Reference No. 49 of 1890, made by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 17th of February 1890, against the order passed by Munshi Serajul-Huq, Deputy Magistrate of Sarun, dated the 14th of January 1890.

fide question as to the way being public is raised, there is no jurisdiction to make an order under the section, and the question should be left for determination by the Civil Court. To have this effect, however, the claim must be _bonâ fide_ and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be _bonâ fide_ or not.

THIS was a reference by the Sessions Judge of Sarun under the provisions of section 438 of the Criminal Procedure Code.

The terms of the reference were as follows :—

"It appears that the District Magistrate on the complaint of Kharag Narain and others, and on a police report, took proceedings against Bissessur Sahu, the petitioner before me, and against Ram Sarun Sahu under section 133, Criminal Procedure Code, by directing them to remove certain obstructions from a public way, or to appear before one of his subordinates and move to have the order set aside. The public way referred to is said to be a village pathway, which is used by the public, and the obstructions complained of consisted of a wall, a stack of bricks, and a shed placed and erected on a portion of the pathway. These persons in due course appeared before the Deputy Magistrate and raised certain objections. Bissessur Sahu urged that there was no public pathway in existence on the spot as alleged by the complaining parties, while Ram Saran, admitting the existence of such a pathway, denied that it has been obstructed. The Deputy Magistrate went into evidence, and he finds as a fact that the pathway is in existence and that it is a public pathway, and further that it has been obstructed as alleged by Bissessur Sahu. He accordingly ordered him to remove the obstructions within seven days, and to restore the pathway to its former condition.

"Bissessur Sahu now urges before me that under several rulings of the High Court the Magistrate was not competent to determine the question as to whether the pathway was a public or private way, and I think his contention is correct. The rulings cited are the following:—*Basaruddin Bhuiah* v. *Bahar Ali* (I. L. R., 11 Cal., 8), *Askar Mea* v. *Sabdar Mea* (I. L. R., 12 Cal., 137), and *Lal Mea* v. *Nazir Khalashi* (I. L. R., 12 Cal., 696), and in these it was held that whenever a *bonâ fide* question seems [665] to exist (as in the present case) as to whether there is a public road in existence at the place named, such question is one for the Civil Courts to decide, because the enquiry contemplated by sections 133 *et seq.*, Criminal Procedure Code, is an enquiry into the existence or non-existence of the obstruction complained of and not an enquiry into disputed question of titles.

"Such being the law, I think the Deputy Magistrate's order cannot be sustained, and I accordingly recommend that it be set aside."

No one appeared on the reference.

The **order** of the Court (NORRIS and MACPHERSON, JJ.) was as follows :—

In this case Kharag Narain Singh and others complained to the District Magistrate under section 133, Code of Criminal Procedure, against Bissessur Sahu, Ram Sarun Sahu, and Piyar Chand Sahu, alleging that they had obstructed a certain public way by placing bricks and erecting a shed thereon. The District Magistrate ordered a police enquiry to be made. The police reported that Bissessur and Ram Sarun had obstructed a path by a mud wall, the stacking of bricks and the erection of a shed. The District Magistrate thereupon issued an order under section 133, Code of Criminal Procedure, requiring Bissessur and Ram Sarun to remove the obstructions, or to appear and show cause against such order. The defendants filed written statements ; Bissessur denied the existence of the path obstructed ; Ram Sarun admitted its existence, but denied having obstructed it.

The Deputy Magistrate, to whom the case was referred, visited the spot and examined a number of witnesses and found that the path in question is in existence, that it is a public one, and that it has in part been obstructed by the defendant Bissessur.

During the progress of the investigation before the Deputy Magistrate an attempt was made to compromise the case, and a petition of compromise was filed, in which Bissessur admitted that the path in question was a public one. The Deputy Magistrate refused to allow the case to be compromised, "because the path is a public one, and the parties concerned in this case had no right to make any change in its width and allow the wall to stand on a part of it."

[563] The Deputy Magistrate confirmed the conditional order of the Magistrate, and directed Bissessur to remove the obstructions complained of within seven days.

Bissessur obtained a rule from the Sessions Judge calling on the Deputy Magistrate and the complainants to show cause why the order of the Deputy Magistrate should not be set aside.

On the argument of the rule, Bissessur contended that under several rulings of the High Court, viz., *Basaruddin Bhuiah* v. *Bahar Ali* (I. L. R., 11 Cal., 8), *Askar Mea* v. *Sabdar Mea* (I. L. R., 12 Cal., 137), and *Lal Miah* v. *Nazir Khalashi* (I. L. R , 12 Cal., 696), the Magistrate was not competent to determine the question as to whether the pathway was a public or private way.

The Sessions Judge has referred the case to us with a recommendation that the Deputy Magistrate's order should be set aside, on the ground that there was a *bonâ fide* question raised by Bissessur as to whether the path in question was a public way or not, and that the cases cited showed that when such a question was raised, there was no jurisdiction to make an order under section 133, Code of Criminal Procedure.

We quite agree with the Sessions Judge that the Deputy Magistrate ought not to have made the order if there was a *bonâ fide* contention on Bissessur's part that the path was not a public way.

In *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (I. L. R., 15 Cal., 564). the law is thus laid down :—" When such a question is *bonâ fide* raised, the Magistrate ought not to make an order under these sections of the Code, but should allow an opportunity for the determination of the question by the Civil Court. The claim of title must, however, in order that it should be allowed to have this effect, be *bonâ fide*, and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be *bonâ fide* or a mere pretence."

We entirely concur in this view of the law.

We therefore set aside the order of the Deputy Magistrate, and direct him, after notice to both parties, to investigate the [566] complaint *de novo*. If he is satisfied that the defendants' contention that the way in question is not a public way is *bonâ fide*, and not a mere pretence, he should set aside the Magistrate's conditional order. If he finds, having reasonable and probable cause for his decision, that the contention is not *bonâ fide*, he should confirm the conditional order.

H. T. H. *Order reversed.*

NOTES.

[For similar cases, see also 23 Cal., 499; 25 Cal., 278; 31 Cal., 979; 2 C. W. N., 554; 3 C. W. N., 345; 7 C. W. N., 117; 8 C. W. N., 143; 4 Bom. L. R., 687; 10 Bom. L. R., 563; 28 All., 98.]

[17 Cal. 566]

CRIMINAL REFERENCE.

The 17th March, 1890.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Queen-Empress
versus
Harridas San.*

Bengal Excise Act (Bengal Act VII of 1878), sections 53, 59, 60—Sale by servant of licensed vendor in presence of master—Liability of servant.

The accused, who was the servant of a licensed retail vendor of spirituous and fermented liquors under Bengal Act VII of 1878, was convicted of an offence under section 53 of that Act for selling exciseable liquor without a license. The sale charged against him was of a quantity of *puchwai* in excess of that allowed to be sold under the license of his master. The sale was made in the presence of the master, the licensee, the accused merely handing the liquor to the purchaser at his master's request. *Held*, that the conviction was bad, as the facts did not establish *sale* by the accused, the mere mechanical act of handing the liquor to the purchaser not constituting *sale* by the accused.

THIS was a reference by the Sessions Judge of Birbhoom under the provisions of section 438 of the Code of Criminal Procedure. The terms of the reference were as follows:—

"The petitioner Harridas San has been convicted under section 53, Bengal Act VII of 1878, and sentenced to pay a fine of Rs. 15, or in default to undergo simple imprisonment for two weeks.

[567] "One Bama Charan Saha is a licensed vendor of *puchwai*. Sriram Jugi purchased 5 seers (*pucca*) at his shop, the person who served him being the petitioner. The head-constable regarding petitioner as a partner with Bama Charan San reported petitioner for prosecution for sale of a quantity of *puchwai* in excess of that which the license permitted, namely 4 seers. The petitioner was accordingly summoned, not indeed under s. 60 but under section 59 of the Act. At the trial the prosecution gave no evidence of partnership. On the contrary the witnesses examined and the petitioner himself all agreed in saying that petitioner was the servant of Bama Charan, the licensee. Accordingly the Magistrate convicted neither under section 60 nor section 59, but under section 53 for selling without license.

"No doubt it has been repeatedly held that servants of licensees are not, as such, exempt from the responsibility under the Bengal Excise Act. *In re Ishur Chunder Saha* (19 W. R., Cr. 34), *Empress* v. *Baney Madhub Shaw* (I. L. R., 8 Cal., 207; 10 C. L. R., 389), *Empress* v. *Ishan Chundra De* (I. L. R., 9 Cal., 847; 12 C. L. R., 451). But I do not find that in any of the cases quoted the facts resemble those of the present case. For here the evidence shows that the sale was in substance the act not of the *shop-man*, but of the *shop-keeper*; that is to say, the licensee was himself present, and even personally directed his servant the petitioner, to deliver the pot of *puchwai* to the purchaser Sriram Jugi.

* Criminal Reference No. 53 of 1890, made by J. Whitmore, Esq., Sessions Judge of Birbhoom, dated the 24th February 1890, against the order passed by N. K. Sarkar, Esq., Joint-Magistrate of Birbhoom, dated the 17th of January 1890.

"The person responsible under the Bengal Excise Act for such a sale would, I consider, be the licensee himself. As for petitioner, his responsibility would seem to be little, if at all, greater than that of the coolie in *Empress* v. *Ishan Chundra De* (I. L. R., 9 Cal., 847; 12 C. L. R., 451).

"In this view of the case I would recommend that the order of the Joint-Magistrate, dated 17th January 1890, convicting petitioner Harridas San of an offence under section 53, Bengal Act VII of 1878, and sentencing him to pay a fine of Rs. 15, or in default to be simply imprisoned for two weeks, be set aside, and that a refund be directed of the fine or any part of it realized."

No one appeared on the reference.

[568] The **order** of the High Court (NORRIS and MACPHERSON, JJ.) was as follows:—

This case comes before us on a reference from the Sessions Judge of Birbhoom; the facts are as follows:—

Bama Charan Saha is a licensed retail vendor of spirituous and fermented liquors under Bengal Act VII of 1878, and under the terms of his license he is not allowed to sell a larger quantity of *pachwai* than four seers. The accused Harridas San is a servant in the employ of Bama Charan Saha. Sriram Jugi went to the shop of Bama Charan and purchased 7¼ *kutcha* (5 seers *pucca*) of undiluted *pachwai*. The *pachwai* was handed to Sriram Jugi by the accused in the presence of his employer and at his (the employer's) request.

The police regarding the accused as a partner with Bama Charan reported him (accused) for prosecution for sale of a quantity of *pachwai* in excess of that permitted to be sold under Bama Charan's license, an offence punishable under section 60 of the Act, which says, *inter alia*, that "every licensed retail vendor who sells by wholesale shall be liable for every such offence to a fine not exceeding two hundred rupees."

The accused was summoned not under section 60, but under section 59, which enacts that "every manufacturer or vendor under this Act who fails to produce his license on the demand of any Excise Officer, or who commits any act in breach of any of the conditions of his license *not otherwise provided for in this Act*, or who artfully contravenes any rule made by the Board under section 10, otherwise than as provided in the last preceding section, shall be liable for every such offence to a fine not exceeding fifty rupees."

The Joint-Magistrate convicted the accused under section 53 of the Act, for selling exciseable liquor without a license.

The Judgment is as follows:—

"The evidence of the witnesses for the prosecution proves that the accused sold more than 4 seers of undiluted *pachwai* to Sriram Jugi, who had no license to purchase such a large quantity of *pachwai*. The accused himself holds no license. His statement is that he sold as servant of Bama Charan. But the pottah of Bama Charan has not been produced. It is not in evidence that the name of the accused is endorsed on the pottah authorising him to sell *pachwai* as a servant under him. I therefore find that he **[569]** sold *pachwai* without a license. I convict him under section 53, Act VII of 1878, and sentence him to pay a fine of Rs. 15, in default to undergo simple imprisonment for two weeks."

We are of opinion that the conviction cannot stand.

No doubt there are cases which say that the servants of licensees are not as such exempt from responsibility under the Bengal Excise Act.

In *In re Ishur Chunder Saha* (19 W. R., Cr. 34), COUCH, C.J., says:— "But there is another reason why it (the conviction) ought not to be interfered with. Supposing there is an error here in the Magistrate's holding that this must be considered as his license, and that he was practically the vendor, there is no doubt that he did sell the liquor; *if this was not his license, he has been guilty of a breach of the law in selling liquor without any license.*"

In *Empress* v. *Baney Madhub Shaw* (I. L. R., 8 Cal., 207; 10 C. L. R., 389), the petitioner, the servant of a licensed vendor of spirits, was convicted for selling a bottle of brandy which was carried off and not drunk on the premises. It was contended for the petitioner that the master, the licensed vendor, was alone liable. PRINSEP, J., in giving judgment, says:—"Two judgments of this Court have been considered by us on this point: *In re Ishur Chunder Saha* (16 W. R., Cr. 34) and the other recently delivered by Mr. Justice PONTIFEX and Mr. Justice FIELD, *The Empress* v. *Nuddiar Chand Shaw* (I.L.R., 6 Cal., 832; 8 C. L. R., 162). These decisions are in conflict Our opinion inclines to the decision in *In re Ishur Chunder Saha*: and having regard to the fact that that decision was not brought to the notice of the Judges who decided the more recent case, we think we are justified in following it."

The case of the *Empress* v. *Ishan Chundra De* (I. L. R., 9 Cal., 847; 12 C. L. R., 451) followed the decisions in *In re Ishur Chunder Saha* (19 W. R., Cr. 34) and *Empress* v. *Baney Madhub Shaw* (I. L. R., 8 Cal., 207; 10 C. L. R., 389). In the *Empress* v. *Nuddiar Chand Shaw* (I. L. R., 6 Cal., 832; 8 C. L. R., 162), PONTIFEX and FIELD, JJ., held that the licensed retail vendor himself is the only person liable to conviction under section 60 of the Act.

[570] In our opinion it is unnecessary to express any opinion as to which of these decisions is correct. The facts proved in this case do not establish a sale by the accused. The master was present in the shop at the time the order was given by the purchaser, and directed the accused to give the article ordered to the purchaser. The mere mechanical act of handing the liquor to the purchaser cannot, under the circumstances, be regarded as a *sale* by the accused.

H. T. H. *Order reversed.*

NOTES.

[This case was distinguished in (1902) 29 Cal., 496.]

[17 Cal. 570]

MATRIMONIAL JURISDICTION.

The 1st and 5th May, 1890.

PRESENT :

MR. JUSTICE WILSON.

Stephen............Petitioner

versus

Stephen............Respondent.*

Divorce Act (IV of 1869), s. 16, cl. (c)—Divorce—Intervenor—Procedure after decree nisi *on application by respondent for liberty to intervene.*

A wife sued for dissolution of her marriage on the grounds of her husband's adultery and cruelty. The respondent did not appear or file an answer, and the case was heard *ex parte* and resulted in a decree *nisi* being passed. Subsequently and before the decree was made absolute, the respondent applied for liberty to intervene under the provisions of clause (c), section 16, of the Divorce Act, the application being based on affidavits alleging *inter alia* collusion on the part of the petitioner.

Held, following *King* v. *King* (I. L. R., 6 Bom., 416) that the respondent should not be allowed to intervene or be heard when the decree came on to be made absolute, but that the affidavits should be filed, and that notice should be given to the petitioner that the decree would not be made absolute until the matters set out in the affidavits as regarded the collusion had been cleared up.

ON the 12th December 1889, the petitioner presented a petition praying for a decree for the dissolution of her marriage with the respondent on the ground of the respondent's adultery and cruelty towards the petitioner. The respondent did not appear or file any answer, and the case came on to be heard *ex parte* on the 23rd January 1890 before Mr. Justice WILSON. At the hearing evidence was given to prove numerous acts of cruelty on the part of the respondent, and also his adultery, and on the 23rd January 1893 the usual decree *nisi* was passed, dissolving the marriage, unless sufficient cause [571] should be shown to the contrary within six months from the date thereof

This decree was filed on the 15th February 1890. On the 1st May 1890, Mr. *Pugh*, on behalf of the respondent, moved the Court, under section 16, clause (c) of Act IV of 1869, on certain affidavits for a rule calling on the petitioner to show cause why the decree *nisi* should not be set aside and a fresh hearing granted, or for such other order as under the circumstances the Court might think fit and proper to pass. The grounds upon which the application was based were contained in certain affidavits alleging, amongst other things, that there had been collusion between the petitioner and the respondent, and that had it not been for the suppression of these facts, the Court would not have passed the decree it did, but have dismissed the petition.

Mr. *Pugh* in moving the Court stated that he was instructed on behalf of the respondent, and moved under the provisions of clause (c) of section 16 of the Divorce Act (IV of 1869).

[WILSON, J.—Is it open to a party to the suit to apply under that section ?]

Mr. *Pugh*.—The question has been very fully discussed in the case of *King* v. *King* (I. L. R., 6 Bom., 416), and Mr. Justice BAYLEY there went very fully into the matter and delivered an exhaustive judgment. My contention is, however, that the learned Judge put too narrow a construction on the section

* Suit No. 6 of 1889.

when he held that the words "any person" did not include the respondent. It is perfectly true that this portion of s. 16 is taken almost *verbatim* from the English Act, but the great difference is that the latter Act provides for the appointment of the Queen's Proctor, whereas here we have no official of that description. Neither the Advocate-General nor any Government Official has any duty cast on him to intervene, and therefore the only person at all likely to intervene is the respondent or a person moved by him, which is the same thing. No independent person who has no interest in the proceedings is very likely to intervene at the risk of having to pay the costs occasioned by his intervention, though of course it is possible that one might come forward and do so. The reasons, therefore, for preventing a respondent from intervening in England do not apply here, and [572] under these circumstances the Court should put a wider construction on the meaning of the term "any person" than is put on the corresponding portion of the English Statute.

Counsel then referred to the case of *King* v. *King* (I. L. R., 6 Bom., 416) at length, and to the cases of *Latour* v. *Latour* (2 Sw. & Tr. 524) *Stoate* v. *Stoate* (2 Sw. & Tr. 384), *Boulton* v. *Boulton* (2 Sw. & Tr. 405) and *Clements* v. *Clements* (3 Sw. & Tr. 394), and after referring to affidavits contended that there was ample material contained in them which if true would lead the Court to set aside the decree. He then continued—The question arises as to what course under the circumstances the Court should adopt. In *King* v. *King* the affidavits, which were filed at the instance of the Attorney for the respondent, were ordered to be placed on the record, and the petitioner was directed to attend in Court to be examined on the matters disclosed by them before the decree be made absolute. What happened after that order does not appear.

[WILSON, J.—Supposing the petitioner does appear, who is to cross-examine her? Upon the English authorities the respondent cannot be heard, and the Court of its own motion could not be in a position to do so.]

Mr. *Pugh*.—That is the difficulty, and that is why in the absence of a Queen's Proctor the Court should put a wider construction on s. 16, and hold that a respondent is entitled to intervene in this country.

[WILSON, J.—The difficulty in the matter is that by doing so the Court would be putting a construction on the section, which is substantially the same as the English Act, wholly different from the construction put on similar words in the English Act.]

Mr. *Pugh*.—In that case the only course is to adopt that followed by Mr. Justice BAYLEY, and allow the affidavits to remain on the file, but, as I have already stated, I contend that a liberal construction should be placed on s. 16 and that *any one* should be allowed to intervene and that therefore the respondent should be allowed to be heard.

Section 7 of the Act provides that, subject to the provisions contained in the Act, the Courts in this country shall act and give [573] relief on principles and rules as nearly as may be conformable to the principles and rules of the English Court. Section 16 says *any person* may intervene, and if the English practice be followed and that be taken to be any person other than the respondent or some one moving at his instance, as there is no person whose duty it is to intervene on facts being brought to his notice, it would, in a case like this, result in the dissolution of a marriage under circumstances under which the Legislature intended it should not be dissolved. Though in England any person other than the respondent, or some one at his instance, may intervene, yet in practice the Queen's Proctor alone does so.

[WILSON, J.—In England there have been cases of private intervention.]

Mr. *Pugh*.—The Act, however, contemplates that in the great majority of cases the Queen's Proctor should be the person to intervene, and as a matter of fact it is the Queen's Proctor who generally does intervene. If, however, the Court holds that the respondent is precluded from intervening, then the affidavits, as in the Bombay case, can be put on the file with the record, and possibly between now and the time when an application is made to have the decree made absolute some person may, on the facts becoming known, come forward and intervene.

The **judgment** of the Court was delivered on May 5th.

Wilson, J.—In this case I shall follow the view of the law taken in the Bombay High Court in *King* v. *King* (I. L. R., 6 Bom., 416). The result will be that the affidavits filed by the respondent and others in this matter will be put up with the record of the suit. Following the Bombay case, I shall not, when the matter comes on for the decree to be made absolute, allow the respondent to be heard; but, as in the Bombay case, information will be given to the attorney for the petitioner that the decree will not be made absolute till the matters set out in the affidavits alleging collusion have been cleared up. She may take what course she may be advised for the purpose of clearing up the matters alleged in the affidavits on that subject.

Attorney for the Respondent: Mr. *H. C. Chick*.

H. T. H.

---

[574] FULL BENCH.

The 5th September, 1888.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE WILSON, MR. JUSTICE TOTTENHAM, MR. JUSTICE O'KINEALY AND MR. JUSTICE MACPHERSON.

Karim Buksh
versus
The Queen-Empress.*

False charge—False charge made to police—Institution of Criminal Proceedings—Penal Code, s. 211.

A person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of section 211 of the Penal Code; and if the offence fall within the description in the latter part of the section, he is liable to the punishment there provided.

* Full Bench Reference in Criminal Appeal No. 463 of 1888 from the decision of J. Pratt, Esq., Sessions Judge of Mymensingh, dated 15th May, 1888.

IN this case the accused Karim Buksh was charged with having falsely instituted criminal proceedings against one Khoaz Mundul by charging him with committing mischief by fire (an offence under s. 436 of the Penal Code), knowing that there was no just or lawful ground for such charge, and with having thereby committed an offence under s. 211 of the Penal Code.

The facts were thus stated in the judgment of the Sessions Judge:—

"On the 15th November Karim Buksh complained to the head constable of Phulpar Thana that Khoaz Mundul had come with 40 or 50 persons to his homestead and had set to work erecting a house there, on the pretext that the land appertained to another man's homestead, which Khoaz had purchased. Karim Buksh went on to state that he remonstrated, and that he was then chased by Khoaz and others to the neighbouring *bari* of his brother, Rasulla; that Khusal Chang, chowkidar, prevented those men from beating him; and that Khoaz Mundul had brought with him a smouldering torch, wherewith he set fire to the house of Karim Buksh. The head constable held a local enquiry and reported the charge as false, and hence the present prosecution under s. 211 of the Penal Code.

[575] "The head constable has proved the complaint. Karim Buksh adheres to that statement, and says the charge he brought was quite true.

"I entertain no doubt that the charge of arson was false, and that Karim Buksh might have been prosecuted for fabricating false evidence as well as for an offence under s. 211, Penal Code. The charge he made was one punishable under s. 436 with transportation for life or imprisonment up to 10 years. I think the offence comes under the latter part of section 211, Penal Code, and that it was the intention of the Legislature to regulate the punishment proportionately to the gravity of the false charge. In this view I am supported by a ruling of JACKSON and HOBHOUSE, JJ., in *Raffee Mahomed* v. *Abbas Khan* (8 W. R., Cr. 67). I am aware of a ruling to the contrary in *Queen-Empress* v. *Karim Buksh* (I. L. R., 14 Cal., 633) following *Empress of India* v. *Pitam Rai* (I. L. R., 5 All., 215) and *Empress* v. *Parahu* (I. L. R., 5 All., 598), but I am in a position to say that these latter rulings are opposed to the practice current in the mofussil Courts during many years. Moreover, it seems to me that when a man formally lays a charge of a cognizable offence at a Police station, he in effect asks the Police to investigate the charge, arrest the accused, and send him for trial before a Magistrate, and that this is nothing short of 'instituting criminal proceedings,' and it was so laid down in *Queen* v. *Bonomally Sohai* (5 W. R., Cr., 32). If it be held that the latter part of s. 211 refers only to false charges instituted directly in Court, then there arises an anomaly. The more heinous the offence the more imperative is it, according to practice and reason, that the complainant should go to the Police in the first instance. A man must almost of necessity go first to the Police if he wishes to prefer a charge of murder for instance, whereas he might, and not unfrequently does, go to a Magistrate if he wishes to lay a charge of grievous hurt under s. 325, Penal Code. Supposing these charges were proved to be false, the man who brought the former with the object of getting an innocent man hanged could be punished only with two years' imprisonment and fine, and would be triable by a Magistrate, while the one who brought the far less heinous charge [576] before a Magistrate would be liable to a sentence of seven years' imprisonment and would be triable only by the Sessions Court. The case of *Queen* v. *Hanooman Lall* (19 W. R., Cr 5) was a false charge of murder preferred to the police and committed to the Sessions Court, and the High Court did not disturb the sentence. I would also refer to *Queen*

v. *Nathoo Doss* (3 W. R., Cr. 12), *In the matter of the petition of Kader Buksh* (21 W. R., Cr. 34), *Ashrof Ali* v. *Empress* (I. L. R., 5 Cal., 281), and *Empress* v. *Salik Roy* (I. L. R., 6 Cal., 582)."

The Sessions Judge concurring with one of the assessors found the accused guilty, and sentenced him to three years' rigorous imprisonment.

The accused appealed, and the appeal came on for hearing before WILSON and RAMPINI, JJ., by whom it was referred to a Full Bench with the following ORDER :--

In this case we see no reason to interfere with the conviction. Nor should we alter the sentence, if it be sanctioned by law. But its legality depends upon a point as to which the decisions of this Court are contradictory, namely, whether the latter part of s. 211, Penal Code, applies to a complaint made to the Police, or is limited to cases brought before a Court. In the present case the accused made before the Police a false charge against one Khoaz Mundul of having committed mischief by fire, an offence punishable under s. 436, Penal Code, with more than seven years' imprisonment. He has been sentenced to three years' rigorous imprisonment. The sentence is lawful if the second part of section 211 applies: if not, it is illegal and must be reduced to not more than two years.

In *Queen* v. *Bonomally Sohai* (5 W. R., Cr. 32) CAMPBELL and PHEAR, JJ., held that to prefer a complaint to the Police in respect of an offence with which they are competent to deal is to institute a criminal proceeding within the meaning of section 211. In *Raffec Mahomed* v *Abbas Khan* (8 W. R., Cr. 67), JACKSON and HOBHOUSE, JJ., took the same view and set aside a conviction by a Magistrate in respect of a false charge made to the police on the ground that the case being [577] under the second part of section 211, the Magistrate had no jurisdiction. In *In the matter of the petition of Kader Buksh* (21 W. R., Cr. 34), KEMP and GLOVER, JJ., decided to the same effect. It is not stated in the published report of this case that the charge was made to the Police, but we have referred to the record and we find that it was so. On the other hand, in *Queen-Empress* v. *Karim Buksh* (I. L. R., 14 Cal., 633), PETHERAM, C.J., and GHOSE, J., held that to make false charges to the Police is not to institute criminal proceedings, and did not fall within the latter part of s. 211. We refer to a Full Bench the question which of these conflicting views is correct.

No one appeared on either side at the hearing before the Full Bench.

The **judgment** of the Full Bench (PETHERAM, C. J., and WILSON, TOTTENHAM, O'KINEALY, and MACPHERSON, JJ.) was delivered by

Wilson, J.—Section 211, Indian Penal Code, enacts as follows:—

"Whoever, with intent to cause injury to any person, institutes, or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

The question before us is whether the latter part of the section applies to cases in which complaint has been made to the Police of an offence falling within the description given, and into which the Police are by law authorised to enquire.

According to the Code of Criminal Procedure now in force, there are two modes in which a person aggrieved may seek to put the criminal law in motion. He may make a charge, or in the language of the Code give information, to the Police (section 154). If the information discloses a cognisable offence, the proper officer of Police may proceed to make an investigation; and if the result of that investigation is adverse to the accused, he is, in due course, brought by the Police before a Magistrate. All this forms the subject of Chapter XIV of the Procedure Code. If the [578] information does not disclose a cognisable offence, the Police cannot take any step of their own authority. Secondly, a person aggrieved may lay a charge, or, as the Code calls it, a complaint, (section 191) before a Magistrate.

Whichever of these methods is adopted, the thing done by the accuser is the same, that which is called in the one case giving information, in the other making a complaint In each case the steps that follow are governed by the Criminal Procedure Code. In each the first step taken by the accuser is ordinarily also the last, for from that time the control of the investigation or enquiry passes out of his hands into those of the constituted authorities; subject to this, that if, after an information before the Police, the result of their investigation is adverse to the complainant, he may renew his complaint to the Magistrate. The procedure by information to the Police is by far the more common course of proceeding, especially where any grave offence is alleged. A system similar to the present in these matters was in force when the Penal Code was passed in 1860; it was embodied in the First Procedure Code of 1861, and has been continued ever since.

In that state of things, if the latter part of section 211 had stood alone, there could probably have been no doubt that the words "if such criminal proceedings be instituted" applied no less to a case in which the criminal law is set in motion by information to the Police than to one in which it is set in motion by complaint to a Magistrate. But the doubt arises from the fact that the expressions "institutes criminal proceedings" and "falsely charges" occur in the first part of the section, and only the one expression "such criminal proceedings be instituted" in the latter. And hence the argument arises that the Legislature must have meant different things when it spoke of "instituting proceedings" and "making a charge," and that only what fell within the former phrase was within the latter part of the section.

I agree in this reasoning in one sense and not in another. I agree that we must take it that the Legislature did not regard the two phrases as co-extensive in meaning, but considered that there were, or might be, cases to which the one would apply and not the other. But I do not think we are to suppose that the Legislature meant the phrases to be mutually exclusive in [579] meaning, so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. This cannot, I think, be for two reasons. First, because there is no mode by which a private accuser can institute criminal proceedings except by making a charge; and if he does not do it by the charge, he never does it at all, to whatever length the proceedings may go. And secondly, because the last part of the section speaks of "proceedings instituted on a false charge."

It is not difficult to see various classes of cases which either do or probably may fall under one of the expressions used and not under the other, and which the Legislature may well have had in view when it used both. Thus proceedings to compel any one to give security, by reason of an anticipated breach of the peace under section 107, or because he is concealing himself or has no

ostensible means of subsistence under section 109 of the Procedure Code are apparently criminal proceedings, but they do not necessarily involve a charge of any offence. On the other hand, a charge to the Police of a non-cognizable offence may very possibly be a charge within the meaning of the section, but could hardly be called the institution of criminal proceedings. So a charge made to the Judge of a Civil Court, or to public officers of other kinds, in order to obtain sanction to prosecute may well be a charge, but is not the institution of criminal proceedings.

For these reasons, I think that a man who sets the criminal law in motion by making a false charge to the Police of a cognizable offence, institutes criminal proceedings within the meaning of section 211 of the Penal Code; and that if the offence fall within the description in the latter part of the section, he is liable to the punishment there provided.

J. V. W.

NOTES.

[This was followed in (1896) 20 Mad., 79; (1903) 27 Mad., 127; (1908) 31 Mad., 506; dissented from in (1909) 32 Mad., 258; 19 Bom., 51; but see on the other hand, (1893) 16 All., 124; (1907) 27 A.W.N. 149; (1911) 8 A.L.J. 1106; (1888) P.R. 3; (1888) P.R. 26.]

[580] PRIVY COUNCIL.

The 19th November, 1889.

PRESENT:

LORD MACNAGHTEN; SIR B. PEACOCK, AND SIR R. COUCH.

Mohini Mohun Das and others............Plaintiffs

versus

Bungsi Buddan Saha Das and others............Defendants.

[On appeal from the High Court at Calcutta.]

Parties—Joinder of parties—Civil Procedure, ss. 30 and 34—Limitation—Signature of plaint by one of several co-plaintiffs.

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Three suits for money were filed by one of three joint-creditors, the others being named as co-plaintiffs with him in the plaints, which he alone signed and verified. An order was made by the Court after the filing of the plaints that one of these joint-creditors should be added as a co-plaintiff, as if he had not been on the record already. If the date of that order had been the date of suit brought, limitation under Act XV of 1877, schedule II, Article 67,* would have applied; but it was *held* that all the joint-creditors became plaintiffs when the

* [Art. 67 :—

Description of Suit.	Period of limitation.	Time from which period begins to run.
On a single bond where no such day is specified.	Three years.	The date of executing the bond.]

plaints were filed, the order adding parties being inoperative, and that the suits when instituted were not defective for want of parties.

THREE consolidated appeals from three decrees (24th February 1886), affirming three decrees (March 31st, 1884) of the First Subordinate Judge of Zilla Dacca.

The plaints (filed 2nd November 1883) in the three suits were signed and verified by Mohini Mohun Das, son of the late Modhusudan Das: but Govind Rani Dasi, widow of another son deceased, Mohini Mohun being described as manager acting on her behalf, and Khettor Mohun, another brother, described as "interested plaintiff," were named as co-plaintiffs. The cause of action was money lent from the money-lending business carried on by the plaintiffs in the name of the late Modhusudan Das, the defendants having signed *hat-chittas*, and the loan with interest having amounted to Rs. 2,991. An agreement dated 22nd Aughran 1268 (8th December 1875) was filed to show that Mohini Mohun was manager for the brothers.

Mohini Mohun petitioned (22nd November 1883) to be allowed to sue on behalf of Khetter Mohun; the latter petitioned (2nd [581] January 1884) that he might be joined as a plaintiff. An order (8th January 1884) was made that he should be made a plaintiff in the suits. The Subordinate Judge having heard the three suits together on issues raising the qustions of Mohini Mohun's authority and of limitation, dismissed them, on the ground that the admission of the debt, which without admission would have been barred by limitation, was made (Assin 1287, September 1880) more than three years before the order making Khetter Mohun a party (8th January 1884) was passed. Till that order was made, the suits in the opinion of the Judge had not been effectively filed, being defective for want of the proper parties having been made plaintiffs.

The High Court (CUNNINGHAM and O'KINEALY, JJ.), on appeals preferred by the three co-plaintiffs, supported this decision, on the ground that one of the three plaintiffs, who was a necessary party to the suits, had not been brought on to the record until after the expiration of the period of limitation.

The three alleged co-plaintiffs having appealed,

Mr. *J. H. A. Branson* (with whom was Mr. *T. H. Cowie* Q. C.), for the Appellants, argued that the decisions of the Courts below were incorrect. All the persons interested as plaintiffs were before the Court, being properly on the record, so that the suit, when filed on the 2nd November 1883, at which time the debt was not barred, was not, as had been erroneously supposed, defective for want of parties. Where the interests of joint-contractors had to be enforced, one of them, if duly authorized, might sue on behalf of all interested; and his authority might be shown. Reference was made to the Civil Procedure Code, sections 30 and 34, and to the requirement that any such objection as the present should be taken at the earliest possible opportunity. There was, however, no valid objection to Mohini Mohun's having sued on behalf of all the joint-creditors. He was manager on their behalf as shown by an agreement filed; and, in fact, neither of them had disavowed the claim as filed by him, with their names mentioned as co-plaintiffs.

Reference was made to *Sujad Ali Khan* v. *Lalla Kasheenath Doss* (6 W. R., 181); *Mokha Harakraj Joshi* v. *Biseswar Doss* (5 B. L. R. Ap. 11: 13 W. R., 344); *Bisandas* [582] *Magniram* v. *Lakmichand Kisanchand* (6 Bom., H. C. 150); and the Civil Procedure Code, ss. 26, 32, cls. 3 and 4.

Mr. *R. V. Doyne* for the Respondent Bungsi Buddan Saha, contended that the suits were instituted by Mohini Mohun alone. He alone signed and verified the plaints. The agreement on which reliance had been placed did not

expressly authorise the bringing suits by Mohini on behalf of Gobind Rani; but the main question was,—when did Khetter Mohun become a party to these suits? It was not at the institution of the suits on 2nd November 1883 that he did so. The suits, having been filed by Mohini Mohun alone, were defective till the 8th of January 1884, by which time they were barred by limitation. The attempted joinder, or ineffectual attempt to join Gobind Rani Dasi was also a complete objection. Reference was made to section 36, Civil Procedure Code, and to *Ramsebuk* v. *Ramlall Koondoo* (I. L. R., 6 Cal., 815).

Mr. *J. H. A. Branson* replied.

Their Lordships' **judgment** was delivered by

Lord Macnaghten.—These suits were instituted on the 2nd of November 1883 to recover moneys alleged to be due to Mohini Mohun, Gobind Rani, and Khetter Mohun jointly, on an account acknowledged and signed in 1880. In both Courts the suits were held to have been originally defective for want of parties, and to have been barred by the Law of Limitation before the defect was cured.

On the face of the plaints the three joint-creditors are named as co-plaintiffs. The names of Gobind Rani and Khetter Mohun have not been struck out, nor did they, or either of them, attempt to repudiate the suits. But still it was contended that Mohini Mohun was the sole plaintiff, or, at any rate, that Khetter Mohun ought not to be treated as a co-plaintiff from the commencement of the litigation.

In the first place it was said that the plaints were signed and verified by Mohini Mohun alone. But that is immaterial. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Then as regards Khetter Mohun, it was said that both Mohini Mohun and Khetter Mohun himself took the view that he was not [583] originally a plaintiff. Having named Khetter Mohun as co-plaintiff, Mohini Mohun presented petitions asking for permission to prosecute the suits on behalf of Khetter Mohun, relying, as appears by the plaints, on section 30 of the Civil Procedure Code of 1882, which only applies "when a suit is brought by one person on behalf of other persons having joint interests, but not named as co-plaintiffs." Notice of the petitions was given to Khetter Mohun, and he being named as co-plaintiff already asked to be made a plaintiff. By some oversight orders to that effect were made on the 8th of January 1884. The orders were merely waste paper. These various experiments or blunders cannot, in their Lordships' opinion, affect the real position of the parties, which is plain on the face of the record. The question, as Mr. *Doyne* put it, is simply this:—When was it that Khetter Mohun became a party to these suits? If it was on the 2nd of November 1883, the suits were in time. If it was not till the 8th of January 1884, they were too late. Their Lordships think that Khetter Mohun, as well as Gobind Rani, became a party, as plaintiff, on the 2nd of November 1883, and that the suits therefore are not barred by lapse of time.

Their Lordships will humbly advise Her Majesty that the appeals ought to be allowed, that the decrees of the Subordinate Court and the High Court ought to be reversed, and that the suits should be remanded to the High Court with a direction that they should be tried on the merits by the Subordinate Court, and giving the parties leave to raise such issues and to adduce such evidence as they may be advised, and that the costs which have been incurred in the Subordinate Court should abide the results of the suits, and the costs

which have been incurred in the High Court be paid by Bungsi Buddan Saha Das. The respondent, Bungsi Buddan Saha Das, will pay the costs of these appeals.

Appeal allowed: suits remanded.

Solicitors for the Appellants: Messrs. *Watkins and Lattey.*

Solicitors for the Respondent Bungsi Buddan Saha: Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[This was followed in (1899) 22 All., 55; 1902 P.R. 103.]

---

[584] PRIVY COUNCIL.

The 14th and 20th November, 1889.

PRESENT:

LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. COUCH.

Mahabir Pershad............Purchaser from one of the defendants

versus

Moheswar Nath Sahai Defendant and another (one of the plaintiffs).

[On appeal from the High Court at Calcutta.]

Sale in execution of decree—Sale of joint family estate in execution of a decree against the father upon debts contracted by him—Liability of son's share—Hindu law—Alienation.

It is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara.

In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution, or not, is a question of fact, in each case dependent on what was understood to be brought, and has been brought, to sale.

Nanomi Babuasin v. *Modhun Mohun* (L. R., 13 I. A., 1; I. L. R., 13 Cal., 21), and *Bhagbut Pershad Singh* v. *Girja Koer* (L. R., 15 I. A., 99; I. L. R., 15 Cal., 717) referred to and followed.

The description of the property, in the certificate of sale, as the right, title and interest of the judgment-debtor was consistent with every interest, which he might have caused to be sold, passing at the sale.

APPEAL from a decree (16th July 1885) of the High Court affirming a decree (10th June 1884) of the Second Subordinate Judge of Sarun.

The suit related to a 5-anna 4-pie share in mouzah Maharajgunge, in the Sarun district, being the ancestral estate of a family consisting of a father, Rai Moheswar Nath Sahai, Massumat Murat Koer his wife, and their minor son, Markanda Nath. The latter sued by his mother as his guardian, and he was a respondent in this appeal. The father was joined as one of the

defendants in the suit, but was respondent in this appeal. He had, on 11th September 1869, mortgaged a fractional part of the above share to Seogolam, father of the principal defendant Chowaram, to secure Rs. 4,381. Again, on November 1869, Moheswar Nath had mortgaged a 2-anna share of the family estate to Sant Lal to secure Rs. 500. And, on 30th August 1871, he mortgaged a 6-pie share to Chowaram to secure Rs. 1,050. These sums were debts, [583] Moheswar's father having begun to contract them, and he himself having increased them.

Sheo Golam, Sant Lal, and Chowaram obtained decrees against Moheswar in respect of principal and interest due on their bonds. Their decrees were dated 11th September 1873, 7th April 1874, and 10th March 1874. One Sobh Narain also held a decree against him for at least Rs. 2,166.

Chowaram proceeded to execute his decree, and the whole 5 annas 4 pie share of Maharajgunge was advertised to be sold on the 15th January 1875. But Moheswar's son and wife, on the day before the sale, brought a suit against him and Chowaram, claiming that the family estate might be protected by a declaratory decree from the impending sale. Also on the 5th January a petition was presented for the sale to be postponed on the ground that the ancestral lands ought not to be sold for a personal debt of the judgment-debtor, and while a suit was pending to exempt that estate from sale. The sale, however, took place.

Chowaram subsequently, on the 21st February 1875, obtained possession of the whole 5 annas 4 pie share from the Court, having paid the purchase-money, Rs. 10,000. This money was appropriated to the payment of various decree-holders against Moheswar, as appears by a proceeding of the Court, dated 10th May 1875. The appellant purchased the rights of Chowaram.

Meantime, the plaintiff proceeded with the declaratory suit. This, however, was dismissed on 12th May 1875, the Court being of opinion that after possession of the whole estate, in pursuance of the sale, had been given to the auction purchaser a declaratory suit would not lie, and that it must be a suit for possession. A suit which Moheswar Nath, on the other hand, brought to have the sale set aside on the ground of fraud was dismissed on 25th June 1878 by the High Court (having been decreed in the first instance), so that the purchaser remained in possession. Upon this the objection was raised under section 332 of Act X of 1877, amended by section 43 of Act XII of 1879, then in force, that the co-sharers were entitled to joint possession with the purchaser. This was disallowed.

The plaintiff, accordingly, brought the present suit on 15th December 1880, in which issues were settled raising the questions [586] whether the shares. other than Moheswar Nath's in the family estate, were bound by the debt, and, whether possession of the whole, or any part, could be recovered by the son as his share.

The Subordinate Judge found it not proved that Moheswar Nath had applied to immoral purposes the proceeds of the loan in respect of which Chowaram had obtained a decree against him. He, however, made a decree for possession of the third share by the minor plaintiff, declaring that the purchaser at the sale was entitled only to the share of Moheswar Nath. This was supported, in the main (with a reversal as to mesne profits which had been decreed), on an appeal to the High Court; the Judges (CUNNINGHAM and MACPHERSON, JJ.) being of opinion that only the father's share had been sold.

From this decree an appeal by Mahabir Pershad, the purchaser of Chowaram's decree, was admitted to Her Majesty in Council. Thereafter the respondent, Massumat Murat Koer, died; and by an order in Council, the

appeal was revived against her husband, Moheswar Nath, on a certificate of the High Court that such revivor should be made; and on a like certificate, Massumat Bubbuh Bibi, was appointed guardian *ad litem* to the infant respondent.

Mr. *J. D. Mayne* and Mr. *H. Cowell* for the Appellant.—The sale was intended by the Court executing the decree, with the knowledge of all concerned, to transfer the whole joint family estate. The Subordinate Judge was right in holding that Moheswar was not proved to have applied the proceeds of the loan, upon which Chowaram's decree was obtained, to any immoral purpose. The minor respondent, by reason of the son's liability for his father's debts, not incurred for immoral purposes, cannot impeach the sale or limit the application of the execution to the father's share. The decree also was based upon a debt incurred by the successive heads of the family, and therefore bound the entirety of the estate, including the son's interest. Where the father of a family under the Mitakshara law has contracted a debt—on the one hand, neither necessary nor beneficial to the family—but still, on the other, not for an immoral or illegal purpose, then, in execution of a decree upon that debt, the whole family estate may be sold, and not merely the father's share. This being the general rule, the exceptional case is where the creditor issues execution against the [587] interest, of the father alone. In every one of the cases it is enough to see whether the facts bring it within the general rule as given in *Nanomi Babuasin* v. *Modhun Mohun* (L. R., 13 I. A., 1; I. L. R., 13 Cal., 21), or within the exception as found in *Deendyal* v. *Jugdeep Narain Singh* (L. R., 4 I. A., 217; I. L. R., 3 Cal., 198). The claim is not under the mortgage, but under the sale upon the decree. They also referred to—*Girdharee Lall* v. *Kantoo Lall* (L. R., 1 I. A., 321; 14 B. L. R., 187); *Suraj Bansi Koer* v. *Sheopersad Singh* (L. R., 6 I. A., 88; I. L. R., 5 Cal., 148); *Simbhunath Pande* v. *Golap Singh* (L. R., 14 I. A., 77; I. L. R., 14 Cal., 572); *Bhagbut Persad* v. *Girja Koer* (L. R., 15 I. A., 99; I. L. R., 15 Cal., 717) *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan* (L. R., 16 I. A., 1; I. L. R., 12 Mad, 142).

The Respondents did not appear.

Afterwards, on 20th November, their Lordships' **judgment** was delivered by

Lord Hobhouse.—The sole question in this appeal is whether the purchaser, whom the defendant represents, acquired the entirety of the 5 annas 4 pie which were put up to sale in execution, or only such share as the judgment-debtor, Moheswar Nath, would take on a partition. Other questions have been raised in the Courts below which are not relevant to this appeal. It has been considered whether the sale was necessary for the benefit of the family estate; but the question is whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shows the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit. Again, the first Court then examined the circumstances at considerable length to show that the purchaser bought the property subject to encumbrances, and that his purchase-money ought not to have been applied, as the Court in fact applied it, to the payment of those encumbrances. But if the plaintiff could have raised any such case as that, he must have done so in a suit differently framed in point of parties, of allegations, of prayer, of [588] issue, and of proofs. Except for the issue raised as to immorality, this suit is solely for the purpose of treating the defendant as nothing more than a co-sharer in the estate, and the decree which the plaintiff has obtained does so treat him.

There have been of late years a great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Committee have lessened these difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases of *Nanomi Babuasin* v. *Modhun Mohun* (L. R., 13 I. A., 1; I. L. R., 13 Cal., 21) and *Bhagbut Persad Singh* v. *Girja Koer* (L. R., 15 I. A., 99: I. L. R., 15 Cal., 717); and addressing themselves to the question of fact whether the thing meant to be sold and bought was the entirety of the estate or only a share in it.

It would be more convenient if the record contained the whole of the proceedings in the execution and sale, because they must always be important evidence, often the best, as to the nature of the thing sold. In this case the application for attachment and sale, and the orders made thereon, and the notification of sale, are not to be found, and their Lordships are left to infer their tenor from an adverse petition presented on behalf of the plaintiff, and from the sale certificate. The difficulty is increased by the circumstance that there were three, or probably four, decrees then standing against Moheswar; whereas the sale proceeded on one of them, founded on a mortgage to one Chowaram of only a fraction of the estate. From the pleadings and judgments, their Lordships conclude that in some way not explained the various creditors combined to have the estate sold for the common benefit. At all events, no difficulty on this score has been felt in the Courts below.

Chowaram's decree, dated 7th March 1874, is for the realisation of a sum of money out of the property mortgaged to him by Moheswar, viz., "my rights and interest in 6 pie out of 5 annas 4 pie of the entire 16 annas" of the estate in question.

The day fixed for the sale was the 5th January 1875. On the 4th January 1875 the plaintiff filed a plaint against Chowaram and Moheswar, in which after alleging fraud and immorality, he [589] claimed that "the ancestral property of the plaintiff, which he has inherited from his grandfather, ought not to be sold in satisfaction of such illegal and personal debts;" and he prayed for a declaration protecting his estate. On the next day the plaintiff's pleader presented a petition in the execution proceeding, stating that the 5 annas 4 pie share of mouzah Udoypore, &c., "which is the ancestral property of my client, is to be sold to-day in this Court." The petition then states the suit commenced the day before, and prays postponement of the sale till the suit should be disposed of. That petition was rejected, not on the ground that the thing to be sold was only the share of Moheswar, which could not prejudice the plaintiff, but on this ground, that "the plaintiff is at liberty, in case of the sale taking place, to make the purchaser a defendant in his suit, so that he (the purchaser) may defend the right purchased by him."

It is hardly possible to make it clearer that all parties, judgment-creditors, judgment-debtor, the plaintiff and his advisers, and the Court itself, considered that the thing put up to sale was the entirety of the estate.

The sale certificate was issued on the 6th February 1875 to the vakil of Chowaram, the decree-holder. After stating that all the "right, interest and connection which the judgment-debtor had in the property" had been purchased "from the decree-holder," and "that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment-debtor," it describes the property thus—"Five annas four pie of mouzah Udoypore *alias* Maharajgunge; pergunnah Cherand, which belonged to the judgment-debtor, Rai Moheswar Nath, is sold (for) Rs. 10,000."

The Procedure Code at that time required that property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a co-sharer. It is a question of fact in each case ; and in this case their Lordships think that the transactions of the 4th **[590]** and 5th January 1875, and the description of the property in the sale certificate, are conclusive to show that the entire corpus of the estate was sold.

They are of opinion that the High Court should have reversed the decree of the Subordinate Judge and have dismissed the suit with costs, and that a decree to that effect should now be made in reversal of the decree of the High Court. The appellant should have his costs in the High Court and also his costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Appeal Allowed.

Solicitors for the Appellant : Messrs. *Sanderson, Holland, and Adkin.*

C. B.

NOTES.

[The real question is what was put up for sale and what did the purchaser think he was buying :—14 Cal., 572 ; 17 Cal., 584 ; 27 Mad., 131 ; 10 Mad., 241 ; 9 M.L.T., 235.

As regards the extent of interest conveyed by the sale, *see* also (1890) 15 Bom., 13 ; (1890) 15 Bom., 87 : (1896) 21 Bom., 616;(1898) 22 Mad., 110 ; (1900) 27 Cal., 724 ; (1903) 27 Mad., 131.

As regards impeachment of the sale by the son, *see* also (1895) 20 Bom., 385 ; (1900) 3 Bom., L.R. 322 ; (1902) 4 Bom., L.R. 587 ; (1905) 29 Mad., 200 ; 31 All., 176 ; 34 Mad., 188 ; 11 M.L.T., 142.]

[17 Cal. 590]

PRIVY COUNCIL.

The 5th and 9th April, 14th and 31st July and 30th November, 1889.

PRESENT :

At the first hearing.

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

At the second hearing.

LORD WATSON, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, SIR B. PEACOCK, AND SIR R. COUCH.

The Secretary of State for India in Council...... ......Defendant

versus

Fahamidannissa Begum and others............Plaintiffs.

[On appeal from the High Court at Calcutta.]

Act IX of 1847—Assessment to revenue, finality of, upon land within an estate permanently settled—Non-liability to assessment of alluvial land re-formed within such an estate, no abatement having been made on account of previous diluvion—Act IX of 1847, construction of—Jurisdiction of the Civil Courts in regard to orders of revenue authorities.

A review of the legislation anterior to Act IX of 1847 shows that whilst it was intended to bring under assessment lands not included in the permanent settlement, whether waste or gained by alluvion or dereliction from sea or rivers, yet all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment.

Lands included in the permanent settlement having afterwards been covered by water, and having then been formed again on the sames ite, *Held*, not to be lands "gained" from the river by alluvion or dereliction within the meaning of Regulation II of 1819, that expression being confined to meaning lands gained since the period of the settlement.

The effect of Act IX of 1847 was merely to change the mode of assessment in the case of land already liable to be assessed under legislation [591] in force when that Act became law. It was not the object of that Act to bring under liability land re-formed on the site of land previously lost, within the area of a permanently-settled estate, the revenue upon which had been paid without abatement since the permanent settlement.

Where an order of the Board of Revenue, purporting to be made under Act IX of 1847, subjected land included in the permanent settlement, to assessment, *Held*, that the District Civil Court had jurisdiction (which, therefore, might be invoked as a matter of right) to entertain a suit brought by the landowner contesting that order, and to declare it unauthorized by law.

APPEAL from a decree (14th August 1886) founded upon the judgment of a Full Bench of the High Court, and reversing a decree (28th November 1884) of the Judge of Faridpur, and affirming a decree (21st March 1883) of the Subordinate Judge of that district.

This appeal, which was twice argued, questioned the correctness of the High Court's decision that the respondents, as proprietors of a mauza within the area of an estate, permanently assessed to the revenue in 1792, were entitled to hold, without further assessment, land within it that had accreted, by the action of water, upon the site of land previously lost by diluvion; notwithstanding that the Board of Revenue, purporting to act under Act IX of 1847, had maintained orders assessing the land to the revenue as an alluvial increment, falling within the scope of their powers under that Act.

The decree of the Court below gave effect to a judgment of a Full Bench (I.L.R., 14 Cal., 67), delivered by WILSON, J., in which concurred a majority, consisting of PETHERAM, C.J., PRINSEP, J., and O'KINEALY, J. (from whom MITTER, J., differed) upon the two questions referred by a Division Bench (FIELD and MACPHERSON, JJ.).

The two questions are stated at the commencement of their Lordships' judgment upon this appeal.

Mauza Mohun Sureswar, part of a zemindari in the Faridpur district, was originally within a divided share belonging to those whom the plaintiff represented. A smaller part of the same share belonged to Sama Churn Ganguli, who was made a co-defendant in the suit, not having been willing to join as a plaintiff. The principal defendant was the Government, whose local officers had contested [592] the plaintiff's claim to hold the entire mauza free of assessment alleging that the recent accretions were not parcel of the original mauza, and maintaining a right to assess them under Act IX of 1847.

This mauza in the year 1792, when partition of the whole zemindari was made, contained an area of 69 drones, or, 10,042 bighas. In 1793, under the permanent settlement, revenue was paid upon the mauza, and had been paid down to the date of the present dispute without any deduction on account of loss of area by diluvion, by which however the mauza had lost much from time to time, being near the confluence of the rivers Ganges and Brahmaputra. Before the year 1839 the 69 drones had been reduced to about 37. The Commissioner of the division made an order, dated 27th April 1838 (apparently in accordance with Regulation II of 1819, sections 3, 7, 20, and others), to the effect that as part of permanently settled lands the mauza Sureswar should be released to the parties then entitled to it as proprietors. After that, further diluvion occurred, and when, in 1859, the thakbust survey preliminary to the regular

survey was made, only 4½ drones or 652 bighas of the mauza were left above water. At the survey in 1860, which followed the thakbust, the whole mauza was under water, the residue having entirely disappeared.

In the meantime Act IX of 1847 was passed. Of this, the first section is quoted in their Lordships' judgment; the third enacted that in all districts of Bengal of which a revenue survey might be completed and approved by the Government, it should be lawful for the latter " to direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and to cause new maps to be made according to such new survey." The fifth section provided for proportionate reductions of revenue where it had appeared from inspection of the new maps that land had been lost by a revenue paying estate, and the sixth enacted that " whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any revenue-paying estate, they shall without delay assess the same according to the rules in force for assessing alluvial increments [593] and shall report their proceedings forthwith to the Sadr Board of Revenue, whose orders thereupon shall be final. The seventh section empowered the revenue authorities to take possession of islands thrown up in large and navigable rivers coming within the provisions of Regulation XI of 1825, section 4, clause 3, with a proviso that any party aggrieved by the act of the revenue authorities in taking possession of any island should be at liberty to contest it in the Civil Court. The ninth section enacted that, except as regarded the proprietary right to islands, no suit should lie against the Government or any of its officers, on account of anything done in good faith in the exercise of the powers conferred by this Act.

The next survey, termed the Diara survey, made by the Government, ten years after the last, under the powers conferred by Act IX of 1847, was for the purpose of ascertaining to what extent the estates bordering on the great rivers had increased or decreased in extent or area. In the interval between 1860 and 1867 there had been a large accretion to Mohun Sureswar, and at this survey 2,000 bighas were measured as newly thrown up. Upon the objection of the proprietors of the mauza about 650 bighas, part of the above, were released to them by the local revenue authorities as re-formed land of their estates, with reference to what had been proved to be the state of the ground in 1859. The proprietors, however, still objected, and claimed that the whole 2,000 bighas should be released to them as forming part of the original estate, and that no part thereof should be assessed as accretion. They accordingly appealed as to the remaining 1,350 bighas. On the 19th April 1881 the Board of Revenue found the facts against them; finding that it was not proved that this land existed at the time of the permanent settlement on its present site, but, on the contrary, that this land had certainly accreted since the survey preceding the last. The Board of Revenue decided upon the appeal of the proprietors, who were now respondents upon this appeal, that they were not entitled to the 1,350 bighas as a reformation upon the site of their original estate. They rejected the appeal, thereby approving and confirming the assessment of the land as an accretion, within the meaning of Act IX of 1847, by the local revenue authorities.

[594] The present suit was instituted on 10th April 1882, claiming a declaration that what was part of Mohun Sureswar had been wrongly subjected to assessment, and presenting the case that the land had before the diluvion been assessed as part of the zemindari, upon which the revenue had been paid

without any abatement, so that the local authorities had no right upon its re-appearance to assess it.

The Government, in their defence, denied that the land was a re-formation on the site of any part of the permanently-settled estate, and alleged that it was an accretion liable as land added to a revenue-paying estate within the provisions of Act IX of 1847, which rendered the assessment final and not questionable in the Civil Courts. The written statement said:—"The disputed land having been assessed by the revenue authorities under the provisions of Act IX of 1847, as being added to an estate paying revenue to Government, no civil suit is maintainable against Government." The issues raised the question of the competence of the Civil Courts, and also whether the land was or was not a re-formation on the site of formerly assessed land.

The Subordinate Judge found that the identification of the land with former parcels was beyond reasonable doubt, and held the Civil Courts to be competent to enquire into the legality of the assessment.

This judgment was reversed by the District Judge, who held that the revenue officer had acted rightly in assessing the land which he found to have been newly formed on the site of old land since the last survey but one. As to the competence of the Civil Courts, he decided in the negative in regard to the provisions of Act IX of 1847 and the decision of the High Court in *Dewan Ramjewan Singh* v. *Collector of Shahabad* (14 B. L. R., 221; 18 W. R., 64).

The Division Bench of the High Court, to which the plaintiffs appealed, in making their reference to a Full Bench, stated their own opinion to be that the Civil Courts were competent to try whether the revenue authorities had in any case acted within, or exceeded, as they held them to have done in this case, their authority (I. L. R., 14 Cal., 68—77). They observed that it had been found as a fact by both the Courts below that the land which formed the subject of suit **[596]** was a re-formation at one time or other on the site of land which had formerly been within the plaintiff's estate, as settled at the decennial and permanent settlements. The Judges added that there was no doubt that the plaintiffs had paid the full amount of revenue fixed at the permanent settlement on the sixty-nine drones, never having received any abatement for land diluviated or washed away.

The general effect of the Full Bench judgment (I. L. R. 14 Cal. 79-92) was that by the substantive law no land included in a permanently-settled estate was liable to further assessment; on the other hand, any land not so included was liable. Also, that the jurisdiction to decide the question of the liability of lands to assessment was no longer vested in the Collectors as revenue authorities, but in the Civil Courts. Although, in regard to lands of which the liability to be assessed was not in dispute, the assessment, as to the amount of it, was final, when made by the ultimate revenue authorities, the Civil Courts were competent where the liability to any assessment at all was in question; and it was for them to try whether the liability existed.

The result was that by the decree of the High Court the land in question was held, as part of mauza Mohun Sureswar, compressed within the permanently-settled estate of the plaintiffs, not to be liable to further assessment by the revenue authorities, notwithstanding the order of the Board of Revenue.

Upon this the Government appealed.

Mr. *W. E. Robinson*, Q. C., and Mr. *J. H A. Branson* for the Appellant.—The question being one of the construction and effect of Act IX of 1847, it was essential to consider the law enacted in the Regulations which preceded it. They referred to Regulations I of 1793, II of 1819, VII of 1822, XI of 1825,

and III of 1828. The effect of the coming into operation of Act IX of 1847 in the districts of Bengal was that land such as that now in question, which had been assessed by the highest revenue authorities as land gained by the action of the river, had been finally assessed, and the Civil Courts were not competent to entertain this suit. The land had been re-formed in the period between a former and the last Diara survey, and it had been assessed to the revenue under [596] s. 6 of Act IX of 1847 by means of the machinery provided, the maps showing it to be an excess over what had been measured at the preceding survey. The order of the Board of Revenue of 19th April 1881 was final under the Act. It could not be questioned in a Civil Court, and the land was liable to the assessment imposed. An examination of the revenue law of Bengal showed that there was no absolute right vested in the proprietor of land to complain in the Civil Courts that his land had been wrongly assessed by the revenue authorities, or assessed too highly; the province having been, by the Civil and Revenue Regulations, placed under two distinct systems, for the civil and fiscal administration, under which it was not conceded that there should be an appeal from the revenue to the civil authorities. The resort to the Civil Courts must rest upon such enactment as might be found. The true construction of Act IX of 1847 had been to take it away in such a case as that of the assessment of the accretion to Mohun Sureswar; and though there had been considerable difference of opinion on the subject, the decision followed by the District Judge in this suit was correct.

They referred to—*Dewan Ramjewan Singh* v. *Collector of Shahabad* (14 B. L. R., 221; 18 W. R., 64; 19 W. R., 127), *Chunder Sikhur Bundopadhya* v. *Obhoy Chunder Bagchi* (I. L. R., 6 Cal., 8); *Collector of Moorshedabad* v. *Roy Dhunput Singh* (15 B. L. R., 49); *Narain Chunder* v. *Tayler* (I. L. R., 4 Cal., 103), *Sarat Sundari Debi* v. *Secretary of State for India in Council* (I. L. R., 11 Cal., 784); *Wise* v. *Ameerun Nissa Khatoon* (L. R., 7 I. A. 73), *Budra Nissa Chowdhrain* v. *Prosonno Kumar Bose* [6 B. L. R., 255 (267)].

Field's Law of Evidence, 3rd edn., p. 203.

Rules for guidance of the Revenue Department by R. B. Chapman.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne*, for the Respondent contended that the exclusive jurisdiction of the revenue authorities, under Act IX of 1847, to decide on what assessment should [597] be fixed, did not empower them to assess land included in a permanently-settled estate. When the fact was in dispute whether land which the revenue officers proposed to assess was included within already settled and revenue-paying land or not, the Civil Courts could alone decide the question. The assessment in this case purported to be under Act IX of 1847, of which section 5 provided for the proportionate reduction of rent where it appeared that land had been taken from a settled estate by diluvion, and section 6 provided the mode of assessment where land had been gained by accretion. But this Act, while it suspended the further continuance of Regulations II of 1819 and III of 1828, which established tribunals, and fixed the procedure, for investigations regarding the liability of land gained from rivers, did not substitute any tribunal, or rules of procedure for determining contested questions as to the liability of any alluvial formation to be assessed at all. It did not even enact that persons interested should have an opportunity of objecting to the survey maps as to correctness. No mode of trying title in the Revenue Courts was established by this Act, nor was any appeal provided for. The whole aim of the Act was to provide a new mode of assessing, not revenue-paying land, but land never before assessed, and liable to be newly assessed. It was not designed to impose any new liability to assessment, which remained as fixed by the law before then in force. Its

language precluded its application to the accretion to Mohun Sureswar, which was not land "gained" from the river, but land which, having been covered by water, had again re-appeared without change of ownership, as in *Lopez* v. *Muddun Mohun Thakoor* (13 Moore's I. A., 467; 5 B. L. R., 521).

The following cases were also mentioned on both sides in reference .. "gained"—*Nogender Chunder Ghose* v. *Mohomed Esof* (10 B. L. R., 406; 18 W. R., 113); *Imambandi* v. *Hurgobind Ghose* [4 Moore's I. A., 403 (467)]; *Nani Lal Sahu* v. *Collector of Sarun* (6 B. L. R., Ap. 93) *Collector of Rajshahye* v. *Shamasoonderce Debea* (14 B. L. R., 219; 22 W. R., 324).

Mr. *W. F. Robinson*, Q. C., replied.

[598] Their Lordships' **judgment**, on a subsequent day (November 30th), was delivered by

Lord Herschell.—Two questions arise in this case. They were stated in the reference to the Full Bench by the Divisional Bench of the High Court in the following terms:—

1st.—Whether the provisions of Act IX of 1847 are applicable to land re-formed on the site of a permanently-settled estate, the revenue of which estate has been paid without abatement since the permanent settlement.

2nd.—Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the revenue authorities in respect of such land are *ultra vires*.

In their Lordships' opinion the second question which arises should be stated somewhat differently, viz., whether, if these provisions are not so applicable, a Civil Court has jurisdiction to review the decision of the Board of Revenue and to declare that the proceedings of the revenue authorities in assessing such land were *ultra vires*.

The distinction is not material in the present case, but it appears to their Lordships that if the Civil Court has jurisdiction at all that jurisdiction may be invoked as a matter of right, and that it is not a case for the exercise of the Court's discretion. If the party appealing to the civil tribunal can establish that the Court has jurisdiction, and that the Board have acted *ultra vires*, he is in their Lordships' opinion, entitled as of right to a decree.

Both the questions involved in this case depend upon the construction to be put upon the Act of 1847. The 1st section of that Act enacts "that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding liability to assessment of lands gained from the sea or from rivers by alluvion or dereliction, or regarding the right of the Government to the ownership thereof, shall from the date of the passing of this Act cease to have effect within the provinces of Bengal, Behar, and Orissa, and that all such investigations pending before the Collectors and Deputy Collectors in the said provinces at the said date shall be forthwith discontinued; and that no measures shall hereafter be taken [599] for the assessment of such lands, or for the the assertion of the right of the Government to the ownership thereof, except under the provisions of this Act."

The terms of this enactment make it clear that its intention and effect were merely to alter the the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time the Act was passed. It is therefore essential to a right interpretation of the enactment to examine carefully the state of the law at that time, and to see what lands were then liable to assessment, and whether

the prior legislation throws any light upon the meaning of the words "lands gained from the sea or from rivers by alluvion or dereliction."

By clause 3 of Regulation I of 1793, by which the decennial settlement was made permanent, it was declared to the proprietors that they and their successors would be allowed to hold their estate at such assessment for ever.

Regulation II of 1819 defines the right of the Government to the revenue of lands not included within the limits of estates for which a settlement had been made, and provides a machinery for their assessment. Clause 1 renounces all claim on the part of the Government to additional revenue from lands included within the limits of estates for which a permanent settlement had been concluded. Clause 3, after declaring and enacting that lands which were not included within the limits of estates for which a settlement had been concluded were to be liable to assessment, provides that the foregoing provisions were to be deemed applicable "to all lands gained by alluvion or dereliction since the period of the settlement, whether from the introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks." It then provides the mode of investigation in relation to the liability of lands to be assessed. It is not necessary for the present purpose to enter into the details of the machinery provided for: it is enough to say that the Collector is to make a judicial inquiry after full notice to the party interested, taking evidence upon oath and examining the documents presented. After the Collector has notified his decision to the party concerned, the [600] Board of Revenue are, upon a day to be fixed by public notice, and after hearing anything which the party may have to urge on his own behalf, to proceed to pass judgment in the case. If the Board of Revenue decide against the assessment, their decision is to be final except on proof of fraud or collusion; but if the Board declare the lands liable to assessment, the party may institute a suit in the Civil Court to try the justness of the demand. It may be further noticed that, by clause 7 of the Regulation, in cases where land is supposed to be liable to assessment under the provisions of clause 3, the Collector is to institute a full and particular inquiry into the circumstances and condition of the land in question at the period of the decennial settlement, and, in cases of alluvial land, into the period of its formation. The 31st clause appears to their Lordships to be also very important. After providing that nothing in the Regulation should be considered to affect the rights of proprietors of estates for which a permanent settlement had been concluded to the full benefit of waste lands included within the boundaries of the estate which may have been since reduced into cultivation, it proceeds:—"The exclusive advantages resulting from the improvement of all such lands were guaranteed to the proprietors by the conditions of that settlement, and it being left to the Courts of Judicature to decide in all contested cases whether lands assessed under the provisions of this Regulation were included at the period of the decennial settlement within the limit of estates for which a settlement has been concluded in perpetuity, and to reverse the decision of the revenue authorities in any case in which it shall appear that lands which actually formed at the period in question a component part of such an estate have been unjustly subjected to assessment under the provisions of this Regulation, the zemindars and other proprietors of land will be enabled, by an application to the Court, to obtain immediate redress in any case in which the revenue authorities shall violate or encroach on the rights secured to them by the permanent settlement."

The next enactment is perhaps even more important. "It is further hereby declared and enacted that all claims by the revenue authorities on behalf of Government to additional revenue from lands which were, at the period

of the decennial settlement, included [601] within the limits of estates for which a permanent settlement has been concluded, whether on the plea of error or fraud or any pretext whatever, saving of course lands expressly excluded from the operation of the settlement, shall be considered wholly illegal and invalid."

It is only necessary to notice in addition Regulation III of 1828. That Regulation recited that, partly from the number of revenue cases, and partly from the practice of the Courts in treating the appeals made to them as original suits, little or no progress had been made towards the settlement of the matter, and heavy arrears of such cases had accumulated. It accordingly provided for the appointment of Special Commissioners, to whom were entrusted the powers of the Court, all appeals to the ordinary Courts being abrogated in those districts in which such Commissioners had been appointed. So far the Regulation only altered the tribunal; it made no substantive change in the law. And inasmuch as no Special Commissioner now exists having authority in the district in which the lands in question are situate, the provisions relating to these Special Commissioners may be disregarded. The Regulation however modified in some respects the provisions of Regulation II of 1819. It enacted that decisions of the Boards of Revenue declaring the liability to assessment of lands should be carried into immediate execution, notwithstanding that the parties against whom the decisions had passed had sued to contest the decision in one of the established Courts of Justice. It further provided that all suits which might be instituted in the established Courts of Justice under the provisions of Regulation II of 1819 to contest decisions of the Board of Revenue should be heard and determined in the same manner as regular appeals, and no further pleadings should be required or received than the objections of the appellant to the decision of the Board, and the reply to these objections on the part of the revenue authorities, and that it should not be competent to the Courts to take further evidence, oral or documentary, unless it should appear that such evidence was tendered by the party adducing it to the Collector or the Board and was then rejected on insufficient grounds, or that such evidence was essential to the ascertainment of some fact material to the issue not fully inquired into in the course of the previous investigation. It will be [602] observed that these modifications of the law of 1819 only affect the procedure in cases of appeal to the ordinary civil tribunals of the country. They do not touch the right of appeal to such tribunals, or alter any of the rights previously assured to the owners of permanently-settled lands.

This review of the legislation prior to 1847 makes it, in their Lordships' opinion, clear that whilst it was intended to bring under assessment lands not included in a permanent settlement, whether they were waste or gained by alluvion or dereliction, all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment. And in addition to this, the proprietors of such estates were assured that they could protect themselves against any action of the revenue authorities which would tend to infringe upon their rights by appeal to the Civil Court. Their Lordships think it equally clear that lands within the limits of settled estates which had become covered with water, and afterwards re-formed, were not lands "gained from the river or sea by alluvion or dereliction" within the meaning of this legislation, which is confined to lands so gained "since the period of the settlement."

Returning now to the Act of 1847, it appears to their Lordships, as has been already observed, that its purpose was merely to change the mode of assessment in the case of a class of land already liable to be assessed under existing legislation, viz., land gained by alluvion or dereliction, which was not

included within the limits of a permanently-settled estate. The terms of the 1st section point to this and nothing more, and the details of the legislation support the same conclusion. It is only to lands "gained" from the sea or river by alluvion or dereliction that the legislation is applicable. Their Lordships have shown from an examination of the previous legislation the construction which must be put upon these words, that they must be limited to lands gained since the period of the settlement. It is only in relation to these lands, therefore, that the previous enactments are to cease to have effect. The 3rd section empowers the Government of Bengal, in any district in which a survey has been completed and approved by the Government, to direct decennially a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may [603] have taken place since the last previous survey, and to cause new maps to be made according to such new survey. Section 6 provides that "whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay duly assess the same according to the rules in force for assessing alluvial increments."

Their Lordships cannot think that it was intended by such a provision as this to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have been "added" to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of permanently-settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed because they had had the misfortune to be practically deprived of it for a time by an incursion of the sea or river. And no violence is done to the language of the enactment by rejecting a construction which leads to such a conclusion. On the contrary, it would be straining the language unnaturally to include such a case as that with which their Lordships are dealing. If, indeed, such legislation as is contained in the preceding s. 5 had been in force from the outset, so that as soon as land had been washed away from a permanently-settled estate there had been a proportionate reduction of the revenue payable to the Government, it would not have been unreasonable to regard the land when again free from water as land "added" to the estate, and to assess it accordingly. And it may be that when the new map shows that land has been washed away from a settled estate since the previous survey, a proportionate abatement ought to be made under the Act of 1847. Upon this it is unnecessary to pronounce an opinion. It is clear that the Act provides no machinery for making such abatement where the land was covered with water at the time of the original survey. It is only "when on inspection of the new map" it appears that land has been washed away that there is any legislative authority for making an abatement.

[604] Their Lordships arrive then at the conclusion that the first question propounded by the Divisional Bench of the High Court ought to be answered, as all the Judges have answered it, in the negative.

But then it is said that the local revenue authorities having assessed the land, and the Board of Revenue having made an order confirming their action, such order is, by the very terms of s. 6, made final, and that there is an express provision in s. 9 that no action in any Court of Justice shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act. Their Lordships cannot conceive that it was intended by these enactments to deprive the

owner of a permanently-settled estate of the protection assured to him by the Regulation of 1819. When once the conclusion has been reached that the provisions of the Act of 1847 are inapplicable to the case of re-formed land being part of a settled estate in respect of which the full assessment has continued to be paid, it appears to follow that neither the local revenue authorities nor the Board of Revenue can effectually render such land liable to assessment. It has been shown that under the previous legislation the owner of such lands was expressly given an appeal to the Civil Court as a protection against any attempt of the revenue authorities to subject him to additional assessment. The provisions contained in clause 31 of the Regulation of 1819 are in no way repealed or affected by the Act of 1847. The action of the revenue authorities was, therefore, in their Lordships' opinion, wholly illegal and invalid. Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the Civil Court. It is argued that where the acts done were within the powers conferred by the Act of 1847 the protection afforded by section 9 would be unnecessary, and that it must be applicable to acts done in assumed exercise of the powers conferred but really in excess of them. But full effect can be given to this section without holding that it deprives the owner of a permanently-settled estate of that right of appeal which is given to him in order that he may have determined in a Civil Court "the justness of the demand" of the revenue authorities.

[606] The case, as it appears to their Lordships, may be shortly put thus. The Board of Revenue have, in violation of the right solemnly secured to the owner of a permanently-setted estate, claimed to subject his land to an additional assessment, a claim which has been declared by legislation to be wholly illegal and invalid. Thereupon the owner exercises the right conferred upon him by the Regulation of 1819, and appeals by suit to the Court of Judicature to reverse the decision of the revenue authorities. In bar of this suit the answer set up is that a subsequent law empowers the revenue authorities to assess by new machinery, lands of a description within which the land in question does not fall, and makes the orders of the Board of Revenue thereupon final. Their Lordships are at a loss to see how this can be any answer. If it had been intended to take away from the proprietors of estates the power, by application to the Courts, to obtain immediate redress in any case in which "the revenue authorities shall violate or encroach on the rights secured to them by the permanent settlement," it would have been done in express terms and not by such enactments as are contained in the Act of 1847. It seems to their Lordships that it would be an erroneous interpretation of that statute to hold that it rendered the Board of Revenue supreme, and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the Appellant: *Solicitor to the India Office.*

Solicitors for the Respondents: Messrs. *Barrow & Rogers.*

NOTES.

[*See* also (1902) 30 Cal., 291.]

---

[606] CRIMINAL MOTION.

The 15th March, 1890.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Mojey and others............Petitioners

versus

The Queen Empress............Opposite party.

Sabya Nashyo and others............Petitioners

versus

The Queen Empress ....Opposite party.*

Cheating—Cheating by personation—Penal Code (Act XLV of 1860), ss. 415, 419—Registration of false divorce—Bengal Act I of 1876.

To constitute the offence of cheating under section 415 of the Indian Penal Code the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation, or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.

Where therefore certain persons were charged under section 419 of the Indian Penal Code, one with personating another person before a Registrar, and the others with abetting such personation and causing the Registrar to register a divorce under the provisions of Bengal Act I of 1876 with the wife of the personated person, and where the Lower Courts convicted the accused under that section, holding that as such registrations were voluntary and a source of gain to the Registrar harm was caused to the Registrar in mind and reputation by registering false divorces as well as by losing his fees in the future through persons being less likely to avail themselves of his services, and that therefore an offence under the section had been committed.

Held, that the possibilities contemplated by the Lower Courts were too remote; that the facts did not constitute an offence under the section; and that the conviction must therefore be set aside.

THESE two cases arose out of the conviction of five persons who were tried by the Deputy Magistrate of Rungpore and convicted, under section 419 of the Indian Penal Code, of the offence of cheating by personation. There were two separate trials in respect of two separate offences, and in each case there were three accused, one of them being charged and convicted in both cases.

In the first case, which gave rise to rule No. 79, one Mojey was charged with the substantive offence, and two persons, named Najebullah and Yar Nashyo, were charged with abetment of the offence. The facts found by the Deputy Magistrate to be [607] conclusively proved in the case were that Mojey had personated one Samir before the Marriage Registrar and dishonestly induced him to register a divorce with Samir's wife under the provisions of Bengal Act I of 1876, and that the other two accused abetted him by identifying him as Samir.

In the case in respect of which rule No. 82 was granted, the accused were Sabya, Shahir, and Najebullah, the offence charged being precisely similar to

* Criminal Motions Nos. 79 and 82 of 1890 against the orders passed by A. Mackie, Esq., Sessions Judge of Rungpore, dated the 14th of February 1890, affirming the orders passed by Moulvie Abdul Khalique, Deputy Magistrate of Rungpore, dated the 17th of January 1890.

the offence in the other case, namely, falsely personating one Kinu and causing the Registrar to register a divorce with Kinu's wife.

The Deputy Magistrate convicted the accused in both cases, and sentenced the principals in each case, viz., Mojey and Sadya, to rigorous imprisonment for two months under section 419 of the Indian Penal Code, and the others, as abettors under that section read with section 114 of the Code, to rigorous imprisonment for one and a half months, Najebullah being convicted and sentenced in both cases.

In each case an appeal was preferred to the Sessions Judge, who however upheld the convictions.

The accused then moved the High Court, and two rules were issued.

In both the Lower Courts it was contended that no offence had been committed assuming the finding of facts to be correct.

The reasons given by the two Lower Courts in support of their finding that the facts constituted an offence under section 419 of the Penal Code are fully stated in the judgment of the High Court.

At the hearing of the rules, Baboo *Umbica Churn Bose* appeared for the petitioners in both cases. The Deputy Legal Remembrancer (Mr. *Kilby*) for the opposite party.

The **judgment** of the High Court (NORRIS and MACPHERSON, JJ.) was as follows:—

In this case the appellant Mojey has been convicted by the Deputy Magistrate of Rungpore of an offence under section 419, Indian Penal Code, and the appellants Yar Nashyo and Nejebullah of abetment of that offence.

The first petitioner was sentenced to rigorous imprisonment for two months, and the other two to rigorous imprisonment for a month and a half each. On appeal to the Sessions Judge the convictions and sentences were upheld.

[603] We granted a rule to show cause why the convictions should not be set aside

The facts of the case are as follows. The petitioner Mojey falsely pretended to a Registrar appointed under the provisions of Bengal Act I of 1876, "an Act to provide for the voluntary registration of Mahomedan marriages and divorces," that he was one Samir, and fraudulently caused the Registrar to register a fictitious deed of divorce, whereby Samir purported to divorce his wife. The other petitioners identified Mojey to the Registrar as Samir when they well knew that he was not Samir, and that the deed of divorce which he registered was a fictitious document. The Registrar was paid by the petitioners, or one of them, one rupee for registering the deed.

The question we have to decide is whether upon these facts the convictions can be sustained. We are of opinion that they cannot. Section 415, Indian Penal Code, thus defines cheating—"Whoever by deceiving any person fraudulently or dishonestly induces the preson so deceived to deliver any property to any person or to consent that any person shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to "cheat." And section 416, Indian Penal Code, thus defines cheating by personation:—"A person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is."

It is clear that the petitioners deceived the Registrar, and it is clear that they thereby intentionally induced him to register the fictitious deed of divorce —a thing which he would not have done unless he had seen so deceived.

Did this act of registering the fictitious deed cause, or was it likely to cause, damage or harm to the Registrar in body, mind, reputation, or property? We think not.

The Deputy Magistrate says:—"Remembering that these registrations are entirely optional with the parties, it is clear that the desire of the parties to get a marriage or divorce registered or not [609] registered depends principally upon the estimation in which the public and the judicial Courts would hold such registration. If a belief gets ground amongst the people that false marriages and divorces can be registered as well as a true marriage or a divorce, I am certain nobody would consider it worth while to spend any money or take any trouble for such registrations. Now these registrations are actually a source of gain also to the Marriage Registrar. I believe therefore that such false registrations not only do harm the reputation of such a semi-private officer, but also go a great way towards the diminution of the Marriage Registrar's income."

The Sessions Judge says:—" After careful consideration I am of opinion that harm was caused to him (the Registrar) both in mind and reputation by the false registration. Such registrations are voluntary, and it is easily seen that a Registar before whom a false divorce has been registered suffers not only in reputation, but also by losing his fees in future through people declining to avail themselves of his office"

The arguments of the Deputy Magistrate and the Sessions Judge were adopted by Mr. *Kilby*, who urged nothing not contained in the passages quoted. We cannot agree with these arguments. We have to deal with the isolated acts of the petitioners, and to consider whether the registering of the fictitious deed, which was the act done by the Registrar in consequence of the deceit practised by the petitioners, "caused or was likely to cause damage or harm to the Registrar in body, mind, reputation, or property." We think that the "damage or harm" must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom. The possibilities contemplated in the argument are in our judgment too remote to be in contemplation of the statute. We therefore set aside the conviction of the petitioner Najebullah in this case and in the case No. 82, in which he has been convicted of a similar offence and sentenced to rigorous imprisonment for a month and a half.

With regard to the other petitioners, the terms of imprisonment have expired, and their pleader does not ask us to interfere with their convictions.

This judgment will govern motion No. 82.

H. T. H. *Convictions quashed.*

NOTES.

[*See* also (1905) 2 C.L.J. 524; (1904) 26 All., 380.]

[610] ORIGINAL CIVIL.

The 13th March, 1890.

PRESENT:

MR. JUSTICE WILSON.

Degumbari Debi
versus
Aushootosh Banerjee and others.*

Security for costs—Practice—Suit for money—Civil Procedure Code (Act XIV of 1882), s. 380, (Act VI of 1888), sec. 5.

A suit to recover certain specified articles and money alleged to have been wrongfully seized and taken possession of by the defendant or to recover the value thereof is a suit for money within the terms of the second paragraph of s. 380 of the Civil Procedure Code, the term "suit for money" as there used being wider than a suit for debts.

Circumstances under which the Court will order security for costs to be given by a female plaintiff in such a suit.

THIS was an application on behalf of the defendants for an order directing the plaintiff, within a time to be fixed by the Court, to give security for the payment of all costs incurred or likely to be incurred by the defendants, such security to be to the satisfaction of the Registrar. The application was made under the provisions of s. 380 of the Code of Civil Procedure as amended by Act VI of 1888, upon notice to the plaintiff, and was based on an affidavit of Mohendronath Banerjee, one of the defendants, and on the pleadings in the suit and certain proceedings in the goods of Prosunamoyee Debi, deceased.

The plaintiff instituted the suit on the 4th January 1890, in her individual capacity and also as administratrix of the property and effects of Prosunamoyee Debi deceased. In her plaint she stated that Prosunamoyee died on the 16th April 1889, possessed of considerable property consisting of two Municipal Debentures of the value of Rs. 1,000 each, and of ornaments, utensils, cash and clothes of considerable value which was her own absolute *stridhan*, and that she, the plaintiff, was her sole heir, according to Hindu law; that she used to reside with the deceased, and that the property claimed in the suit was kept by the deceased in an iron safe, the key of which, the deceased gave her; that shortly after the death of the deceased the defendants, who were the sons of the brother of the husband of the deceased forcibly took the [611] key away from her, the plaintiff, and took possession of the property in the safe.

The plaint went on to state that the plaintiff had applied for letters of administration to the estate of the deceased, and that on a citation being issued the defendants had lodged a caveat, but that such caveat was subsequently withdrawn and letters of administration granted to her on payment of the duty on the rupees 2,000 worth of Municipal Debentures in her possession, upon her undertaking to pay the duty on the value of the assets she might subsequently recover. She stated that she had demanded the property so seized by the defendants, but they had not complied with her demand, and she annexed to her plaint a list of the property which she sought to recover. The list contained a number of gold and silver ornaments, utensils and clothes of

* Motion in Original Civil Suit No. 4 of 1890.

considerable value, the value being given, and also stated that there was cash to the extent of Rs. 3,000 and ten-rupee notes to the extent of Rs. 500 in the iron safe, and the prayer of the plaint in the first place asked for a declaration that the debentures and property in suit were the *stridhan* of the deceased and, subject to the payment of the debts, belonged to the plaintiff, and then went on to ask that the defendants might be directed to deliver up the property in suit as specified in the list, or to pay to the plaintiff as administratrix the sum of Rs. 12,318, the value thereof.

In their written statement the defendants denied the allegations of the plaintiff so far as the merits of the case were concerned.

In his affidavit in support of the application, Mohendranath Banerjee *inter alia* alleges that, in applying for letters of administration, the plaintiff had stated that the property other than the Municipal Debentures, of which Prosunamoyee Debi died possessed was not likely to come into her possession, and that she had been unable to ascertain in whose possession it was, or whether it was still in existence; that the suit was a vexatious one; that the plaintiff was residing with her nephew Koylash Chunder Gangooly in the district of Hooghly, and was wholly dependent on him for her food and clothing, having no means of her own, and that she was not possessed of, or in any way entitled to, any immoveable property in British India or elsewhere.

[612] The plaintiff and Koylash Chunder Gangooly filed a joint affidavit in reply to the defendants, in which the plaintiff denied that the suit was vexatious or that she was without means and dependent on her co-deponent for support, and stated that she was prosecuting a perfectly just claim; and Koylash Chunder Gangooly equally denied the allegation that the plaintiff was dependent on him for her support and maintenance. It was not, however, denied that the plaintiff was not possessed of any immoveable property in British India.

Mr. *Bonnerjee*, for the Defendants, in support of the application.

Mr. *T. A. Apcar*, for the Plaintiffs, *contra*.

Mr. *Bonnerjee*.—This is a suit for money within the meaning of the last clause of s. 380 of the Code of Civil Procedure, and although I do not dispute that the Court has a discretion under that clause to make the order or not as it thinks fit, this is a case in which the Court should act under the section. It is quite clear from the plaint and the proceedings on the application for letters of administration (to which he referred at length) that this is a more speculative suit.

Mr. *T. A. Apcar*.—This is not a suit for money within the meaning of s. 380, but a suit to recover certain specified articles and a certain specified sum alleged to have been wrongfully and forcibly taken possession of by the defendants, and the section could never have been intended to apply to a suit of this description. The last clause of the section was no doubt added by Act VI of 1888 as in some way to compensate for the amendment of the Code which exempted women from arrest under a decree in certain cases. The amendment, however, did not exempt women from arrest in all cases; and it could never have been intended that the last clause of s. 380 was to be applied to cases of this description, as the effect would be in numerous cases to prevent female plaintiffs from prosecuting just claims. This is not a speculative suit, and the proceedings show that the plaintiff is *bonâ fide* prosecuting a just claim. The application is therefore not one which the Court should grant, being merely an attempt to stifle the suit.

Mr. *Bonnerjee* in reply.

[613] The **judgment** of the Court (WILSON, J.) was as follows:—

On this application two questions arise. The first is whether this case falls within the enactment. The enactment in question is the second paragraph of section 380 of the Procedure Code, which paragraph has been added by a recent enactment, Act VI of 1888, and is as follows:—"On the application of any defendant in a suit for money in which the plaintiff is a woman, the Court may at any stage of the suit make a like order" (that is an order for security for costs) "if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India independent of the property in suit" The first question, then, is whether this is a suit for money. It is a suit in which the plaintiff claims in the alternative to recover certain gold and silver ornaments, chests, plates, clothing and other things, and Rs. 3,000 in cash and Rs. 500 in notes said to be in one of the chests, or for the value of such things. As to the meaning of the section, I think it clear that a suit for money is wider than a suit for debts. As to Rs. 3,500 of the Rs. 12,318 claimed, the suit is clearly a suit for money. As to the rest we must look at the substance. Suits brought against a person for depriving the plaintiff of goods are in ninety-nine cases out of a hundred met by money damages. I think that this is a suit for money damages, and therefore within the section.

That being so, is it a case in which the order should be made? There is no dispute that the plaintiff has not sufficient immoveable property to be security for the defendant's costs, for she has none at all. I should be very sorry to lay down, and I guard myself against laying down, that this section is imperative on the Court, and that the Courts have no discretion but to order security to be given; but having regard to the circumstances of this case, I think I ought to exercise that discretion in favour of making the order. The order will therefore be made accordingly.

Application granted.

Attorney for Plaintiff: Baboo *Kader Nath Mitter.*

Attorneys for Defendant: Messrs. *N. C. Bural and Co.*

NOTES.

[*See* also (1894) 21 Cal., 283; (1898) 23 Bom., 100; (1899) 3 C.W.N. 753; (1908) 10 Bom. L. R.. 337; (1907) 31 Bom., 308.]

[614] ORIGINAL CIVIL.

The 17th March, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE PIGOT.

Poreshnath Mookerjee and others............Defendants

versus

Omerto Nauth Mitter............Plaintiff.*

Receiver—Joint estate—Mortgage—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 503.

In a suit for partition of a joint estate the words "property the subject of a suit" in section 503 of the Civil Procedure Code mean the whole joint estate.

In such a case "the owner" in section 503 (d) means the whole body of owners to whom the joint estate belongs.

The Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned in the hands of a receiver, and to order that a receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate.

THIS was a suit for a declaration that an Indenture (being an agreement to mortgage) dated the 13th May 1886, and executed under the authority of an order dated the 6th May 1886, by Mr. L. P. D. Broughton the receiver appointed in two pending suits, created a valid charge in favour of the plaintiff over the properties specified in the schedule to the agreement (being the whole of the joint estate in which the defendants were interested), and for an account and sale.

The present defendants were also parties to the above pending suits in which the receiver was appointed, and the agreement was executed by the receiver in his own name and purported to create a charge on the entire property. The agreement was drawn and caused to be executed by the attorney for the plaintiffs in one of the above suits, at whose instance the order of the 6th May 1886 was obtained and who had the carriage of the order.

The defendants admitted that the plaintiff advanced the money, and that it was applied for the purposes for which the Court gave the receiver liberty to raise money, but they contended that the order was made without jurisdiction, that the plaintiff should have made an application in the suit in which the order was made, and that the receiver had no authority to bind the parties in his own name. The decree in the lower Court was in the plaintiff's favour.

[615] The arguments in the lower Court sufficiently appear from the judgment of Mr. Justice TREVELYAN, which (so far as is necessary for the purposes of this report) was as follows:—

"Several questions were raised by counsel for the defendants. It was first contended that the order authorising the mortgage was made without jurisdiction, and was therefore void. Mr. Phillips for one of the defendants argued that the Court had no jurisdiction in a partition suit to appoint a receiver, and that it had no jurisdiction to authorise the receiver to deal with the property. I cannot assent to this argument. I do not think there can be any doubt that property sought to be partitioned is the subject of a partition suit; and if

* Original Civil Appeal No. 21 of 1889 against the decree of Mr. Justice TREVELYAN, dated the 4th of May 1889.

that be so, section 503 of the Civil Procedure Code authorises the Court to appoint a receiver Receivers have frequently been appointed in partition suits in this Court. Where it is necessary for the preservation of the estate it has always, so far as I know, been taken to be law in this Court that the Court may authorise the receiver to charge the property. The Court, if it can appoint a receiver has ample powers to provide for the management of the property; and if the property is in danger of being lost, the Court has surely power to prevent such loss by raising money on it. The Court can deal with property which is under its control just as completely as the owner of the property can deal with it. How far the Court ought to allow a sale or a pledge of course depends upon the circumstances of each case. I think it is clear that the Court has jurisdiction.

"The next contention which I think I must notice is that this suit does not lie, but that the plaintiff's remedy (if any) is by application in the suits in which the order was made. The fact that the plaintiff may have a remedy in those suits does not exclude his remedy in this suit. I know of no provision of law which takes away his remedy, and no such provision or precedent has been cited to me. It is by no means clear that the present plaintiff could have in the other suits obtained the relief he now seeks. He might have in those suits compelled the drawing up of a formal mortgage, but it may be a question whether he could have therein asserted his remedies under such mortgage.

"The next point was that the receiver could not have bound the parties by an agreement made in his own name. The order of [616] the 18th of March 1886, under which the receiver acted, gave him liberty to raise Rs. 30,000 by mortgage of the joint estate at such rate of interest and upon such terms as he should think fit. He was also given liberty to execute the mortgage and get the same registered on behalf of the parties interested in the joint estate.

"This question can, I think, be answered by reference to the case of *Wilkinson* v. *Gungadhur Sircar* (6 B. L. R., 486), which is the leading case in this country on the position of a receiver. Mr. Justice PHEAR there points out (p. 488) that in his opinion whatever the receiver rightly does with regard to the property under his control he does in the character of agent for the owners of the property. I think that this principle applied just as much with regard to parties to the suit who opposed his appointment or who objected to his receiving particular powers, as it does to the parties at whose instance he is appointed or set in motion. This being so, the ordinary law of principal and agent applies, and the defendants other than Kissory Mohun Roy and Komal Coomary Dabee must be held liable for the acts of their agent."

The plaintiff obtained an ordinary mortgage decree for an account and sale, but no personal decree except as to costs, with liberty to apply for an order for sale of other property the subject-matter of the suit.

Five of the defendants appealed.

Mr. *Phillips* and Mr. *Handley* for the Appellants.

Mr. *Bonnerjee* and Mr. *T. A. Apcar* for the Respondent, Omerto Nauth Mitter.

Mr. *M. Zorab* for the Respondent, Radha Nath Mookerjee.

Mr. *Phillips*.—The order of the 6th May 1886 goes beyond what the Court has power to do, and does not bind the shares of the defendants. The Court cannot interfere with the enjoyment of the other co-sharers, or place the whole of the joint estate, out of which the plaintiff seeks to have his share partitioned, in the hands of a receiver and give the receiver liberty to raise money on the security of the entire estate. If all the co-sharers desire it, a receiver may be

appointed in case of necessity. The plaintiff should have obtained a proper mortgage. The agreement to mortgage was made without our knowledge. We are [617] prepared to pay the money we have received with proper interest, but not compound interest. In this case there was no necessity. The decree gives a power of sale of property other than that included in the agreement, which is clearly wrong.

Mr. *Bonnerjee* for the Plaintiff Respondent.

Mr. *Phillips* in reply.

The following authorities were cited in the course of the arguments:— *Hargrave* v. *Hargrave* (9 Beav., 549); *Tyson* v. *Fairclough* (2 Sim. & Stu., 142); *Searle* v. *Smales* (3 W. R., Eng., 437); *Gibbins* v. *Howell* (3 Mad., 469); *Calvert* v. *Adams* (2 Dick, 478, and *vide* p. 602); *Evans* v. *Matthias* (7 E. & B., 590, at p. 602); *Porter* v. *Lopes* (L. R., 7 Ch. D., 358); *Hubbard* v. *Hubbard* (2 H. & M., 38); *Wilkinson* v. *Gungadhur Sircar* (6 B. L. R., 486); *Sidheswari Dabee* v. *Abhoyeswari Dabee* (I. L. R., 15 Cal., 818); Daniell's Chancery Practice, 6th ed. (1884), p. 1673; Seton on Decrees, 4th ed. (1879); p. 1004; Code of Civil Procedure (Act XIV of 1882), s. 503; Beach on Receivers (ss. 4, 47, 79, 194, 492); Kerr on Receivers (ed. 1882), pp. 79, 80, 148.

The **judgment** of the Court (PETHERAM, C.J., and PIGOT, J.) was as follows:—

This is an appeal by five out of a numerous body of defendants in an action brought to enforce a charge upon certain estates belonging to all the defendants jointly, and which the plaintiff contends was created by a deed dated 13th May 1886, executed by Mr. Broughton in the character of receiver, he having been appointed receiver of all the estates in question by an order of this Court dated 18th March 1886, made in two consolidated suits which were then pending between the various defendants to the present suit, for the partition of such estates, and who had by another order of this Court, dated 6th May 1886, been authorised to raise the sum of Rs. 50,000 on the security of the estates which had been so placed in his hands for the purpose of paying the putni and mourasi rents which had fallen due on 1st May 1886. Neither of the present appellants was seeking partition in either of the two consolidated suits, and the applications upon which the orders in question were made were resisted by them and were made adversely to them notwithstanding such resistance. The [618] facts are not in dispute, and the questions which have been argued before us on this appeal are—(1) whether the Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned in the hands of a receiver; and (2) whether it has any jurisdiction to order that a receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate. It is clear that if the Court had jurisdiction to make the orders, no question can be raised in this suit as to their correctness, they having been made by a Court of competent jurisdiction in the course of other proceedings, and being now existing orders of such Court.

The first question mainly depends on the meaning to be given to the words "property the subject of a suit" in section 503 of the Code of Civil Procedure, when the suit is one for the partition of a joint estate. Mr. *Phillips* for the appellants has contended that the sole purpose of such a suit being to give the plaintiff possession of a divided share, and for that purpose only to divide the joint property, the only property which is the subject of the suit is the plaintiff's share, whether joint or divided, and that the Court has no jurisdiction to place anything more than that share in the hands of a receiver. For the plaintiff it was contended that the property in suit is the whole joint estate, inasmuch as until it has been partitioned the plaintiff has an interest

in every portion of it. I think that the contention of the plaintiff must prevail, as not only is he interested in every portion of the joint property before it is partitioned, but by the partition the title of each of the joint owners is changed, the decree being carried out by mutual conveyances between the joint owners of the interest of the others in the several shares allotted to each. This view appears to be in accordance with the practice of this Court, as it seems that receivers of the entire joint estate have been appointed in partition suits, and is also in accordance with the practice of the Court of Chancery in England acting under the Judicature Act, 1873, section 25, sub-section 8—see *Porter* v. *Lopes* (L. R., 7 Ch. D., 358) : and with the practice of that Court before the passing of that Act, *Searle* v. *Smales* (3 W. R., Eng., 437), even where there had been no exclusion.

[619] The second question depends on the meaning of section 503, sub-section (*d*). By that sub-section the Court has power to grant to a receiver such powers for the protection, preservation, and improvement of the property as the owner himself has. It is in my opinion clear that when it is decided that the property in suit means the entire joint property, it follows that the words "the owner" at the end of the sub-section must mean the whole body of owners to whom the joint estate belongs; and what we have to decide is, whether a power to raise money on the property itself *may* be necessary for its own preservation. In considering this question, we must have regard to the conditions under which estates are held in this country, one of which is that they are liable to be sold if the rents and revenue due upon them are not paid; and when that fact is appreciated, it is apparent that the power to take the estate out of the hands of the owners and to place it in the hands of a receiver with power to do what is necessary for its protection must include a power to raise money to pay rent or revenue when it is necessary to do so; as to hold otherwise would be to hold that a receiver appointed to protect the estate could not interfere to prevent its being lost to the parties interested, although his appointment put it out of their power to protect it themselves. For these reasons I think that this suit was properly decreed, and this appeal must be dismissed with costs.

Appeal dismissed.

Attorney for the Appellants: Mr. *A. St. John Carruthers.*

Attorneys for the Respondents: Messrs. *Sen & Co.*, and Baboo *Poorno Chunder Mookerjee.*

A. A. C.

NOTES.

[*See* also (1907) 6 C. L. J., 404; (1909) 14 C. W. N., 248; (1904) 6 Bom. L. R., 1140.]

[620] ORIGINAL CIVIL.

The 17th March, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE PIGOT.

Suddasook Kootary............Defendant

versus

Ram Chunder............Plaintiff.*

Trust—Parol trust—Trustee—Executor de son trot—Donatio mortis causa —*Exceptions to Report—Account—Appeal as to costs—Limitation.*

One *T.C.*, in anticipation of death, handed over his property to the defendant his brother, and verbally directed him to pay certain specified debts and to apply the surplus for the necessities and support of his family. *Held* that a good trust was created at any rate so far as the debts were concerned.

The defendant claimed to have paid to *S.*, the widow of one *L.*, the deceased brother of *T.C.* and himself, the sum of Rs. 7,273-1 alleged to have been owing by *T. C.* to *L.* In a suit by the son of *T. C.* for an account, the Assistant Registrar found (*inter alia*) in his report that Rs. 1,975 had been paid to *S.* by the defendant, and that the balance Rs. 5,298-1 had been taken over by the defendant by arrangement with *S.* (the first payment being time-barred); *held* that a good trust in favour of *S.* for the whole debt due to her was created in respect of the monies which reached the defendant's hands applicable under the terms of the mandate to him for the payment of her claim; that no question arose as to limitation; and that it was unnecessary to consider whether the defendant, if acting as an executor *de son tort*, had power to pay it though barred.

Held also that the trust was not in the nature of a testamentary disposition, though it was created in anticipation of death, and could not after the death of *T. C.* be recalled by his representatives—*Peckham* v. *Taylor* (31 Beav., 250) followed.

Query—whether as to the application of the surplus after payment of the specified debts the defendant was in the position of an executor *de son tort*, and that, practically, it may in some cases be difficult to avoid the application to Hindus of the principles upon which executorship *de son tort* rests—*Jogender Narain Deb Roykut* v. *Temple* (2 Ind. Jur., N. S., 234) referred to.

Semble that even upon the findings of the lower Court the order as to costs would have to be altered materially in favour of the defendant.

THIS was an appeal from an order of Mr. Justice TREVELYAN made upon exceptions to a report of the Assistant Registrar, and from a decree made by Mr. Justice NORRIS upon further directions.

The suit was brought by one Ram Chunder by Goomtee Bibee, his mother and next friend, the widow of one Teicum Chand Kootary, [621] a deceased brother of the defendant Suddasook Kootary. The decree in the cause, made on the 18th August 1885, directed an account to be taken of the stock in trade and outstandings and effects of the shop or of the business carried on by Teicum Chand at Puggiaputty in the plaint mentioned, and of the jewels and gold and silver ornaments belonging to the plaintiff or to Goomtee Bibee (his mother) or Rookmai Bibee (his sister) come into the hands of the defendant subsequent to the death of Teicum Chand.

* Original Civil Appeal No. 37 of 1889 against the order of Mr. Justice TREVELYAN dated the 14th May 1889, and against the decree of Mr. Justice NORRIS dated the 3rd September 1889.

The report of the Assistant Registrar was excepted to by the plaintiff upon the grounds that the defendant should have been charged with a larger quantity of goods than that admitted to have been received by him, and that he should not have been allowed in account the sum of Rs. 3,755, the marriage expenses of Rookmai Bibee, the daughter of Teicum Chand. Mr. Justice TREVELYAN held upon the first exception that it was for the plaintiff to prove the receipt by the defendant of any portion of the stock in trade other than that admitted by him, which he had failed to do; and upon the second exception the learned Judge held upon the evidence that the defendant was entitled to the marriage expenses of Rookmai Bibee as claimed by him. The plaintiff's exceptions were therefore disallowed.

The defendant also filed exceptions claiming to be allowed Rs. 2,507 the expenses of the *shrad* of Teicum Chand, which he alleged was, in accordance with the customs of his community, performed at Bikaneer. As to this Mr. Justice TREVELYAN, differing in opinion from the Assistant Registrar, held that the *shrad* was performed at the cost of the defendant, and he therefore was entitled to be reimbursed the amount. The defendant further claimed to have paid to one Sara Bibee, the widow of Luchmun Kootary, the brother of himself and Teicum Chand the sum of Rs. 7,273-1, the amount of a debt alleged to have been owing by Teicum Chand to Luchmun. The following are the portions of the judgment of Mr. Justice TREVELYAN relating to this claim:—

"There is no doubt that this money was either lent by Luchmun to Teicum Chand or deposited by Luchmun with Teicum Chand. A *hath chitta* was granted for Rs 8,000 on the 9th of Choit, Sumbut 1931, by Teicum Chand in favour of Luchmun. In the year 1936 four sums aggregating Rs. 350 were paid to Luchmun's [622] widow by Teicum Chand. I think that the Assistant Registrar is right in finding that these sums were paid by Teicum Chand on account of this debt. An entry of their payment appears in his books in his handwriting. Luchmun's widow says that this payment was made on account of the debt; and if there were not this evidence, I think it would be right to assume that these sums were so paid on account of the debt since Teicum Chand's death. The defendant has paid in cash to Luchmun's widow the sum of Rs. 1,975, and by arrangement with her he has taken over the liability for the remainder of the debt.

"Baboo Grish Chunder has held that inasmuch as the payments by Teicum Chand were more than three years after the date of the *hath chitta* the claim is barred . . . With a good deal of hesitation I think I must hold that the Assistant Registrar was right in deciding that the debt was barred by limitation and for the reasons given by him. I have been considering whether, having in view the fact that the debtor and creditor are both dead, it ought to be possible to assume that the payment made by the debtor was within the time of limitation, and that such payment beyond the time within which a loan is barred would show that the money was deposited, or that there had been an acknowledgment or some other mode of taking the case out of the statute.

"I do not see my way to differ from the Assistant Registrar on the question, but, according to the view which I take of this case, it is not necessary for me to decide this question.

"As to the second point (whether the transfer in accordance with the arrangement made by the defendant with Sara Bibee amounted to payment), a portion of the money was no doubt paid. On consideration I think that what was done as to the rest did not amount to payment. I assume that the defendant was in the position of an executor.

"An executor can only charge the estate with money he has paid. By an arrangement of the kind made in this case he may possibly discharge the estate from liability to the creditor, but he does not necessarily charge it with liability to himself. If it were otherwise the result would be that an executor coming to an arrangement of this kind, and subsequently omitting to pay the creditor, or paying him by arrangement a smaller sum than the [623] amount due, would gain a personal advantage; whereas the benefit of any such transaction ought to enure to the estate which he represents. Counsel has not cited any case where an executor has received credit for anything but actual payment in cash. It seems to me that I must hold that the defendant is not entitled to credit for the sum not paid by him. . . I think that the defendant is practically in the same position as an executor, who is undoubtedly permitted to pay a time-barred debt. It seems to me that this principle applies to any person administering an estate. Even if the defendant be an executor *de son tort*, he is entitled to credit for such payments as might properly have been paid by him if he had been executor. In the result I allow this objection only in respect of the money actually paid, *i.e.*, Rs. 1,975"

The learned Judge in dealing with the costs of the hearing and of the objections ordered the defendant to pay his own costs of the second day's hearing, and directed the plaintiff's next friend to pay the rest of the defendant's costs. The plaintiff's costs of the second day's hearing were ordered to come out of the estate, and the rest of his costs were to be borne by his next friend.

The case came up for further directions as to the costs of the reference and of the suit before Mr. Justice NORRIS, who (after stating the facts) delivered the following judgment:—

"The result was the learned Judge varied the Assistant Registrar's report by allowing the defendant in all Rs. 4,475 out of Rs. 9,973-1, and disallowing his claim as to Rs. 5,298-1 —the result being that the Rs. 11,197 brought into Court was increased by Rs. 4,475.

"The matter now comes on before me on further directions, and the question as to who is to pay the costs of the suit and reference has been argued. I have had some difficulty in determining what order I ought to make, as the hearing was not before me. But after consideration I think the right thing to do is to have regard to the facts of the case and to the rules as to costs in suits against persons in the defendant's position (Mr. Justice TREVELYAN treated him as an executor); and unless an executor is guilty of fraud or wrong-doing he is entitled to have his costs of the suit brought against him paid out of the estate, and I think in [624] this case the defendant is entitled to the general costs of the suit out of the fund in Court. On the other hand, I think the defendant must pay the whole of the costs of the reference which was rendered necessary owing to the position he took up claiming to credit himself with Rs 9,973-1. He failed as to a moiety of this (Rs. 5,298), and I think he must pay the whole of the costs of the reference. The costs must be taxed on the proper scale, and when taxed set off against one another, the balance to be paid over by the party owing the largest amount. The costs of the next friend must come out of the funds in Court. The costs of argument on further directions to be costs in the reference."

The defendant appealed from the order and decree as to the sum of Rs. 5,298-1 (being the residue of Rs. 7,273-1) disallowed in his accounts, and as to costs. The plaintiff also filed a memorandum of cross objections as to the sum of Rs. 3,755 allowed to the defendant on account of the marriage expenses of Rookmai Bibee, as to the sum of Rs. 2,507 allowed for the *shrad* expenses of Teicum Chand, and also as to the sum of Rs. 1,975, being portion of the

sum of Rs. 7,273-1 allowed as having been paid by the defendant to Sara Bibee, and as to costs.

Mr. *Bonnerjee* and Mr. *T. A. Apcar* for the Appellant.

Mr. *Woodroffe* and Mr. *Sale* for the Respondent.

Mr. *Bonnerjee* —The domicile of Teicum Chand was the Native State of Bikaneer. The mandate therefore by him to his brother should be construed as a nuncupative will, and Suddasook is an executor of the estate (consisting of moveables only) in British India, and no questions of limitation can arise. Our appeal is as to the sum of Rs. 5,298-1, the liability for which we have taken over in our books by an arrangement with Sara Bibee, and we offer to bring this sum into Court. (This sum was paid into Court in the course of the hearing.) The defendant having been successful as to a large sum upon his objections on the reference, he should upon the merits have been allowed his costs.

Mr. *Woodroffe* for the Respondent.—There is no finding as to Teicum Chand's domicile, so the contention as to an oral will is inadmissible. As to the sum of Rs. 5,298-1 it has never been paid, and it would be a novel doctrine if an executor were allowed to take over or compromise a debt due to the estate for his [625] own advantage. But the defendant is not an executor, for there was no will. If this point is disposed of then the appeal is wholly as to costs. But the defendant has failed as to a substantial sum upon his exceptions, and by s. 49 of the Judicature Act of 1873, 36 and 37 Vict., Cap. 66, where costs are in the discretion of the Court below, no appeal would be allowed. *Cotterell* v. *Stratton* (L. R., 8 Ch., Ap., 295) and the other cases as to trustee's and mortgagee's costs cited in Wilson's *Judicature Acts*, 6th ed., p. 43, are clearly inapplicable to the present case, and the discretion of the lower Court should not be interfered with. As to our cross-appeal the defendant cannot claim protection as, or be in a better position than, an executor *de son tort*. The provisions of the Succession Act relating to executors *de leur tort* (Act X of 1865, Part XXX II) have not been extended to Hindus, and it is doubtful whether the principles are applicable at all in the case of Hindus—*Jogender Narain Deb Roykut* v. *Temple* (2 Ind., Jur., N. S. 234), referred to in Henderson's *Tagore Lectures for 1887*, p. 362. The position of the defendant was that of a manager. In *Gopal Narain Mozoomdar* v. *Muddoomutty Goopta* (14 B. L. R. 21, at pp. 45 and 47), COUCH, C.J., states that among Hindus an executor really is not recognized. As to the sum of Rs. 1,975 which has been found to have been paid, this should not have been allowed, as the defendant was not entitled to pay a time-barred debt. The sum of Rs. 3,755 should upon the evidence have been disallowed, and the lower Court has for no sufficient reason allowed Rs. 2,507 for *shrad* expenses. As to this we say the Assistant Registrar's report should have been confirmed.

Mr. *Bonnerjee* was heard in reply.

In the course of the reply, upon a suggestion by the Court that the defendant should be treated as a trustee under a parol trust created by Teicum Chand in his lifetime, the Court expressed a wish to hear the respondent upon this point.

Mr. *Sale*.—If it is argued that there is a parol trust that was clearly made in contemplation of death, being in the nature of a testamentary disposition or *donatio mortis causa*. But such gifts are unknown to the Hindu law, and the provision in the Succession Act (s. 178) has never been extended to Hindus (M. Bonnerjee's work on the Hindu Wills Act, p. 82 note, was referred to).

[626] The judgment of the Court (PETHERAM, C.J., and PIGOT, J.) was delivered by

Pigot, J. —The principal questions before us are five :—

On the part of the appellant it is contended that he ought to have been allowed, in account with the plaintiff, the sum of Rs. 5,298-1, being the residue of the sum of Rs. 7,273 (after deducting the sum of Rs. 1,975 found to have been actually paid) due by the estate of Teicum Chand to Sara Bibee, the widow of his deceased brother Luchmun Chand, and for which residue of Rs. 5,298-1 he alleged that he had become liable by agreement with her; and he also contends that having succeeded on the reference to the Assistant Registrar, he ought to have been allowed his costs of the reference out of the money in the hands of the receiver, or that, at any rate, he ought not to have been ordered to pay the plaintiff's costs of that reference.

The respondent in his cross objections objects—1st, that the marriage expenses, Rs. 3,755, of Rookmai ought not to have been allowed; 2nd, that Rs. 2,507 for the *shrad* of Teicum Chand at Bikaneer was improperly allowed; and 3rd, that the sum of Rs. 1,975 allowed to the defendant as having been actually paid, out of the sum of Rs 7,273-1, was improperly allowed. These are the principal points.

There are other contentions as to costs which we need not specially mention, and which must follow the result of the main contention before us.

We think that it is clearly proved by the evidence in the case that the transaction deposed to by the defendant, between him and Teicum Chand did substantially take place. It is proved, we think, that Teicum Chand handed over his property, so far as he could do so, to the defendant, with a direction to him to pay the debts which he specified, and to apply the surplus for the necessities and support of his family. This the defendant did, and, so far as appears from this case, with perfect fidelity, to the best of his judgment. He collected the monies due to the deceased, paid his debts, and conducted the affairs of the family of the deceased, taking, in their domestic matters, the place which naturally fell to him as the surviving brother of Teicum Chand.

[627] We see no reason whatever to doubt that in what he did both with respect to the payment of debts, to the part payment of Sara Bibee, and the settlement with her as to what remained unpaid to her, and with respect to the monies paid by him for the expenses of Teicum Chand's family, he acted in perfect good faith; and that as to the latter, he made the disbursements, both those which have been allowed to him and those which are in part the subject of this appeal, with regard to what it was in his judgment right and proper for him to expend on their behalf. A proof of his good faith in this respect is afforded by the fact that he expended Rs. 3,000 on the marriage expenses of the plaintiff, which sum he did not make any attempt to seek credit for in this suit, but has been content to defray from his own purse.

We have however to determine, not the question of the defendants' good faith, but whether he made, and if so was legally entitled to make, the actual payments challenged in this appeal, and whether he is or is not liable at all events in respect of the Rs. 5,298-1 not actually paid to Sara Bibee.

Now, first, as to the *shrad* expenses of the deceased and the marriage expenses of Rookmai.—We see no reason to be dissatisfied with the finding that as a matter of fact those expenses were incurred: we agree with the reasons given by TREVELYAN, J., for the conclusion to which he came on this matter.

Nor do we think that any case is made out of extravagant or improper expenditure. Taking it as we do that the expenditure deposed to and recorded in exhibit 9 was honestly recorded, and that this book has not been forged for the purposes of the suit, we have it that the money spent on Teicum's *shrad*

and on Rookmai's marriage was spent or was authorised by the persons most acquainted with the position of the family and the sort of expenditure which that position would properly entail according to the usages of the country, and at the same time interested in not going unreasonably beyond a proper expenditure; for there is no reason to conjecture that at that time there was in any one's mind the least anticipation of an account of these expenses being called for on behalf of the plaintiff or his family, or any notion beyond that of celebrating these two ceremonies in a suitable and proper manner.

[628] If, therefore, the defendant had a legal right to defray out of Teicum Chand's estate expenses of this nature, he is entitled to be allowed these items in his account.

As to the defendant's legal position as custodian or holder of the estate of his brother, three alternative views have been suggested to us.

That as the domicile of Teicum Chand was the Native State of Bikaneer, the mandate by him to his brother should be construed as a nuncupative will, good as to the estate (consisting of moveables only) in British India; and that the defendant was therefore in the fullest sense, an executor to his brother's will.

The case is not before us in such a shape as would allow us to enter on this question. Most probably Teicum's domicile was as suggested; but this has not been found, nor was the question raised, or any evidence directed to it.

Then it is said that at any rate he was an executor *de son tort*, and that the payments made by him were good in that point of view.

A third mode of regarding the dealings of the defendant with the estate is to treat him as a trustee under a parol trust created by Teicum Chand in his lifetime: and we think that (subject to what we shall say further on as to the possible effect of the Probate and Administration Act, which came into force a week before Teicum Chand's death) that this contention may be supported. According to the account of the defendant, which we accept, Teicum Chand made over to him the key of his place of business, and requested him to take charge of his goods and outstandings, to pay thereout his debts, specifying them, and to apply the rest of the estate for his family.

In this country especially, a Court must require a transaction of this kind to be very completely proved before holding that a parol trust has been created. But looking both to the evidence and admissions in this case, and to the subsequent acts of the family, to the fact that defendant did pay the debts (by actual payments, save as to part of Sara Bibee's claim), and that as to none of the debts, save Sara's has any question been raised, we think ourselves in this case justified in holding that, at any rate so far, as the debts were concerned, a good trust was created, and that, so far as the **[629]** intention of Teicum and the defendant was concerned, a good trust also as to the application of the surplus for the benefit of the widow and children.

Regarding the matter in this light, a good trust in favour of Sara Bibee for the whole amount of the debt due to her was created in respect of the monies which reached the defendant's hands applicable under the terms of the mandate to him for payment of her claim. No question therefore arises under the Statute of Limitation: and it is unnecessary for us to consider the questions whether we should be entitled to assume, in the absence of anything to the contrary, that Sara's claim was not time-barred: or whether if it was, the defendant, if acting as an executor *de son tort*, had power to pay it though barred.

The trust was not one in the nature of a testamentary disposition, though it certainly was created by reason of the anticipation of speedy death, just as

the trust to which effect was given in *Peckham* v. *Taylor* (31 Beav., 250) was so; and at any rate after the death of Teicum Chand, could not be recalled or questioned by his representatives.

The payment therefore of the Rs. 1,975 was a good payment in execution of the trust, while as to the residue, the trust of it in the defendant's hands for Sara Bibee is a good answer to the plaintiff's claim. The defendant now holds that money as a trustee for her. He does not dispute it and, as we understand, has never done so; and indeed produced the money in Court that it might be taken charge of by the Court for her benefit, which of course we have no power to do in this suit.

As to that part of the intended trust which from its nature could not operate until after Teicum Chand's death, *i. e.*, the application of surplus for widow and children, a difficulty might arise in holding it to be operative, inasmuch as this would, or might, be to allow a testamentary effect to be given to a disposition, not a will, not subject to probate duty, and therefore an evasion, however unintentional, of the law: it may be that after the debts specified were paid the defendant was as to the surplus and his management of it in the position of an *executor de son tort*. No doubt the sections of the Indian Succession Act relating to [630] executors *de leur tort* are not applicable to Hindus; and s. 265, illustration (*b*) of that Act, would not expressly apply to the case. The remarks of PHEAR, J., in *Jogendro Narain Deb Roykut* v. *Temple* (2 Ind., Jur., N. S., 224), cited in Mr Henderson's *Tagore Law Lectures for 1887*, show that practically it may be difficult to avoid the application of the principle on which executorship *de son tort* is founded to Hindus in some cases. It is not necessary to deal with the question here, as we are here concerned with the payment of a debt expressly mentioned by Teicum Chand, and with defendant's authority to pay it, whether-time-barred or not. But in either case the findings we have affirmed show that the payments were properly made by him in that capacity.

The result is that the defendant succeeds as to the whole sum in dispute upon the exceptions to the report: and completely succeeds upon the account ordered, and the appeal must be allowed and the decree modified accordingly.

As to costs. The enquiry before the Assistant Registrar was conducted in a highly unfortunate manner on the part of the plaintiff, imprudent to say the least with reference to his interests; and most oppressive to the defendant. The plaintiff is now of age: and he has adopted, as far as he could, the oppressive proceedings conducted in his name, and has pressed for costs as given in the Court below; or rather, for costs on terms even more favourable to him than the order then made: an order which, in respect of costs even upon the findings made in the original Court, we should have felt bound to alter materially in favour of the defendant.

Not merely was the conduct of the suit after the order for account was made oppressive. The suit itself was instituted without demand made of the defendant either for an account or for anything else.

This was the conduct pursued towards the defendant after he had for many years acted as head of the family with generosity to the plaintiff personally, and as custodian of the family funds with perfect fidelity, as appears from the findings of fact. It must not escape attention, too, that had the plaintiff succeeded in this appeal, his success would have chiefly consisted in relieving his [631] estate from payment of a claim undoubtedly just, and which his father admitted just before his death.

The defendant appellant must have his costs of the suit as against the next friend, or as to all or such portion of them as he may claim thereout, out of the moneys in the hands of the receiver ; the plaintiff respondent must bear his own.

Appeal decreed.

Attorney for the Appellant : Mr. *C. F. Pittar.*
Attorneys for the Respondent : Messrs. *Remfry and Rose.*
A. A. C.

NOTES.

[*See* also (1890) 14 Mad.. 61 ; (1905) 10 C. W. N., 566.]

[17 Cal. 631]
FULL BENCH

The 13th February, 1890.
PRESENT :

SIR W. COMER PETHERAM, KT., C.J., MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY, AND MR. JUSTICE GHOSE.

Asgar Ali............Judgment-debtor
versus
Troilokya Nath Ghose...........Decree-holder.*

Execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 230, 235, 237, 245—Specification of property—Form of application.

A decree was passed on the 6th September 1876, and on the 6th July 1888 an application for execution was made in the terms of section 235 of the Code of Civil Procedure which did not contain a list of property as prescribed by section 237, and the decree-holder did not produce the same till the 11th September 1888. The application having been made and admitted, any further application would be barred after the 6th September 1888.

Held by the full bench that the application of the 6th July 1888 was one within the meaning of section 230 of the Code of Civil Procedure.

Per PRINSEP, PIGOT AND GHOSE, JJ.—*Held* that the application was defective as not complying with the provisions of section 237 , and as it was not amended within due time or under the provisions of section 245, the decree holder was barred.

Per PRINSEP AND PIGOT, JJ.—*Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124) should be overruled.

Per PETHERAM, C.J.—The application could not be carried out without amendment, and no amendment could be made after the application had [632] been admitted and registered under section 245. So much of the decision in *Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124) as decides that an application may be amended after admission and registration should be overruled.

Per O'KINEALY, J.—The original application was defective, and the further application of the 11th September 1818 was barred. An application to execute a decree, if admitted, and order for execution made under section 245, should be dealt with on its merits and decided accordingly.

* Full Bench reference in appeal from order 212 of 1889 against the order of F.H. Harding, Esq., Officiating District Judge of Chittagong, dated the 22nd April 1889.

ON the 5th September 1876 the plaintiff obtained against the defendants a decree for the possession of certain lands with mesne profits, and on the 6th July 1888 applied for execution of this decree against the property of the judgment-debtors. This application, however, although praying for the attachment of the immoveable property "specified in the list," did not contain, nor was there annexed thereto, any list of properties whatever. The absence of the list was not reported to the Court by the officer responsible for this, but he did, however, report to the Court that the application was imperfect, in that it did not specify correctly the number and date of the previous application proceedings. On the 13th July the Court directed the application to be amended within a week's time. On the 18th July an amended application was filed, but again no list of the specific properties which the decree-holder sought to attach was annexed. On this occasion also the officer responsible failed to report the absence of the list, but merely reported that a copy of the decree was required. On the 25th July the Court ordered the decree-holder to file a copy of the decree within a week. On the 10th August the *amla* reported that execution might proceed, and the Court passed an order accordingly. On the 11th September 1888 the decree-holder filed a list of the immoveable properties. On the 21st September the Court passed an order permitting the authorised agent of the decree-holder to verify the list of property, and subsequently warrants of attachment and sale proclamation were issued. The judgment-debtors then appeared and filed objections to the sale of the attached properties, contending that execution was barred because the application of the 18th July 1888, not having been accompanied by the descriptions required by s. 237 of the Code of Civil Procedure, could not be regarded as having been made in accordance with law. The decree-holder contended that the application for execution should be taken to have been made on [633] the 11th September 1888, when the list of properties sought to be attached was filed. The Court considered that the filing of the list was an amendment of the application of the 18th July, and held that inasmuch as the list had been accepted an amendment of the application of the 18th July had been granted, and disallowed the objection. On appeal to the High Court against the order disallowing the objection of the judgment-debtor, PETHERAM, C. J., and TOTTENHAM, J., on account of there being conflicting decisions on the point to be decided, referred the question set out below to a Full Bench.

The referring order was as follows.—"The point for decision in this appeal is whether a petition for execution of a decree by sale of the judgment-debtor's property, drawn up in terms of s. 235 of the Code of Civil Procedure, but not containing at foot a description of the property as prescribed by s. 237 is an application within the meaning of s. 230. The decree in this case was passed on the 6th September 1876, and by s 230 application to execute it having once been made and granted under the Code, any further application would be barred if made after the 6th September 1888. An application was made in the terms of s. 235 on the 6th July 1888, but it was not till the 11th September that the list of property to be attached and put up for sale was produced by the decree-holder. If without this list the application of the 6th July was no application in law, execution is barred; but if, even without it, it was an application within the meaning of section 230, it is not barred by limitation. The lower Court has held that the application is not barred. Direct authority in support of this view is reported in the case of *Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124).

"But our attention has been drawn to a recently decided, but as yet unreported, case of this Court, Appeal from Order No. 58 of 1889 decided on the

19th November 1889, in which a Division Bench has decided a similar question in the opposite way.

"In this conflict of decisions we consider it necessary to refer the question to a Full Bench :—Is an application in terms of s. 235 of the Code of Civil Procedure, but not containing at foot a description of the property such as is prescribed by section 237, an application within the meaning of section 230 ?"

[634] Moulvi *Mahomed Yusuf* (with him Baboo *Surendro Nath Roy*), for the Appellant, contended that the application, to fall under section 235, must comply with the provisions of section 235 (clause *j*). The two sections must be read together; *Sree Nath Gooho* v. *Yusoof Khan* [I.L.R., 7 Cal., 556 (559).] If no such amendment as is alleged had been made, then the application would not have been in order. Section 245 does not make the application a good one, as under that section the Court should have rejected the application or have allowed it to be amended then and there. No such order was made when the application was presented. The lower Court had no power to extend the period of limitation by means of s. 235. In *Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124) it is decided that some specification of the property to be attached is necessary. I say that s. 245 is imperative; and if the application is not made properly, it shall be rejected. The case of *Hurry Charan Bose* v. *Subaydar Sheikh* (I. L. R., 12 Cal., 161) shows that no amendment can be allowed regarding the properties mentioned in a first application for execution. Some limit must be placed on s. 245 as regards the nature, time, and extent of the amendment. A trivial amendment after time possibly might be admitted: but if it is a material amendment affecting the decree-holder's rights, it should not be allowed, that is really what the decision of *Hurry Charan Bose* v. *Subaydar Sheikh* (I. L. R., 12 Cal., 161) comes to. The case of *Fuzloor Ruhman* v. *Altaf Hossein* (I. L. R., 10 Cal., 541) is an instance of a trivial amendment. The case of *Gouree Sunkur Tribedee* v. *Arman Ali Chowdhry* (21 W. R., 310) shows that an application for execution is not a proper one unless it is in accordance with the Code; and *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (I. L. R., 7 Bom., 459) is a similar case.

Baboo *Mohini Mohun Roy* (with him Baboo *Aukil Chunder Sen*) for the Respondent.—The question referred is distinct from the question whether such an application could be amended under s. 245. A defective application may be admitted under the 3rd clause of s. 245. That section does not include all the cases in which amendments can take place. Section 245 must be read with s. 53 and 647 as amended by s. 9 of Act VII **[635]** of 1888. When the application is once received and is on the file the Court may take it up, even after the period of limitation for the application is passed. Section 245 fixes no time for the Court to take up the application. [PETHERAM, C. J.—Section 245 applies to matters before the petition is filed.] The case of *Kaminy Mohun Somoddar* v. *Gopal* (I. L. R., 8 Cal., 479) shows that the Court is not bound to act at once under s. 245.

The decree-holder should not be made to suffer because the Court failed in its duty to reject the application—*Syud Mahomed* v. *Syed Abedoollah* (12 C. L. R., 179); *Fuzloor Ruhman* v. *Altaf Hossein* (I. L. R., 10 Cal., 541). Defects of this nature do not cause the application not to be one under section 235—*Hurry Charan Bose* v. *Subaydar Sheikh* (I. L. R., 12 Cal., 161), which agrees with the principle laid down in *Syud Mahomed* v. *Syed Abedoollah* (12 C. L. R., 179).

The note to the case of *Hurry Charan Bose* v. *Subaydar Sheikh* (I. L R., 12 Cal., 161) has been explained in *Macgregor* v. *Tarini Churn Sircar* [I. L. R., 14 Cal., 124 (127)].

The **opinions** of the Court (PETHERAM, C.J., and PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.) were as follows:—

Petheram, C.J.—When an application for execution has been made, it is the duty of the Court to satisfy itself whether the requirements of the law have been complied with; and if it is not satisfied that they have been, the Court may at once reject the application, or, if the materials necessary to amend it are before the Court, may allow it to be amended then and there, or the Court may direct that it be amended by the applicant and fix a time within which such amendment shall be made; the penalty for not making an amendment directed by the Court within the time fixed, unless the time has been extended, being that the application must be rejected.

The Court also has the power to admit the application if it is satisfied that the provisions of the law have been sufficiently complied with; but if the Court does in fact admit and register an application for execution, which is so imperfect that it is [636] incapable of execution, because no property is indicated in it which the applicant desires the Court to attach, I am of opinion that the Court has no power to allow it to be amended or added to afterwards. Section 245 gives a power of amendment before admission and registration, and I think by implication excludes any such power afterwards: indeed, it is apparent that no such power is needed in the interests of justice, as if one application is defective, the applicant can at any time within the period of limitation present another in proper form. It follows that my answer to the question referred must be that such an application is an application within the meaning of section 230, but is one which cannot be carried out without amendment, and that no amendment can be made after the application has been admitted and registered under section 245.

I think that so much of the decision of the case of *Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124), as decides that an application may be amended after admission and registration must be overruled.

The result is that the appeal will be allowed with costs.

Prinsep, J.—The decree in the matter before us bears date 6th September 1876, and therefore ordinarily its execution would, under section 230 of the Code, become barred on 6th September 1888.

Application to execute was made on 6th July 1888 in the form prescribed by section 235, except that in the last column, where the law requires the mode in which the assistance of the Court is required, it was stated that the immoveable property of the judgment-debtor, as per list, might be sold. But no list was attached to that application, so that no execution could be taken out thereon. It was informal and imperfect, but still nevertheless it was an application to execute within the terms of section 230, and so far the question put to us by the Division Bench is, strictly speaking, answered. But I am unable to agree with the opinion expressed by that Division Bench, that being such an application, execution is not barred by section 230.

Section 237 provides "whenever an application is made for the attachment of any immoveable property belonging to the judgment-debtor, it shall contain at the foot a description of the property [637] sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same."

"Every such description and specification shall be verified in manner hereinbefore provided for the verification of plaints."

The application before us does not comply with section 237.

Section 245 declares that the Court, on receiving an application for the execution of a decree, shall ascertain whether such of the requirements of

sections 235, 236, 237, and 238 as may be applicable to the case have been complied with; and if they have not been complied with. the Court may reject the application or may allow it to be amended then and there, or within a time fixed by the Court. If the application be not so amended, it shall be rejected.

The Court therefore should have either rejected this application or should have allowed it to be amended then and there, or within a time fixed by the Court, and if not so amended the application should have been rejected. It would seem that this defect in the application was not brought to the notice of the Judge, nor was he made aware when execution would become barred. On 11th September 1888, however, after execution had become barred, the decree-holder put in a list of immoveable properties belonging to the debtor, which he wished to have attached. The District Judge has held that although no amendment was ordered by him, and consequently no period was fixed within which it was to be made, the order accepting that list, made in oversight of the real state of the matter, must be regarded as allowing that amendment, although at that time execution was barred. I cannot agree in that view of the law. The District Judge was bound to act as provided by section 245, and inasmuch as he did not allow the application to be amended then and there (that is when it was made) or within a time fixed by him, he had no alternative but to reject that application as informal, and execution became barred by limitation. Having regard to the terms of section 4 of the Limitation Act, I am of opinion that as that application could not be put in force beyond the term of limitation fixed by section 230, the District Judge could not, by an order under section 245, after **[638]** execution on that application had become barred, revive it by a list of immoveable property against which it was sought to be executed. The terms of the judgment by a Bench formed by myself with MACPHERSON, J., with which the referring Division Bench expresses dissent, are not quite accurately expressed. We never intended to hold contrary to section 245, but we were of opinion that the lower Court was correct in refusing to grant a further period for amendment of the informal application, and thought that it should have been summarily rejected in the first instance.

In the case of *Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124), to which we have been referred, the application to execute did not comply with section 237, because it did not specify any immoveable property as belonging to the debtor. It was, however, held that this would be sufficient indication of what it was intended to attach, as there could be no mistake when the creditor says, I want to take the whole. With every respect to the learned Judges, I cannot agree in this view of the law. A general application of that kind is informal, or it would never have been provided by the Legislature that a non-compliance with section 237, by specification of immoveable property to be attached, would subject the application to be summarily rejected, or, at any rate, require an amendment before it could be acted upon. It is only when compliance has been made with section 237 that the application could be admitted (section 245), so that attachment could follow.

No reported case goes so far, and indeed the judgment itself states that a contrary opinion was expressed by another Division Bench in *Hurry Charan Bose* v. *Subaydar Sheikh* (I. L. R., 12 Cal., 161).

I am therefore of opinion that the order of the Subordinate Judge should be set aside, and the application to execute rejected as barred by limitation.

Pigot, J.—I agree that the application in question, although it did not contain at foot a description of the property such as is prescribed by section 237, was an application within the meaning of section 230.

I also agree with, I believe, all the other members of this Bench in dissenting from the proposition stated by the referring Bench [639] in this reference, viz., that if, even without the list (or description of property prescribed in section 237), the application was one within the meaning of section 230, it was not barred.

I think it was an application under section 230; that it was defective as not complying with section 237; and that it not having been amended within due time, or under the provisions of section 245, the decree-holder was barred.

I agree that the case of *Macgregor* v. *Tarini Churn Sircar* (I. L. R., 14 Cal., 124) was wrongly decided, and that the decision in appeal from order No. 58 of 1889, by PRINSEP and MACPHERSON, JJ., and referred to in the order of reference, was rightly decided.

O'Kinealy, J.—In this case the plaintiffs obtained a decree against the defendants on the 6th September 1876, and under section 230 of the Code of Civil Procedure it is said that an application to execute it would have been barred if made after the 6th September 1888. The judgment-creditor applied for execution on the 6th July 1888. He made his application in the usual form, and in the last paragraph he prayed that certain immoveable properties (as per list) belonging to the judgment-debtor might be sold. As a matter of fact no list was filed, nor was its absence reported to the District Judge. On the 13th July the Judge directed that the application should be amended on another point, and on the 25th July the Court directed that a further and different defect should be set right. On the 11th September the decree-holder filed a list of the immoveable properties, and the Judge in the Court below who tried this case held that although this list was not ordered by the Court yet the Court, by accepting it, allowed the application of the 18th July to be amended, and had perfect power to do so, although at that time the decree was barred by limitation.

On the case coming before a Division Bench of this Court, the learned Judges referred to this Bench the following question:—

"Is an application in terms of section 235 of the Code of Civil Procedure, but not containing at foot a description of the property such as is prescribed by section 237, an application within the meaning of section 230?"

[640] To this question I think there can be only one answer, and that in the affirmative. Section 235 prescribes the form in which the application should be made. That section gives in detail the particulars that shall be entered in an application for execution, just as the previous sections of the Code describe in what manner the application shall be written. Section 237 is a special section prescribing what further particulars are necessary in cases where the application for attachment is made in regard to immoveable property. It requires that the application shall contain at foot a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same.

Every such description and specification must be verified in the manner provided for the verification of plaints.

It is thus clear that every application for the attachment of immoveable property must be made in conformity with the directions contained in sections 235 and 237 of the Code.

Section 245 enacts that—

"The Court, on receiving an application for the execution of a decree, shall ascertain whether such of the requirements of sections 235, 236, 237, and

238 as may be applicable to the case have been complied with : and if they have not been complied with, the Court may reject the application or may allow it to be amended then and there, or within a time fixed by the Court. If the application be not so amended, it shall be rejected."

It seems, therefore, difficult to arrive at any other conclusion than that section 245 treats an application, imperfect by reason that it has not complied with the provisions of section 237, as an application for execution of decree under section 230 of the Code, and my opinion, therefore, is that the question referred to the Full Bench must be answered in the affirmative. But at the same time I feel I cannot concur in another conclusion arrived at by the learned Judges who referred this case. In their reference they state—

" If without this list the application of the 6th of July was no application in law, execution is barred ; but if, even without it, it was an application within the meaning of section 230, it is not barred by that section."

[641] I regret I cannot bring myself to acquiesce in this conclusion. On the contrary, I am of opinion that the application was barred. Under the ordinary procedure of our Courts, an application, if perfect in form, is admitted, and an order is immediately granted to execute the decree ; but where a defective application is made, the Court, on receiving it, is directed to ascertain whether the requirements of the law applicable to the case have been complied with, and, if not, it may either reject it or allow it to be amended. If amended, the application is admitted, and the Court proceeds to order execution of the decree according to the nature of the application. These are the provisions of section 245, which is the only section in the Code allowing amendment of an application for execution. And if we compare section 245 with section 53, which provides for the amendment of plaints, we can hardly help coming to the conclusion that the Legislature never intended that the Court should allow any amendment of an application to execute a decree after it had been admitted and an order for execution made in the manner prescribed by section 245, but rather that it intended that the application should be dealt with on the merits. So I take it that if the application is so defective, is of such a nature that no relief can be granted, as it is in the present case, the result is that the application must be dismissed. No doubt in several cases in this Court the decree-holder has been allowed to give in a supplementary list of property to be attached and sold after the application for execution has been made and granted : but, properly speaking, the applications made in regard to such supplementary lists were not applications to amend, but new applications for the execution of the decree made within the time allowed by the law of limitation.

In the present case the original application was so defective that no relief could be obtained under it ; and if the views already expressed are correct, it follows that the second and further application of the 11th September was barred and should have been rejected.

Ghose, J.—I also agree in holding that the application in question was an application within the meaning of section 230 of the Code. But it was defective and incapable of enforcement, because it did not contain, as provided by section 237, a list of the properties to be attached and sold. This defect might have been **[642]** rectified, under the provisions of section 245, within any time that the Court should have thought proper to allow ; but it is now too late to do so.

A. A. C. *Appeal decreed.*

NOTES.

[*See* also (1906) 34 Cal., 20; (1891) 18 Cal., 462: (1895) 23 Cal., 217; (1902) P. L. R., 112; (1907) P. R., 116; (1892) 16 Mad., 142; (1898) 25 Cal., 594; (1893) 17 Mad., 67; (1898) 20 All., 478.]

[17 Cal. 642]

FULL BENCH.

The 10th March, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE MACPHERSON AND MR. JUSTICE NORRIS.

The Queen-Empress
versus
O'Hara.*

Accomplice--Corroboration—Improper reception of evidence—Misdirection—Evidence (Act I of 1872), ss. 114, ill. (b), 133—Criminal Proseedure Code (X of 1882), ss. 337, 364, 434 —Letters Patent of 1865, s. 26—Review.

Case in which, upon review, a certificate having been granted by the Advocate-General under section 26 of the Letters Patent, a conviction was quashed on the ground of improper reception of evidence and misdirection.

The accused being upon his trial at the Sessions for murder, the two principal witnesses for the prosecution were *G* and *M*, to whom pardons were tendered by the committing Magistrate under section 337 of the Criminal Procedure Code, and who had accepted the pardons. The Judge read to the jury statements (which had not been admitted in evidence) by *G* and *M* purporting to have been taken under section 364:

Held, that the improper reception of such evidence constituted a decision erroneous in point of law calculated to prejudice the prisoner.

The Judge further charged the jury that they were not to convict upon the evidence of *G* if satisfied that he was an accomplice and uncorroborated, but coupled the direction with a strong expression of opinion that *G* was not an accomplice.

Held, that this constituted a misdirection in fact, though not in form, calculated seriously to prejudice the prisoner's case.

CASE certified by the Advocate-General under clause 26 of the Letters Patent of 1865.

At the First Criminal Sessions of 1890 Thomas O'Hara and William Bellew were charged *inter alia* under section 302 of the Penal Code with having committed murder by causing the death of one Sheikh Soleem on the 6th November 1889. The prisoners, at the trial before Mr. Justice NORRIS and a special jury, pleaded not guilty. The two principal witnesses against the accused were Joseph Goldsborough and John MacDermott, to whom pardons were tendered by the committing Magistrate under section 337 of the Criminal Procedure Code. These pardons were accepted.

[643] The case for the prosecution was that on the night of the 6th November O'Hara accompanied by Bellew and MacDermott, Privates of the

---

* Full Bench in Case No. 1 of the First Criminal Sessions of 1890.

Leinster Regiment, and Goldsborough, a private of the Buffs, all stationed at Dum-Dum, left the barracks armed with two rifles and several rounds of ball cartridge, their object being to shoot wild pigs; that they were all more or less in liquor, and that they attacked more than one of the inoffensive villagers, and obtained some toddy; that they broke into a dispensary with the object of getting more toddy, and afterwards proceeded to the house of the deceased, who was asleep at the time, and that he was awakened by these four men and was asked for toddy; that on his failing to give any he was dragged out of his house; that O'Hara led him as they went along, and he and the deceased went, preceded by MacDermott and Bellew, and followed by Goldsborough, up to a tank; that at this tank the deceased complained and was shoved into the tank by O'Hara; that he complained when in the tank; and that then O'Hara knelt down, loading a rifle as he did so, and fired at the deceased the fatal shot. The evidence of Goldsborough given at the trial, so far as is necessary for the purposes of this report, appeared from the notes of the learned Judge to be as follows:—" I knew MacDermott for five or six days before the 6th of November. I knew the prisoners O'Hara and Bellew. I did not know O'Hara before his regiment came to Dum-Dum. I remember the night of the 6th November. I had a conversation with the prisoner and MacDermott that day in the canteen after it opened: it opens at 5-30 P.M. We were talking from 5-30 P.M. to 9-15 P.M. We were all drinking. The conversation was that we should go out that night to a pig jungle. I proposed this. We were to go after we had answered to our names to the orderly Serjeant . . . . MacDermott and O'Hara (then says MacDermott and Bellew) were to bring their rifles . . . . Bellew gave the 10 rounds of ammunition. I got outside the barracks at 10-30 P.M. or 10-40 P.M. We four went on the road together. I was down first. MacDermott handed the rifle to O'Hara, and Bellew had a rifle. I don't think any of the other men had ammunition except Bellew. My rifle was in the bungalow in its place on the rack. We four started off. We were more or less in beer; we were happy. We went north and west into a [644] house on the left hand side going up. There I saw a native sitting on a bench . . . . . We asked for toddy . . . He (the native) said he had none, and he took us to another house further north. No shots had been fired up to that time. I don't recollect if any had been fired. I don't know if the rifles had been loaded. The first time I remember their being loaded was when we took the turning to the right and went to a house and saw a man lying in the verandah, that was the man that was shot. The rifles were loaded just after they shoved the native into the tank. O'Hara's rifle was only loaded. O'Hara loaded it himself. We asked him (the native) for toddy . . O'Hara pulled him along. MacDermott was in front, Bellew next, O'Hara with the native, and I was last. When we got near to a tank the native started murmuring, and O'Hara shoved him into the tank up to his waist in water, and whilst he was in the water he murmured again. O'Hara dropped on his knee and fired at him. The man appeared to have been hit. He shouted and threw up his hands. At the moment O'Hara fired I was three yards away. Bellew was a half turn facing O'Hara. Bellew was 10 or 15 yards from O'Hara. MacDermott was in front still walking on. No one did anything to prevent the native being shoved into the tank. I asked him (O'Hara) to get up and not to do it: if anything happened there would be a terrible row. He said 'Never mind, there are plenty more of the black bastards.' There was a second shot fired by O'Hara a little distance from the tank, after the native had been fired at . . . . . O'Hara's second shot was fired at nothing. We passed round another small tank, then took a southerly direction for a long distance."

This was the only evidence given as to the fact of O'Hara having fired the fatal shot; and the only evidence of his being at the tank with the deceased was that of Goldsborough and MacDermott.

The evidence given by MacDermott, so far as is necessary for this report, was as follows:—"On the 6th November we (after mentioning the four men) arranged an expedition in the canteen ..... When we started we were all under the influence of drink," and he also (after stating that they when on the road entered two or three houses) said:—"We went further on the road, taking a road [646] to the right and a narrow path to the left and came to another native house. I saw a native standing alongside his bed. The native left the house with us four. I led out first. When I got in the road I found there was no one with me .... I did not look back to see if the others were coming. I got to a pond and went past it. I can't say whether we passed another ... I came till I got to a road which turned to the right. I heard two shots fired, after which I turned round to look for my comrades ... I went towards them up to the tank I noticed. I walked about 15 yards. I found my three comrades. I had not my senses properly at the time. I looked for the native, and saw him standing out in the pond. I asked my comrades whether they gave him a swim? They made no reply; they were laughing. We came away on to the main road again."

Several other witnesses were examined on behalf of the prosecution, whose evidence, however, for the purposes of the report, need not be referred to.

During the trial a statement made by Goldsborough on the 11th December to the Cantonment Magistrate, and purporting to have been taken by the Magistrate under s. 364 of the Code of Criminal Procedure, was at first tendered in evidence, but being objected to, its admission was not pressed by the Crown, and it was not therefore admitted in evidence. After the reply for the prosecution, and before the charging of the jury, the jury, under the directions of the learned Judge, found Bellew not guilty of the charges made against him.

During the course of the charge of the learned Judge to the jury, his Lordship said:—"Any difficulty that arises in the progress of this case ... namely, whether Goldsborough or MacDermott are accomplices or not, does not rest with the prosecution; the Legislature has conferred on certain persons the power of tendering pardons ... no information was given till the 11th December, when Goldsborough made a statement to the Cantonment Magistrate at Dum-Dum. I shall read it. It can do no harm. This statement contains nothing other than he has stated here, and a great deal less. On this statement there is no ground—I speak confidently, hardly any ground—for treating the men as accomplices,—no more ground than there would be for treating you or me so, [646] and all our chief difficulty in the case arises from the taint attached to these men which by no manner of means attaches to them."

His Lordship then read the statement, to which reference has been made as to its not having been received in evidence, to the jury, save so much thereof as constituted the heading, namely, "examination of accused persons," and the description of it as being made under s. 364 of the Criminal Procedure Code. This statement ran as follows:—

EXAMINATION OF ACCUSED PERSONS.

The examination of Joseph Goldsborough on the 11th December 1889.

My name is Joseph Goldsborough. I reside at Dum-Dum barracks. I am a private in the C. Company of the Buffs. On the morning of the 7th November

I was in company with Private Bellew, Private O'Hara, and Private MacDermott of the Leinster Regiment. We went out of barracks at about 10-15 P.M. on the night of the 6th. Two of the Leinsters had rifles, Bellew and MacDermott. We went up past the cemeteries straight up the road. We went to a house and demanded some toddy. The native would not give it. MacDermott hit him a blow. I interfered and would not allow him to strike him. The man took us to another house further up the road, and there we got some toddy, a *chatti* full; then we went right up the road, crossed some jungle and came to another house. They again demanded toddy, and as the man would not give them toddy they took him about 100 yards or so and shoved him into a ditch and then shot him. Private O'Hara fired the shot. We then went on by a roundabout road till we came into the main road again. We came straight on to the barracks. We got back to barracks about 2 P.M. I went to my bed. I slept in No. 3 C. Company block. When I left them they were standing on the steps of No. 3. Other shots were fired at *chatties* on trees and at nothing in particular. Bellew told us to keep it quiet and nobody would find it out. We got some toddy from trees on the side of the road off the main road. We were all rather the worse for liquor when we went out. I never mentioned the matter to any one before I made this statement of my own free will.

(Sd.) JOSEPH GOLDSBOROUGH.

[647] "The above examination was taken in my presence and hearing, and contains a full and true account of the statement made by the accused."

His Lordship then continued :—" Upon that statement Goldsborough was treated as a person tainted and a pardon offered, which he accepted. MacDermott's statement was substantially the same as what he has given in the witness-box to-day. (*States effect*). The least that could have been done before these men were put in this position would have been that these depositions should have been laid before the Government Solicitor and the Standing Counsel for advice. Whether or not they were accomplices in actual murder, you will partly have to determine. No doubt they were so in the acts of house-trespass, robbery, and violence that preceded. If you are of opinion that they were accomplices in the murder, I must put you in possession of a rule of practice guiding juries in dealing with evidence before them. (*Reads R.* v. *Stubbs, 1 Dear C. C. 555.*) I adopt that as my own. I tell you there is nothing to prevent you from convicting on their evidence. But I tell you that if I were in your place, and I were satisfied that they were accomplices not corroborated, I should refuse to convict. If both Goldsborough and O'Hara fired at the deceased with a common intent to commit murder, and death was inflicted by one or other of the shots fired, you might under those circumstances find O'Hara guilty of murder. I need not refer in detail to what took place at the toddy-trees; but there is a point which does seem to me most important. The whole of MacDermott's evidence is tinged with a desire to shield his own comrades, and he made adroit attempts to do so. At this place, firing at *chatties*, MacDermott said he got a rifle from O'Hara and loaded it, and an empty cartridge fell out. This seems to me, if true, to afford, if you believe it, the strongest corroboration of Goldsborough's statement as to the prisoner O'Hara's guilt. Goldsborough at the worst was a participator, and his evidence needs corroboration. . . .

"If MacDermott is an accomplice, his corroboration goes for nothing, and Goldsborough is uncorroborated. Do you believe the evidence of MacDermott? If so, it is abundantly plain that he was not an accomplice. In finding whether he is an accomplice or not, you have to satisfy yourselves whether his evidence is true or false."

[648] A similar statement made by MacDermott before the committing Magistrate was also laid before the jury by the learned Judge.

On the evidence before them the jury found O'Hara guilty of the charge of murder, and sentence of death was passed upon him.

Under clause 26 of the Letters Patent of 1865, the Advocate-General then certified the following case:—

Case certified by Her Majesty's Advocate-General for Bengal, under s. 26 of the Letters Patent for the High Court of Judicature at Fort William in Bengal, bearing date the 28th day of February 1890.

"1. Thomas O'Hara and William Bellew were indicted at the First Criminal Sessions, 1890, for in effect—

"*Firstly.*—That they, on or about the 6th day of November 1889, committed murder by causing the death of one Sheik Soleem, and thereby committed an offence under section 302 of the Indian Penal Code.

"*Secondly.*—That the said William Bellew abetted the said Thomas O'Hara in committing the offence in the first charge mentioned, which offence was committed in consequence of the said abetment, the said William Bellew being present when such offence was committed, and thereby the said William Bellew committed an offence under sections 114 and 302 of the Indian Penal Code.

"*Thirdly.*—That the said Thomas O'Hara and William Bellew, knowing, or having reason to believe, that the offence in the first charge mentioned had been committed, intentionally omitted to give any information respecting that offence, which they, the said Thomas O'Hara and William Bellew, were legally bound to give, and thereby the said Thomas O'Hara and William Bellew committed offences under section 202 of the Indian Penal Code.

"2. The said Thomas O'Hara and William Bellew, respectively, pleaded not guilty to the several charges in the said indictments, and were tried before the Honourable, JOHN FREEMAN NORRIS, one of the Judges of this Honourable Court, and a special jury on the 19th, 20th and 21st days of February 1890.

"3. On the 21st of February 1890, after the close of the reply for the prosecution, the said William Bellew was, under the direction of the learned Judge, found not guilty on all the counts, but Thomas O'Hara was, after the charge of the learned Judge to the jury, found guilty on the first count and sentenced to death.

"4. The evidence sufficiently appears for the purpose of this case from the charge of the learned Judge as hereinafter set forth. The first examination of Goldsborough was not put in evidence, and the same purported to have been taken as the examination of an accused person under section 364 of the Criminal Procedure Code, whereas it was not, in fact [649] taken in conformity with the provisions of that section. The said examination was tendered in evidence on behalf of the prosecution, but it was not admitted.

"5. The two principal witnesses for the prosecution were Joseph Goldsborough and John MacDermott, to whom pardons had been tendered by the committing Magistrate under section 337 of the Criminal Procedure Code, and the said Joseph Goldsborough and John MacDermott, respectively, accepted such pardons. Goldsborough stated in his deposition that there was another shot fired by O'Hara a little distance from the tank and after the native was fired at, and that that second shot was fired at nothing, and that afterwards they went on to the toddy-trees, which he climbed for toddy, that no shots were fired at this place, and they went on further and turned to the left to other toddy-trees, at which all four fired. MacDermott stated that they fired at the same trees up which he and Goldsborough had climbed.

"6. The learned Judge, in the course of the address of the Counsel for the prisoner to the jury, interrupted him, and said that if it was on the evidence proved that two shots were fired by two men, and both men fired at the deceased with the intent to kill him, he would direct the jury that, though unable to say which shot produced the fatal effect, both were guilty of murder.

"7. The learned Judge, in charging the jury, said that "any difficulty that arises in the progress of this case—I won't deny it is one of great difficulty—namely, whether Goldsborough or MacDermott are accomplices or not, does not rest with the prosecution; the Legislature has conferred on certain persons the power of tendering pardons. * * No information was given till the 11th of December, when Goldsborough made a statement to the Cantonment Magistrate at Dum-Dum. I shall read it. It can do no harm. This statement contains nothing other than he has stated here, and a great deal less. On this statement there is no ground—I speak confidently, hardly any ground—for treating the men as accomplices, —no more ground than there would be for treating you or me so, and all our chief difficulty in the case arises from the taint attached to these men which by no manner of means attaches to them. (*Reads.*) Upon that statement Goldsborough was treated as a person tainted and a pardon offered, which he accepted. MacDermott's statement was substantially the same as what he has given in the witness-box. (*States effect.*) The least that could have been done before these men were put in this position would have been that these depositions should have been laid before the Government Solicitor and the Standing Counsel for advice. Whether or not they were accomplices in actual murder, you will partly have to determine. No doubt they were so in the acts of house-trespass, robbery, and violence that preceded. If you are of opinion that they were accomplices in the murder, I must put you in possession of a rule of [660] practice guiding juries in dealing with evidence before them. (*Reads from R.* v. *Stubbs*, 1 *Dearsley, C. C.*, 555.) I adopt that as my own. I tell you there is nothing to prevent you from convicting on their evidence. But I tell you that if I were in your place, and I were satisfied that they were accomplices not corroborated, I should refuse to convict. * * I go back to the point. If two shots were fired, it is suggested that Goldsborough fired one of them, but there is no evidence that he did. But if you think you can play with the evidence like you might play at bowls or ducks and drakes, and if you think he did, and O'Hara did it too, O'Hara is equally guilty of murder. I need not refer in detail to what took place at the toddy-trees; but there is a point which does seem to me most important. The whole of MacDermott's evidence is tinged with a desire to shield his own comrades, and he made adroit attempts to do so. At this place, firing at *chatties*, MacDermott said he got a rifle from O'Hara and loaded it, and an empty cartridge fell out. This seems to me, if true, to afford, if you believe it, the strongest corroboration of the prisoner O'Hara's guilt. Goldsborough at the worst was a participator, and his evidence needs corroboration. Is not this corroboration as to man and instrument in his hand, an instrument in a state showing it had been used * * * You may spring a defence at any time; but it was a surprise to me, and it was an unusual thing that no intimation was given by cross-examination of witnesses. If in bed and seen, I agree that there is an end of the case. Mr. *Pugh* says O'Hara and Bellew were in bed; but he is in a dilemma as to MacDermott. It was suggested that there might have been a dummy in his bed, but there is absolutely not a shred of evidence of this. Ought it not to have been put to MacDermott—'Was there not a roll call?' 'What steps did you take to prevent your absence being detected?' If MacDermott is an accomplice, his corroboration goes for nothing, and Goldsborough is uncorroborated. Do you believe the evidence of MacDermott? If so, it is abundantly plain that he was not an accomplice. In finding whether he is an accomplice or not, you have to satisfy yourselves whether his evidence is true or false.

"The defence was never heard of till it was produced in this Court. Halliday never heard. You would have expected they would at once have said in November if the evidence was available at this time: 'There was a check roll at 12.' You are at liberty to disregard the evidence, but if you believe that the check roll-call was carefully taken on that night, you must acquit.

"8. *The learned Judge thereby erroneously decided the following points of law, namely*:—

"A.—That it was for the jury to find whether Goldsborough and MacDermott, or either of them, were accomplices in the actual murder, whereas, it was for the Judge to direct the jury whether they were accom-[661]plices or not; and if it was for the jury,

the learned Judge should have directed the jury as to what was necessary to constitute them accomplices, and that it was not necessary that they should be shown to be liable to be convicted as participators in the actual murder, and the learned Judge was in error not so to have done.

"B.—That there was, upon the first examination of Goldsborough, no more ground for treating Goldsborough and MacDermott as accomplices than there was for so treating his Lordship or one of the jury, though, no doubt, Goldsborough and MacDermott were accomplices in the acts of house-trespass, robbery, and violence, which preceded the actual murder, whereas the learned Judge ought not to have referred to the said examination, for that it was not admitted or admissible in evidence, and it showed that both of them were accomplices, and the learned Judge ought to have directed the jury that, as they were accomplices in the acts of house-trespass, robbery, and murder, their evidence should be treated as that of accomplices.

"C.—That even if Goldsborough at the worst was a participator, the evidence of MacDermott that O'Hara handed him the rifle at the tree mentioned in his evidence, and an empty cartridge fell out, afforded the strongest corroboration of Goldsborough's statement as to the prisoner O'Hara's guilt; whereas the learned Judge should have told the jury that, according to Goldsborough's statement, O'Hara had, sometime after the murder and before they reached the toddy-trees, up which they climbed, fired a shot at nothing, and that no shot was fired at the trees up which they climbed.

"D.—That on the evidence of MacDermott he was not an accomplice, and it was for the jury to consider only whether they believed his evidence; whereas the learned Judge ought to have told the jury that MacDermott was an accomplice and that, without corroboration, it would not be safe to believe his evidence.

"E.—That though, if MacDermott was an accomplice, his evidence must go for nothing, and Goldsborough would be uncorroborated, yet it was for the jury to consider whether they believed the evidence of MacDermott; for, if so, he was not an accomplice, wherein the learned Judge fell into a like error as in the preceding point.

"F.—That the jury ought simply to consider whether MacDermott's evidence was true or false, and that the question of his being an accomplice, and of the necessity of other corroboration of Goldsborough, would only arise in case the jury believed the evidence of MacDermott to be false, wherein the learned Judge fell into a like error as in the two preceding points.

"G.—That no taint attached to the evidence of Goldsborough or MacDermott, though they had received and accepted pardons under section 337 of the Criminal Procedure Code, whereas the learned Judge ought to have told the jury that on this account also their evidence could only be treated as that of accomplices.

[652] "H.—That if two shots were fired by two men, and both men fired at the deceased with the intent to kill him, and it were not proved who fired the shot which produced the fatal effect, both were guilty of murder: whereas the learned Judge ought to have told the jury that the man who fired the fatal shot would alone be guilty of murder.

"I.—That if two shots were fired, and Goldsborough fired one of them and O'Hara fired the other, O'Hara was equally guilty of murder, wherein the learned Judge fell into the like error as in the preceding point.

"I certify that in my judgment the points of law above mentioned, which have been decided by the said Court, should be further considered by the High Court under the provisions of section 26 of the Letters Patent of 1865.

"(Sd.) G. C. PAUL, *Advocate-General of Bengal.*

The 28th February 1890."

Mr. *Woodroffe* (with him Mr. *Pugh*) for the prisoner.—The case went to the jury on the evidence of Goldsborough and MacDermott. These persons had accepted pardons under section 364 [*sic*] of the Criminal Procedure Code; they were in the position of accomplices, and if not strictly speaking *particeps criminis*

they were in that position, and for the purpose of weighing their evidence they ought to be considered as accomplices; they were certainly persons giving their evidence under a conditional pardon, whether rightly or wrongly granted. If these pardons were wrongly granted, it would seem that it was the duty of the Judge to have told the jury that they were not persons to whose evidence no suspicion attached. The learned Judge, however, at one time considered that they were persons who needed the protection of a pardon. As regards Goldsborough being an accomplice, it was quite clear from his own statement that if these men were put on their trial for criminal trespass, hurt, or burglary, Goldsborough was not only an accomplice, but a person responsible in the highest degree. The word "accomplice" is not defined. Under section 133 of the Evidence Act he is made a competent witness, and a conviction is not to be considered illegal because based on such evidence. Under section 114 he is presumed to be unworthy of credit unless corroborated in material particulars. Mr. Justice NORRIS proceeded on the ground that an accomplice was *particeps criminis*. I wish to establish that Goldsborough was an accomplice with reference to the provisions of [653] the Evidence Act and the rules of law prevailing here as in England regarding persons who come forward under pardons. It was the duty of the learned Judge to have told the jury that the man Goldsborough was an accomplice, but what the Judge did say was, that the statement of Goldsborough made before the Cantonment Magistrate was made under section 364; and on reading it to the jury, he observed that Goldsborough was no more an accomplice than his Lordship or one of the jury were. The learned Judge left it to the jury to say whether these men were accomplices. This was wrong. The jury cannot determine he was *particeps criminis* in the sense that he was a person who could be punished for the crime. The learned Judge was also wrong in stating that the jury were to take into consideration the circumstances under which Goldsborough and MacDormott gave their evidence. As to the position of accomplices, see *The King* v. *Addis* (6 C. & P., 388) and the *Queen* v. *Boyes* (I B. & S., 311) [PIGOT, J.—The different classes of accomplices are pointed out in *Plummer's case* in Foster's Crown Law, p. 352.] The cases cited show that it is for the Judge to say who was or was not an accomplice: *see* also Stephen's Digest of Criminal Law, p. 154; Roscoe's Criminal Evidence (10th ed.), 132. As to the law in this country, Goldsborough falls under section 337 of the Criminal Procedure Code, which is a section dealing with the tender of pardons to accomplices. The case of the *Queen* v. *Mohesh Biswas* (19 W. R., Cr. 16) points out the kind of corroboration which is needed to the evidence of an accomplice, and *Reg* v. *Farler* (8 C. & P., 106) lays down that it must be in a material circumstance. The case of the *Queen* v. *Sadhu Mundul* (21 W. R., Cr. 69) shows that the Judge ought to draw the attention of the jury to the principles relative to the reception of an accomplice's testimony. The *Queen* v. *Chando Chandalinee* (24 W. R., Cr., 55) shows that where a witness admits that he is cognizant of the crime as to which he testifies, and takes no means to prevent or disclose it, his evidence is no better than that of an accomplice. Further, an insufficient summing up is an error of law; and no general rule can be laid down as to when a prisoner is prejudiced by a defective summing up, but the Court will usually interfere where the finding [654] of the jury is such that an Appeal Court would set it aside—*Req.* v *Fattechand Vastachand* (5 Bom. H. C., Cr. 85).

Now what corroboration was there of Goldsborough's evidence? The learned Judge pointed out that the words "there are plenty more black bastards" used by O'Hara to Goldsborough were corroboration, as the witness would not be likely to invent them; and he further directed the jury that the prisoner's

guilt was corroborated by the dropping out of the empty cartridge from the gun given to MacDermott by O'Hara. This was clearly a misdirection, as the evidence is that O'Hara fired two shots, the last at nothing. There was a further misdirection, as the attention of the jury was not drawn to certain discrepancies. A Judge should caution a jury not to accept the evidence of an accomplice unless it is corroborated, and his omission to do so is a misdirection—*Queen-Empress* v. *Arumuga* (I. L. R., 12 Mad., 196), which takes the same view as *Queen-Empress* v. *Bepin Biswas* [I. L. R., 10 Cal., 970 (975)]. The evidence of the accomplice ought not to have been left to the jury without proper direction and observation from the Judge, see *Queen* v. *Elahi Buksh* [B. L. R., (Sup. vol.), 459; 5 W. R., Cr. 80], where all the cases on the subject are collected. There has been no corroboration of Goldsborough's or MacDermott's evidence by the evidence of the other witnesses; and further there has been no corroboration as to some very important matters connected with the details of the crime, *e.g.*, there was no corroboration to show that the deceased died in the tank; or if he was there, as to who took him out and to his clothes being wet or muddy.

I understand his Lordship's charge to have been on this point as follows:—"These persons ought never to have had conditional pardons tendered to them because they were not at that time, and on the statement made, accomplices in the sense which the Judge attached to the words. In order to be accomplices in that sense a person must be *particeps criminis*, and on these statements they were not so: there was no reason for his Lordship to suppose they were or were not accomplices. 'That,' said his Lordship,' it will be for you to determine on the evidence which you have before [655] you, and they therefore come before you, in my opinion undeservedly, with a taint on their evidence, which taint is derivable from the fact of their having had, rightly or wrongly, and in my opinion wrongly, tendered to them a conditional pardon and having accepted it. It will be for you, gentlemen, to determine on the evidence whether they are accomplices in the sense in which you are to take from me that they are accomplices, namely, whether they are *particeps criminis*. I tell you that if you think they are accomplices of that kind, then it is a rule, not indeed of law, but of practice which has all the reverence of law, that there must be corroboration. Corroboration is required of these statements, and corroboration has usually, not invariably, been resorted to by Judges as to the question of personal identity of the prisoners in reference to the occurrence.' His Lordship could even have gone further, and said: 'If you find that they are accomplices in that sense, if you find they are not corroborated as regards identity, then I can only tell you that I advise you to acquit them, as I would do myself.' Then his Lordship went on to say: They are accomplices undoubtedly in acts of theft; they are undoubtedly accomplices in robbery and house-breaking by night." That was the position which the Judge legally took up as regarded the position of accomplices. I say that even under the Law of England an accomplice coming within the rule of the case of *R.* v. *Stubbs* (1 Dear. C. C., 555) is not limited to a person who is *particeps criminis*, but that rule deals with all persons who are involved in the circumstances in and out of which the crime has arisen, and particularly applies to all persons who give their evidence under a promise of pardon. I further say that if the learned Judge was right in his interpretation of the word "accomplice," he was wrong in saying that they were not accomplices even in the other sense. According to Goldsborough's evidence he was present; and in accordance with the case of *The Queen* v. *Coney* (L. R., 8 Q. B. D., 534), if a person was present at a murder and saw the whole event till completed, and then said nothing to his confederates, that would be evidence that he was aiding and abetting in the

commission of the crime. But here, in this country, we have to deal with an accomplice as understood by the Evidence Act, **[656]** s. 114. There was a further misdirection in not calling the attention of the jury to the discrepancies between the statements made by Goldsborough in his statement to the Magistrate and his evidence given in the Sessions Court. [PETHERAM, C.J.—What is your reading of s. 114 of the Evidence Act? And what is the effect if a Judge deliberately omits to leave the matter of this section to the jury?] I think "the Court" there means the Judge, and that if a Judge does not exercise his judicial discretion, then the verdict must be set aside. [PETHERAM, C.J.—Then I suppose s. 114 means that the presumption must be made in the absence of evidence to the contrary.] The Judge was further wrong in putting before the jury a document which was not admitted in evidence, on the ground that it could do no harm; and was further wrong in saying that the finding of the empty cartridge in the rifle handed to MacDermott by O'Hara was corroboration of Goldsborough's statement as to O'Hara's guilt. The only evidence of O'Hara's being on the spot and firing is that of Goldsborugh, although MacDermott says he was there; one person alone speaks to the fact of O'Hara firing the shot, but two speak of his being present.

Applying the principle of the *Queen* v. *Gorachund Gope* [B. L. R., (Sup. vol.) 456], it is clear that Goldsborough was acting in accordance with the common object. As to the course open to the Court, s. 26 of the Letters Patent lays down the powers of the Court. As to these powers, see the case of *The Queen* v *Hurribole Chunder Ghose* (I. L. R., 1 Cal., 207). In *Elahi Buksh's* case [B. L. R., (Sup. vol.) 459; 5 W. R., Cr. 80], the law permitted a new trial. I contend that "such judgment and sentence which to the Court should seem right," is the judgment and sentence which would have followed from a correct summing up in the Court below. In *Gogan Chunder Ghose* v. *Empress* (7 C. L. R., 74), the sentence and verdict were set aside; and in *Hurribole Chunder's* case (I. L. R., 1 Cal., 207), the Court looked into the evidence, and GARTH, C.J., says that the Court can either quash or confirm the sentence. For a definition of "sentence," see *Wharton's Law Lexicon.*

The Standing Counsel (Mr. *Phillips*, with him Mr. *Handley*) for the Crown:—The High Court under the Letters Patent of 1865 had **[657]** preserved to it the powers of Supreme Court, and those powers included many powers belonging to the Court of Queen's Bench in England. Clause 25 of the Charter enacts that there shall be no appeal in criminal cases: therefore this case cannot be dealt with on appeal. It is in the discretion of the Court to reserve points of law, but there is no power in the Court to decide them under that clause. Clause 26 refers to decisions of points of law, and gives power to the High Court to review the case and to finally determine such points of law and to alter the sentence and to pass such judgment and sentence as shall seem right. There must be a point of law, and that point must have been decided; then this Court may correct the decision and deal with the sentence. If the sentence cannot be dealt with, then there is no jurisdiction in the High Court to hear the case or for the Advocate-General to certify. Nothing can be done but to alter the sentence and pass such sentence as the Court below could have passed had it decided correctly the point of law. This Court may (but I do not admit it can) quash the sentence. There is in this case no point of law in any view of the case. No point of law has been decided, and decided erroneously. The sentence is perfectly legal:—

First, as to whether there is any point of law:—It is no rule of law that the witness's evidence is to be considered as to how far a man is mixed up with the crime: that is a question of fact. The case of *R.* v. *Stubbs* [1 Dear. C. C.,

555 (558), per WILLES, J.) is authority for this. The point put forward as a point of law is whether a man is an accomplice who has not participated in the crime. There is no law which compels the jury not to convict without corroboration, for the Evidence Act says there need be no corroboration. *Secondly*, there was no *decision*. What a Judge may say inadvertently in his charge and which is afterwards looked into and said to contain a point of law, is no decision. No notice is taken of what the Judge may have said till after the case is over. It is not necessary for me to say that nothing that a Judge says in a charge is not a decision ; but under clause 26 the matter must be a matter raised and decided consciously and not inadvertently.

I deny that in my opening I led the other side to believe that these men were accomplices; and even if I did, it did not prevent **[658]** the other side from arguing whatever they chose. I then in summing up put the case to the jury that these men were not accomplices if their story was to be believed. Even if it were not so, the other side had the opportunity to draw the attention of the Judge to the matter. The counsel for the prisoner cannot have understood that a point of law was decided wrongly by the Judge, as he made no objection.

The case of *R.* v. *Stubbs* (1 Dear. C. C., 555) lays down that an accomplice must be a person implicated in the guilt : he must be liable to be punished. There is no point of law, and no point of law has been decided. But even assuming there to have been a point of law decided, this Court has no jurisdiction. I presume the point of law said to have been decided is that Goldsborough and MacDermott were accomplices. If so, then the next step for the Court below to have taken was to consider its discretion to use the presumption under section 114 of the Evidence Act. As to illustration (c) to that section, it is explained subsequently in the Act ; the Negotiable Instruments' Act supplies that presumption; besides the presumption in favour of official acts is not so strong as the presumption of judicial acts. [PETHERAM, C. J.--Did not the Judge tell the jury that he considered the men not to be accomplices if what the witnesses said was true, and is not that in fact telling the jury that section 114 did not apply?] That amounts to saying that this illustration (b) only applies to accomplices, and that is quite correct. It is a question of fact whether a man is an accomplice or not. There are two further remarks as to illustration (b) showing that every accomplice is not unworthy of credit. When he admits that he was a participator in the crime, he may not be always unworthy of credit : the character of the man must be looked into, and that is a matter of fact. Illustration (b) intends to suggest that the Judge would be right in saying that the accomplices were not worthy of credit unless corroborated from the outside. The conclusion which the Judge comes to on the facts arising under section 114 is a conclusion of fact. The next step is not as a matter of course to conclude that the accomplice is unworthy of credit. The accomplice contemplated in section 114 is one who shares in the guilt of the crime. It is not for a Judge **[659]** because he finds a man is implicated in a crime, to say that as a matter of law he is unworthy of credit. The presumptions are presumptions of fact arising out of the particular case, and they are for the jury and not for the Judge,--there is no use in the Judge making the presumption, except for the provisional purposes of advising the jury. Whatever view of an accomplice is taken, whether he is one or not, is a question of fact.

The next step for the Court below is to direct the jury correctly. When this Court has corrected the Judge's error, if there is one, there is no jury to receive the correction. What this Court has to do is to correct the sentence, and that means the sentence pronounced upon the prisoner. The sentence on the verdict is a legal sentence, and without altering the verdict the sentence cannot

be altered. This Court must find that there has been a wrong sentence pronounced. The Court cannot enter a verdict of acquittal. If the verdict of the jury is still a verdict of the jury, and it they were in law competent to pronounce that verdict, this Court has no power to deal with it. Further, a misdirection of law by a Judge does not render a jury incompetent in law to give a verdict. There is no case in England laying down that an omission to charge the jury as to a point of law is a misdirection. The cases cited under the appellate sections of the Code by the other side have no application. Then as to the case of *Reg* v. *Naoroji Dadabhai* (9 Bom., H. C., 391), GREEN, J., distinguishes between judgment and sentence, and speaks of them separately, not as is done by the Chief Justice in *Hurribole's* case (I. L. R., 1 Cal., 207), where the words were dealt with generally. This case supports what I have contended for, except that it says that the Court may quash the conviction, which I do not admit—*Empress* v. *Pitamber Jina* (I. L. R., 2 Bom., 61). In *Hurribole's* case (I. L. R., 1 Cal., 207), the point I am contending for was raised but not decided. The only decision come to there was that the Judge did not wrongly decide the case. There is no ground for thinking that the case can be re-tried or revised. It can only be so revised or re-tried on discovery of an error in a decision of a point of law. As to new trials in cases of murder, the Privy Council have held that there can be none—*Attorney-General* v. *Bertram* (L. R., 1 P. C., 520). The view taken by the other [660] side that there are two classes of accomplices is based on *R.* v. *Addis* (6 C. & P., 388) and *R.* v. *Boyes* (1 B. & S., 312), but there was no proposition of law in either of those cases. The first case does not tell us what constitutes an accomplice. As to the effect of the illustrations attached to the Acts of the Legislature, see *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (I. L. R., 7 Cal., 132, 135) and *Nanak Ram* v. *Mehin Lal* (I. L. R., 1 All., 487, 495). The question whether the evidence of an accomplice is credible is for the jury, and there would be no illegality if the Judge merely touched upon the matter and did not go thoroughly into it—*R.* v. *Atwood* (2 Leach, 521). As to directing the jury and the effect of section 114 of the Evidence Act, see *The Queen* v. *Jaffir Ali* (19 W. R., Cr 57 (61.) *R.* v. *Stubbs* (1 Dear. C. C., 555) shows that the Judge has a discretion in charging on evidence of accomplices. In *R.* v. *Mullins* (3 Cox. Cr. Cas., 526), MAUDE, J., gives the difference between spies and accomplices, and states that the whole matter is for the jury. There was here no direction as to whether these men were accomplices, but the mere expression of opinion of the Judge on the point leaving it to the jury to decide it. Further, I say, if corroboration is needed, there was corroboration in that. Adjoodhia identified three of the men and called the fourth a boy, and said that O'Hara carried a rule. Jodhia Passi also corroborates this, and the widow refers to four soldiers. The fact of the cartridge falling out of the rifle handed over by O'Hara to MacDermott corroborates the fact that MacDermott is not an accomplice.

Mr. *Woodroffe* was heard in reply.

Petheram, C. J. intimated that the Court would deliver a judgment upon the law points. After this, if it was necessary, their Lordships would hear counsel on both sides upon the facts, and then decide the case themselves.

The **judgment** of the Full Bench was delivered by :—

Petheram, C. J.—Thomas O'Hara, a private in the Leinster Regiment, having in the February Sessions been convicted by a special jury of the murder of Sheikh Soleem on the 7th November, was sentenced to death by Mr. Justice NORRIS, and we are now called upon to determine certain points of law arising from the [661] summing up of the learned Judge to the jury, which have been

in the certificate of the Advocate-General under section 26 of the Letters Patent of 1865.

That section is as follows:—

"And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of Original Criminal Jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right."

The following is the certificate given by the Advocate-General:—[After reading the case certified above set out (*ante*, *pp.* 648-652), his Lordship proceeded as follows:—]

In order to make intelligible the arguments addressed to us, and our opinion on the points raised in the Advocate-General's certificate, it is necessary to set out briefly the case for the Crown as stated by the prosecution; but for reasons which will appear, it must be understood that we express no opinion as to the truth or falsehood of any of the statements made in evidence.

The witnesses who have been called for the prosecution have stated that on the night of the 6th November the prisoner O'Hara, accompanied by Bellew and MacDermott, privates of the Leinster Regiment, and Goldsborough *alias* Taylor, private of the Buffs, or East Kent Regiment, all stationed at Dum-Dum, left the barracks armed with two rifles and several rounds of ball cartridge, their object being to shoot wild pigs; that they were all more or less in liquor; that they attacked more than one of the inoffensive villagers and obtained some toddy; that they broke into a dispensary with the same object, and that they afterwards proceeded to the house of the deceased. It is further stated that at the time of their arrival deceased was asleep; that he was awakened by the four men and asked for toddy; that on his failing to give any he was dragged out of his house, taken along a short distance, and then pushed into a tank and shot, and that he died in his house that night from the effects of the wound. It is also stated that [662] the four men then went on, and eventually returned to barracks at Dum-Dum some time towards early morning.

We have set out the certificate of the Advocate-General. It is, of course, so far as the statements in it purport to narrate what took place at the trial, to be read as though those statements were preceded by the recital "whereas it has been represented to me that." We mention this, as some of the statements contained in the certificate do not, in the opinion of the learned Judge, appear to him quite accurate. There is, however, no difficulty as to what occurred at the trial, the learned Judge who presided at it being a member of the present Bench.

The statement in paragraph 7 of the certificate (down to the words, "I should refuse to convict") as to the manner in which the learned Judge in his charge dealt with the question whether or no the evidence of the witness Goldsborough and that of the witness MacDermott was to be treated as the evidence of an accomplice, and if so, how that evidence should be regarded by the jury, is substantially correct.

The statement in the same paragraph, to the effect that the learned Judge advised the jury that, at the place where after the party had left the tank MacDermott said he got a rifle from the prisoner O'Hara and loaded it, an empty cartridge fell out, and that this was corroboration of Goldsborough's evidence, if his evidence needed corroboration, is substantially correct.

It is not correct that the learned Judge told the jury, as stated in the 7th paragraph, that if two shots were fired and Goldsborough fired one of them, and O'Hara fired too, O'Hara was equally guilty of murder. The learned Judge told the jury that if both Goldsborough and O'Hara fired at the deceased, with a common intent to commit murder, and death was inflicted by one or other of the shots fired, they might under those circumstances find O'Hara guilty of murder.

The statement said to have been made by Goldsborough on the 11th December, and referred to in the 4th paragraph of the certificate, was tendered, was objected to, and was not put in evidence in the case. It was, as stated in the 7th paragraph, read to the jury by the learned Judge in the course of his charge, save that part of it which constitutes the heading of it, namely, [663] "statement of an accused person," and the description of it as being made under section 364 of the Criminal Procedure Code. A statement made by MacDermott before the Committing Magistrate, not put in evidence, was also, in effect, laid before the jury by the learned Judge in his charge.

A circumstance which constituted a part of the trial, and which, though not referred to in the certificate, must, in our judgment, be regarded, was stated to us by the prisoner's counsel in the opening of his argument before us, and was confirmed by the learned Judge. It is, that each of the witnesses Goldsborough and MacDermott was warned by the learned Judge when under examination that the conditional pardon granted to him was subject to revocation by the learned Judge should the evidence given be such as to make it his duty to revoke such conditional pardon.

On behalf of the prisoner it was contended in the argument before us, that upon the several points set out in the certificate the learned Judge had erroneously decided points of law within the meaning of clause 26 of the Letters Patent, in the manner therein set forth, and which we need not recapitulate.

For the prosecution it was contended that no point of law arose in the case in respect of the matters referred to in the certificate, and that no point of law had been decided. It was contended that the rule requiring a Judge to advise a jury not to convict upon the evidence of an accomplice unless he be corroborated upon material points is a rule of practice and not a rule of law, as decided in (amongst other cases) *R.* v. *Stubbs* (1 Dear. C. C., 555); that it was for the jury to determine whether a particular witness was or was not an accomplice, and to draw such presumption, if any, against his evidence as it might be exposed to; that the Judge has no right to lay down, as a matter of law, that a witness is unworthy of credit; that if the jury think right, they are entitled to find upon the uncorroborated evidence of an accomplice; that in the rule of practice relied on, accomplice means a *particeps criminis*; and that in the present case neither Goldsborough nor MacDermott was an accomplice, but that even if one or both were accomplices, there was ample corroboration of their evidence. We do not attempt to state exhaustively all the arguments offered by the [664] learned counsel for the prosecution, but these were the main arguments relied upon by him in this part of the case.

Before dealing with the points of law which arise before us, we must refer shortly to part of the evidence in the case. We shall do so, for obvious reasons, no more than may seem to us absolutely necessary for the decision of such points of law as we must decide in this proceeding.

The case for the prosecution is that the four soldiers—we mention them in the order in which they are said to have gone towards the tank—MacDermott, Bellew, O'Hara, and Goldsborough—went from the house of the deceased to

the tank, taking the deceased with them; that O'Hara held him as they went along; and he and deceased so went, preceded by MacDermott and Bellew, and followed by Goldsborough, up the tank; that there the deceased complained, was shoved into the tank by O'Hara, that he complained when in the tank, and that then O'Hara knelt down, loading as he did so, and fired the fatal shot.

The case against the prisoner therefore involves two principal facts—*1st*, that he was at the tank with the deceased; *2nd*, that he fired the shot which killed the deceased. As to the first, MacDermott and Goldsborough depose to it: the second is deposed to by Goldsborough alone. There is no evidence but theirs that O'Hara was ever at the tank at all.

If both of these witnesses are accomplices, the rule which is commonly said to require corroboration of accomplices' testimony, would apply with reference, not merely to O'Hara's having actually committed the murder, but with reference to his having been at the place where it was committed. If MacDermott be not an accomplice, there is evidence in the case, not needing corroboration, which brings O'Hara to the place of the murder. Of course, if Goldsborough be not an accomplice, no question under the rule as to accomplice's evidence arises.

We shall proceed to deal with the point as to Goldsborough. Now, upon the case for the prosecution, chiefly contained in his own evidence, these facts appear. He was one of a party of four persons who went out armed at night; broke into a house, from which they took some property; used, at other houses, violence, or used menaces of violence by act or word, to persons found there, [665] and who, all four of them, carried off the deceased at dead of night, from his house and took him to the tank. While there he was shoved into the tank by O'Hara, Goldsborough being close by, and though not aiding and only so far as his presence might tend to intimidate the deceased from making resistance, not interfering to prevent the deceased from being so treated, Goldsborough being one of the persons who had brought the deceased to the spot. O'Hara then, according to Goldsborough's evidence, loads and aims at deceased within three yards of Goldsborough, and fires the fatal shot which Goldsborough sees take effect. After it is fired, MacDermott returns, finds the deceased in the water, and Goldsborough standing there, the other two men being sitting or lying. He finds them laughing. They then all four go away, and pursue their marauding expedition elsewhere.

We think that these facts are such as would form sufficient grounds for putting Goldsborough on his trial upon a charge of abetting the murder; and this notwithstanding the remonstrance which, according to his evidence, he offered to O'Hara just before the shot was fired.

From this point of view, and having regard to the fact that he had received a pardon under section 337, and gave his evidence under that section, Goldsborough was, we think, an accomplice within the meaning of the rule under the law existing in India. Goldsborough being an accomplice, it was the duty of the learned Judge to follow the ordinary rule and advise the jury not to act on his evidence without corroboration in a material part of it, applying in the prisoner's favour section 114 of the Evidence Act and illustration (*b*) of that section,—"that an accomplice is unworthy of credit unless he is corroborated in material particulars."

It is true that if, notwithstanding such advice, the jury had found the prisoner guilty on the accomplice's evidence, the conviction would not have been illegal merely because they had so done—(section 133, Evidence Act).

It may be that an omission by the Judge to advise the jury according to the rule, however dangerous such a failure of duty on his part might be, would

not nevertheless be ground for interfering with a conviction, but it did not become necessary to decide it in a proceeding under clause 26 of the Letters Patent. This question [666] was referred to in the case of *Pestonji Dinsha* (10 Bom., H. C. at p 60). Having regard to the course of decisions in this Court (although no doubt those decisions were, as pointed out in the Bombay case referred to, come to in appeals from the mofussil), we are not prepared to say that this Court might not feel bound, even on the ground of such an omission alone, to review the case under clause 26 of the Letters Patent. This difficult question, however, need not be decided in the present case.

We have in this case to consider the nature of the learned Judge's charge from another point of view, namely, the effect of the strong expression of opinion which fell from him that Goldsborough was not an accomplice. In the part of his charge to which we refer, summarised in paragraph 7 of the certificate, he spoke of Goldsborough and MacDermott together. We have for the present to deal with those observations with reference to Goldsborough's position only, and must separate the reference to the one from that to the other for the purpose of expressing our meaning.

In this observation the jury were advised not to convict on the evidence of Goldsborough, if satisfied that he was an accomplice and uncorroborated. But in truth the effect of that advice was, having regard to what accompanied or preceded it, practically nothing, because it was coupled with a strong expression of opinion, couched in terms of the most persuasive force, that he was not one: indeed, the result, though not the actual purport of the learned Judge's words on this matter was, that the notion of his being an accomplice was utterly idle and preposterous. He said that Goldsborough was no more an accomplice than he the Judge, or they, the jury, were.

The substantial effect of this was, that (although *if* an accomplice, Goldsborough's evidence should not be acted on without corroboration), inasmuch as Goldsborough was *not* an accomplice, his evidence ought to be given *as much* weight to as that of a perfectly independent and unprejudiced witness. It was not an omission only, but an affirmation. It constituted, in our opinion, a misdirection, in fact, though not in form.

We shall refer presently to the effect of this misdirection, as we consider it to have been. We must here refer to the use of the [667] statements of Goldsborough and of MacDermott in this part of the charge. These statements could not, we think, be laid before the jury: they had already, or one of them had, been tendered, objected to, and not put in. We think that to lay before the jury these statements, not admitted nor admissible in evidence, was in itself a decision erroneous in point of law, and calculated to prejudice the prisoner on his trial.

As to the misdirection with respect to Goldsborough, we think it was of a nature to prejudice most seriously the prisoner at the bar. The prisoner was entitled, on his trial, to the benefit of the presumption set out in the 114th section of the Evidence Act, and the effect of this misdirection was to exclude him from the benefit of that section.

Had the jury not been told that, in the opinion of the Judge, Goldsborough was not an accomplice, it may well be that, having heard his evidence as that of a person who had been in that character given a conditional pardon under section 337, and who had been twice warned in their hearing that the pardon was subject to revocation, they might, as asked to do by the Counsel for the prisoner, have so treated him in their own consideration of the case, and required corroborative evidence, satisfying to themselves, of some of the material particulars of his evidence. It may be that they would have found

such corroboration in the evidence of MacDermott: but MacDermott (whether an accomplice within the meaning of s. 114, or not, a question we need not here determine) came before the jury with the stigma of having received a pardon under s. 337 of the Procedure Code, and he also had been twice warned in their presence by the learned Judge. It may perfectly well be also that they would have disbelieved that witness's testimony, or treated its truth as so uncertain as not to constitute satisfactory corroboration. It may even be that had the jury not heard from the Judge the opinion expressed by him, they would not have acted upon Goldsborough's evidence, whether corroborated or not.

In the view we take of the case, it is unnecessary to deal with the argument for the prosecution as to the powers of the Court acting under s. 26 of the charter. We take it to be clear that in a case of misdirection such as this, and of improper recep-[668]tion of evidence such as took place in the present case, this Court may and ought to exercise its powers of review.

Norris, J.—I do not think that I ought to rest satisfied with silently acquiescing in the judgment which has just been delivered. A careful consideration of the arguments addressed to us has satisfied me that I ought to have told the jury that Goldsborough was an accomplice, and there is no doubt in my mind that that misdirection must have very seriously prejudiced the prisoner. I also agree that I ought not to have referred in the way I did to the statements made by MacDermott and Goldsborough before the Cantonment Magistrate, but I do not agree that the reference to those statements in any degree prejudiced the case of the prisoner on his trial.

After delivering the foregoing judgment, the Court (the Judges forming the Full Bench) sat to deal with the case on the evidence as it appeared from the notes of Mr. Justice NORRIS.

Mr. *Woodroffe* (with him *Mr. Pugh*), for the Prisoner, said he proposed to address the Court upon the evidence in the same way as if that evidence was before a jury. He submitted upon the facts that MacDermott was an accomplice, and that his evidence should be received in that light, and that Goldsborough's evidence, apart from his position as an accomplice, was full of inherent improbabilities and unworthy of credit. MacDermott being an accomplice within the ruling of Sir CHARLES SARGENT, C.J., in *Reg.* v. *Fattechand Vastachand* (5 Bom., H. C., Cr. p. 85; *see* p. 96), there was no corroboration as to the material points in the case. There was further no evidence of intention.

The *Standing Counsel* (Mr. *Phillips*, with him Mr. *Handley*) for the Crown.—The case is, it is presumed, being discussed under similar circumstances to that of the *Queen* v. *Hurribole Chunder Ghose* (I. L. R., 1 Cal., 207). It is not in the power of this Court to sit as a Judge and jury, and to enquire whether the verdict pronounced was or was not illegal unless on a point of law. The merits of the case cannot be gone into; there is no complete record before the Court. PONTIFEX, J. in *Queen* v. *Hurribole Chunder Ghose* shows how the cases should be dealt with apart from the Evidence Act, *i.e.*, on the Letters Patent. Under the Criminal Procedure Code the Court has a power to do a [669] variety of things of which there is no trace in clause 26 of the Letters Patent, which gives totally different powers dealing only with points of law. The review referred to there is to be for the purpose of determining points of law and thereupon to alter the sentence. In *Reg.* v. *Naoroji Dadabhai* (9 Bom., H.C. 393), GREEN, J., says the clause is not one giving a power to appeal. It cannot be that an appeal is meant, as there are no materials before the Court to deal with.

The case of *Queen* v. *Hurribole Chunder Ghose* is further reported in 25 W. R., Cr. 36, on the question whether the evidence, if believed, supported the verdict. On this trial the Court has not the advantage of seeing the demeanour of the witnesses. I shall show, however, that there is sufficient evidence, if believed, beyond the evidence of the two persons said to be accomplices, to support the conviction. (The learned Counsel then referred to the facts of the case). There is nothing peculiar in the circumstances under which Goldsborough gave his statement; drunkenness is no excuse as a defence; they were all four in the same state, though perhaps MacDermott was the worst. The case of *Reg.* v. *Fattechand Vastachand* (5 Bom., H. C., 85) only shows that the person treated by the Magistrate as an accomplice was not one. The amount of corroboration required to the evidence of an accomplice must depend on circumstances—*Queen* v. *Kalla Chand Dass* (11 W. R., Cr. 21). There is here ample corroboration in the evidence of MacDermott. He shows that O'Hara had a gun during the time of the occurrence, and that gun had been used. It is not necessary that an informer should be corroborated in every particular, because, if such evidence could be found, it would be unnecessary to call the approvers—*Reg.* v. *Gallagher* [15 Cox., C. C. 292 (319).]

Mr. *Woodroffe* in reply submitted that there was both misdirection and improper admission of evidence, and that the prisoner had been seriously prejudiced thereby.

The Court on the evidence quashed the conviction and set aside the judgment and sentence.

Conviction quashed.

Attorney for the Crown: The *Government Solicitor* (Mr. *R. L. Upton*).
Attorneys for the Prisoner: Messrs. *Remfry and Rose*.
A. A. C.

NOTES.

[As regards the corroboration of accomplice evidence, *see* also 19 C. W. N., 669; 27 Cal., 144; 25 Cal., 711; 32 Bom., 111; 11 I. C., 896; 33 Cal., 649; 35 Mad., 247; 35 Mad., 397.]

[670] APPELLATE CIVIL.

24th March, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Hamidunnessa Bibi............Defendant

versus

Zohiruddin Sheik ....Plaintiff.*

Mahomedan law—Restitution of conjugal rights—Prompt dower—Stipulation as to residence

In a suit by a Mahomedan husband for restitution of conjugal rights, the defendant, his wife, pleaded, *first*, that he had entered into a stipulation at the time of the marriage to

* Appeal from Appellate Decree No. 228 of 1889 against the decree of C.B. Garrett, Esq., Judge of the 24-Pergunnahs, dated the 23rd of January 1889, modifying the decree of Baboo Krishna Chunder Chatterjee, Subordinate Judge of the 24-Pergunnahs, dated the 20th of June 1888.

reside with her in the house of her father, and that he had not done so ; and *secondly*, that he had not paid the exigible portion of the dower due to her, the marriage having been consummated :—

Held as to the first point, upon the facts (after referring to the authorities, but without deciding whether a stipulation of this kind can be valid in any case), that the stipulation relied upon was not a sufficient answer to the plaintiff's claim.

Held upon the authorities that the non-payment of prompt dower is not a sufficient plea in bar of such a suit.

Abdul Kadir v. *Salima* (I. L. R., 8 All., 149) approved.

THIS was a suit for possession of a wife by one Zohiruddin Sheik against his wife Hamidunnessa Begum, and the defendants Nos. 2 and 3, her father and mother praying for restitution of conjugal rights. The plaintiff alleged that he was married to the defendant No. 1 on the 18th Baisakh 1290 according to law, and the defendant No. 1 had lived with him in his house as his wife for some time after the marriage, occasionally visiting her parents ; that in the month of Cheit 1291 the defendants 2 and 3 took away their daughter and refused to send her back, and the defendant No. 1 also refused to come to the plaintiff's house or to live with him as his wife. The plaintiff then brought a suit in the same form as the present suit, and at the same time brought a suit to have the *kabinnamah* or marriage contract pronounced invalid. The defendant No. 1 also brought a suit for maintenance against the plaintiff. Attempts were then made to settle the matter amicably, and on *solehnamahs* being executed [671] the three suits were withdrawn, and the defendant No. 1 came and resided with the plaintiff (as he alleged). Disputes, however, again arising, the cases were re-instituted on the ground that the defendant No. 1 had not given her consent to the withdrawal of the suits. Defendant No. 1 pleaded limitation and denied that she ever lived in the plaintiff's house, and further pleaded that by a *kabinnamah* executed at the time of the marriage the plaintiff had agreed that he would reside during his wife's lifetime at the house of her father, the defendant No. 2 ; that he did in fact so reside there till Bhadro 1292 ; that the plaintiff had been guilty of cruelty and had taken another *nikah* wife in contravention of the terms of the *kabinnamah* ; that at the time of the marriage the sum of Rs. 650 was fixed as dower, of which Rs. 80 was for ornaments and Rs. 570 in cash ; that the defendant had only received a pair of "*pirs*" worth Rs. 24, and that the sum of Rs. 626 was therefore due by the plaintiff, which the defendant claimed as prompt or exigible dower.

The Court of First Instance found that the marriage had been consummated, and that the plaintiff should be allowed restitution of conjugal rights on payment of the prompt dower claimed, and the suit was decreed on those terms. The Lower Appellate Court held on the authority of *Abdul Kadir* v. *Salima* (I. L. R., 8 All., 149), that restitution should be decreed unconditionally, and in other respects upheld the decree of the lower Court.

Moulvie *Seraj-ul-Islam* for the Appellant.

Moulvie *Mahomed Yasuf* for the Respondent.

The arguments and the authorities cited sufficiently appear from the judgment.

The **Judgment** of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by—

Banerjee, J.—This was a suit by a Mahomedan husband for restitution of conjugal rights. The defendant No. 1 amongst other things, which it is not necessary now to consider, urged that the plaintiff was not entitled to succeed, *first*, because he had entered into a stipulation to live with the defendant, his

wife, in the house of her father; and, *secondly*, because he had not paid the exigible portion of the dower due to the defendant.

[672] The First Court overruled these objections, and gave the plaintiff a decree which was made conditional, however, as regarded execution, upon payment of the prompt part of the dower. On appeal, the learned District Judge has modified that decree by striking out the condition and making it a decree absolute. In second appeal it is contended on behalf of the defendant, the wife, *first*, that the Courts below are wrong in giving the plaintiff a decree for restitution of conjugal rights when they ought to have held that he was not entitled to such a decree by reason of the stipulation entered into at the time of the marriage; and, *secondly*, that the Courts below are further wrong in giving him a decree when he has not paid the prompt part of the dower due to the defendant.

Now this is how the facts stand. The stipulation relied upon is contained in a *kabinnamah*, the execution of which is not denied. The stipulation is to the effect that the plaintiff shall live with his wife in the house of her father. But the *kabinnamah* contains another stipulation, which is to the effect that the plaintiff shall allow his wife to see her parents; and this, in our opinion, goes to show, that the stipulation as to residence was not intended to be absolutely obligatory. It further appears that the plaintiff, in his plaint, alleged that, after his marriage, his wife, the defendant No. 1, lived with him, sometimes in her father's house and sometimes in his own house; and this allegation was not denied in the written statement, though the defendant alleged that the periods of her stay in the house of her husband were short. And the learned District Judge has found, upon the presumptions arising in the case, and the correctness of that finding is not in any way questioned before us, that the marriage has been consummated. These being the facts of the case, let us see how far the objections taken before us are valid.

It is an ordinary incident of marriage, under the Mahomedan law, that the husband acquires dominion over the person of his wife. See Macnaghten's Principles of Mahomedan Law, Chap. VII, para. 7; Baillie's Digest of Mahomedan Law, 2nd Edition, p. 13; see also *Buzloor Ruheem* v. *Shumsoonnissa*, (11 Moore's, I. A., 551). The authority to which the learned Vakil for the appellant has referred to show that this general right can be restrained by a contract to the [673] contrary, is a passage from Mr. Ameer Ali's work on the Personal Law of the Mahomedans, p. 287, which is to this effect: "If it be agreed that a husband shall allow his wife to live always with her parents, he cannot afterwards force her to leave her father's house for his own:" But the learned author goes on to add: "If the wife, however, once consent to leave the place of residence agreed upon at the time of marriage she would be presumed to have waived the right acquired under express stipulation, and to have adopted the domicile chosen by the husband." The authority cited is really therefore, upon the facts of this case, an authority in favour of the respondent.

There are other authorities still more in favour of the respondent's contention. In the Hedaya, Book II, chap. 3, Grady's Edition, page 49, it is said:—"If a male marry a woman on a dower of one thousand dirms, on a condition that he is not to carry her out of her native city, or that he is not to marry, during his matrimonial connexion with her, any other woman,—in this case, if he observe the condition, the woman is entitled to the above specified dower only, as that consists of a sum sufficient to constitute a legal dower, and she has agreed to accept it; but if he should infringe the condition, by either carrying her out of her native city, or marrying another wife, she is in this case entitled to her proper dower, because he had acceded to a condition

on behalf of the woman which was advantageous to her, and that not being fulfilled, the woman is not supposed to be satisfied with the thousand dirms, and must therefore be paid her complete proper dower." This goes to show that a stipulation like the one relied upon in this case is not generally considered to be absolutely binding, though any infringement of it may entitle the wife to a larger amount as her dower than that agreed upon.

Then there is a case in Macnaghten's Precedents of Mahomedan Law, Chapter VI, Case VIII, in which it was held that a condition like the present is illegal and invalid. But without determining the question whether a stipulation as to residence such as this can be valid in any case—a question which it is not necessary for us now to decide—we think it sufficient to say that, having regard to the terms of the *kabinnamah* and also to the subsequent conduct of the parties, the stipulation relied upon is not in our opinion a sufficient answer to the plaintiff's claim for restitution of conjugal rights.

[674] Then, as regards the second point, there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Mohammed, upon the question whether a woman can refuse herself to her husband after consummation upon the ground of non-payment of the prompt dower, the former answering the question in the affirmative and the two latter in the negative. (See Hedaya, Book II, Chap. 3, Grady's Edition, page 54). But upon this point the practice of later jurisconsults has been to follow the two disciples, though they agree with Abu Hanifa upon the question of the wife's right to refuse to accompany the husband on a journey.—Baillie's Digest, 2nd Edition, page 125. And this view has been approved by a Full Bench of the Allahabad High Court in the case of *Abdul Kadir* v. *Salima* (I. L. R., 8 All., 149).

That being the state of the authorities bearing upon the question, we think the learned District Judge was right in holding that the non-payment of prompt dower was not a sufficient plea in this case, the marriage having been consummated. The result is that this second appeal must be dismissed with costs.

A. A. C.

Appeal dismissed.

NOTES.

[Sir R. K. Wilson in his *Anglo-Muhammadan Law* III Edn. (1908) p 123 regards this to be settled, notwithstanding his criticism in former editions, having been followed in (1905) 30 Bom., 122, as regards restitution of conjugal rights.

As regards ante-nuptial contracts as to residence etc., *see* also (1901) 28 Cal., 751; (1902) 1 L.B.R., 351; (1899) L.B.R., (1893-1900) p. 655.

As regards husband's guardianship, *see* also (1901) 5 C.W.N., 673 : 28 Cal., 751.]

[17 Cal. 674]
APPELLATE CIVIL.

The 1st April, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Roma Nath *alias* Ramanund Dhur Poddar...........Defendant No. 1

versus

Rajonimoni Dasi for self and as mother and next friend of Jagobundo Dhur, and others, Minors...........Plaintiffs.*

Hindu widow—Maintenance—Incontinence—Forfeiture of rights—Starving maintenance.

It is a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her unchastity. This rule is not to be restricted to women espoused, who are not of the rank of *patni* or wife.

Where a widow became unchaste after her husband's death, and was leading an unchaste life at and about the date of suit, *held* that she was not entitled to maintenance of any sort. *Quære*, whether if she were to begin to lead a moral life, she would not be entitled to a starving maintenance.

Honamma v. *Timannabhat* (I. L. R., 1 Bom., 559) and *Valu* v. *Ganga* (I. L. R. 7 Bom., 84) referred to.

[675] THIS suit was brought by one Rajonimoni Dasi, the widow, and the minor son and minor daughters of one Ram Narain Dhur, through their mother and next friend the said Rajonimoni Dasi, against the present appellant, the executor to the estate of Ram Narain Dhur, and certain other persons who were legatees under his Will. The plaintiffs prayed *inter alia* for a declaration that they were entitled to the properties left by the deceased Ram Narain Dhur, and that his Will might be construed as to such portions (if any) as might be found valid, and for maintenance and other relief.

The claim for maintenance was resisted upon the ground that Rajonimoni was an unchaste widow, and that her son and daughters were not the children of Ram Narain Dhur; and certain questions as to the validity and construction of the Will were raised by the plaintiffs and decided by the Courts below, but the decision arrived at was in no way impugned by either side in the present appeal.

Upon the question of maintenance the first Court held that the evidence was not sufficient to prove Rajonimoni's unchastity during her husband's lifetime, but that she was actually carrying on an illicit intercourse since his death with one Hurry Mohun; and the Subordinate Judge was therefore of opinion that she was entitled to what is called a "starving maintenance," that is, bare food and raiment, from the estate of her husband. The legitimacy of the children was also considered to have been established, and the rights of the parties under the Will were declared.

Against this decision allowing a "starving maintenance" to the widow, the defendant No. 1, the executor to the estate of Ram Narain, preferred an appeal to the District Judge, but no appeal or cross objections were filed on behalf of

* Appeal from Appellate Decree No. 88 of 1889, against the decree of C. B. Garrett, Esq. Judge of 24-Pergunnahs, dated the 28th of July 1888, modifying the decree of Baboo Krishna Chunder Chatterjee, Subordinate Judge of 24-Pergunnahs, dated the 30th of June 1887.

any of the plaintiffs. The judgment of the Subordinate Judge was confirmed by the Lower Appellate Court. Upon the question of maintenance the District Judge observed:—"On the whole I think that the weight of authority is not so clearly against the Subordinate Judge's decision that I ought to refuse it; and it seems a legitimate deduction from the decision in *Keri Kolitani's* case (I. L. R., 5 Cal., 776), that if a woman who has succeeded to property on her husband's death does [676] not forfeit it by subsequent unchastity, a less fortunate woman who has succeeded on her husband's death to bare allowance for food and clothing shall not forfeit it by subsequent unchastity."

The defendant No. 1 appealed to the High Court. At the hearing the minor plaintiffs sought to raise the question whether, their legitimacy having in the opinion of the Courts below been established, they would not be entitled to maintenance apart from the widow, and whether, even if the widow's claim to maintenance were found to be unsustainable, the decree for maintenance given by the Courts below might not be sustained upon the ground that the minors who were living under her protection were entitled to maintenance. They prayed in the alternative that they might be allowed to withdraw from the suit.

The minor plaintiffs were allowed to withdraw from the suit.

Baboo *Golap Chunder Sarkar* for the Appellant.

Baboo *Krishna Komal Bhuttacharjee* and Baboo *Uma Kali Mookerjee* for the Respondents.

The authorities cited and the arguments appear sufficiently from the judgment.

The **judgment** of the High Court (PETHERAM, C.J., and BANERJEE, J.) after setting out the above facts was as follows:—

The minor plaintiffs then being out of the record, the next question that arises is, whether the widow is entitled to the maintenance that has been decreed in her favour. Upon that question the finding arrived at is that she was leading an unchaste life at the date of the suit, and it is contended on behalf of the defendant, appellant, that whatever may be the rights of a Hindu widow who has taken one false step in her life but has afterwards repented, a Hindu widow who is actually leading an unchaste life is not entitled to maintenance of any sort, as against the heirs of her late husband, or those who represent his estate. On the other hand, it is contended for the respondent that if a widow is not unchaste at the date of her husband's death and becomes subsequently unchaste, the right to claim maintenance having once accrued, she is not divested of that right by her subsequent unchastity; and in support of this position the rule laid down in the case of *Moniram Kolita* v. *Keri Kolitani* (I. L. R., 5 Cal., 776) is cited.

[677] If this position of the respondent were tenable, then, upon the findings of fact arrived at in this case, namely, that the unchastity of Rajonimoni during her husband's lifetime is not made out, but that she subsequently became unchaste and was leading an unchaste life at the date of the suit, her claim for maintenance would be a valid claim. But we do not think that this contention is sound. The very case cited in its favour turns out really to be an authority against the position contended for. For the Privy Council, in that case, drew a clear distinction between a claim for maintenance and a claim to inheritance. Their Lordships observe [I. L. R., 5 Cal. 776 (786)]—"The right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However the texts cited in regard to maintenance

show that when it was intended to point out that the right was liable to resumption or forfeiture, clear and express words to that effect were used. Jimutavahana in c. XI, s. 1, v. 48 of the Dáyabhága, refers to a text of Narada, in which he says:—'Let them allow maintenance to his women for life, provided they keep unsullied the bed of their lord; but if they behave otherwise, the brother may resume that allowance.'"

It was argued for the respondent that the passage of the Dayabhaga referred to in this part of their Lordship's judgment applies not to the *patni*, or wife, but relates merely to women espoused, but below the rank of *patni* or wife. As to that I shall have a word to say presently. For the present, it is enough to say that the authority cited is really in support of the opposite view, namely, that the right to maintenance may be forfeited for subsequent unchastity.

That being so, and the widow not having a vested right to maintenance by reason of her having been chaste at the date of her husband's death, the next question is whether the right to maintenance is conditional upon her continuing chaste.

The passage of the Dáyabhága which is quoted in the judgment of the Judicial Committee in the case of *Moniram Kolita* [I.L.R., 5 Cal., 776 (786)] is direct authority to show that the widow is entitled to maintenance only so long as she remains chaste, and that unchastity at [678] any period of widowhood would deprive her of the right to claim maintenance. It is true that Jímútaváhana, after quoting the text of Narada, observes that the text relates to women merely espoused and not having the rank of *patni* or wife; but on referring to his explanation of the term *patni* in the paragraph immediately preceding, that is the 47th paragraph of c. XI, s. 1, it would appear that the only distinction that he draws between a woman espoused and one having the rank of *patni* is seniority or superiority in point of caste, and that upon the death of the senior wife or wife of superior caste, the next in point of superiority in caste attains the rank of *patni*, or wife, without any further ceremony being gone through. That being so, we do not see any reason for restricting the rule laid down as to chastity being a condition for maintenance in the text of Narada in paragraph 48, s. 1, c. XI of the Dáyabhága, to the case of women espoused who are not of the rank of *patni*.

Of course, as regards the right to succession, there is a distinction observed, but we see nothing in reason or principle to make any distinction between women of the two classes, namely, those who are *patnis* and those who are merely espoused, as regards the conditions under which their claim for maintenance should be allowed.

This passage of the Dáyabhága is, therefore, in our opinion, sufficient authority for the position that the right to maintenance is conditional upon chaste living on the part of the widow. And this view has been followed by later writers on Hindu Law, and also by Courts of Justice. See Macnaghten's Precedents of Hindu Law, Volume 2, Chapter 2, Case 5; 1 Strange's Hindu Law, 172: 2 Strange 309, and the case of *Maharanee Bussunt Koomaree* v. *Maharanee Kummul Koomaree* (7 Sel. Rep., 168, New Edition). See also the observations of the Madras High Court in the case of *Visalatchi Ammal* v. *Annasami Sastri* [5 Mad. H.C., 150 (160)]. That being so, we think it a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her unchastity.

Then there remains the further question whether, though she may not be entitled to maintenance as a source of wealth, she is not entitled to what has been termed "starving maintenance," that is, bare food and raiment. The Courts below have allowed her that, [679] and the question is, whether they

have done so rightly. It is true that there are texts of Hindu law which require the husband to give bare starving maintenance to a disloyal wife; see Colebrooke's Digest, Book IV, c. I, vv. 81 to 83; see also the case of *Honamma* v. *Timannabhat* (I. L. R., 1 Bom., 559). We should add, however, that this last case has been dissented from in a subsequent case by the Bombay High Court. See the case of *Valu* v. *Ganga* (I. L. R., 7 Bom., 84). But though, if the facts of this case had been different, and if the woman Rajonimoni, notwithstanding that she had taken one false step during her widowhood, had been leading a chaste life at the date of suit, we should have felt inclined to take the view that the Bombay High Court took in the earlier case, and declared her entitled to bare food and raiment from the persons who are in possession of her husband's estate, yet, having regard to the facts found in this case, we do not think there is any reason for our applying the rule laid down in the case of *Honamma* v. *Timannabhat* (I. L. R., 1 Bom., 559) in her favour. The facts found, as we have pointed out above, are, that she became unchaste after her husband's death, and was leading an unchaste life at and about the date of the suit. That being so, we do not think there is anything in reason or authority to entitle her to any maintenance. The reason why bare food and raiment are directed by the Hindu sages to be given to an unchaste woman is that she may have a *locus pœnitentiæ*, and that she may not be compelled by sheer necessity to continue to lead a life of shame and misery. That reason has no application to the present case, where the widow is still leading such a life and is claiming an allowance from the representatives of her husband to enable her to live comfortably. The reason of the rule, then, that prescribes a starving maintenance for an unchaste widow not being applicable to this case, we do not think that Rajonimoni is entitled to such maintenance.

It was said that such a decision may have the effect of confirming her in the immoral life that she is leading. We see no reason for such an apprehension. We do not decide in this case what her rights would be if she were to give up her present way of living and begin to lead a moral life: we do not say that she would not, even in that case, be entitled to claim a starving maintenance. All **[680]** that we say now is, that under the existing state of things she is not entitled to maintenance of any sort. In this view of the case, the decrees of the Courts below must be reversed and the plaintiff's suit dismissed with costs.

Appeal decreed.

A. A. C.

NOTES.

[Unchastity affects the right to maintenance; 17 Mad., 392; 34 Bom., 278; 26 All., 321 (agreement); 15 All., 382; (1908) A.W.N., 119; 19 Mad., 6; (1910) 9 I.C., 926.]

[17 Cal. 680]

APPELLATE CIVIL.

The 14th April, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Boidya Nath Adya and others............Defendants*

versus

Makhan Lal Adya............Plaintiff.

Appeal—Receiver, Appointment of— Appealable order—Jurisdiction, value for purposes of--Civil Procedure Code (Act XIV of 1882), ss. 503, 505, 588 (24), and 589—Bengal, North-Western Provinces, and Assam Civil Courts Act (XII of 1887), s. 21—Court Fees Act (VII of 1870), s. 7, cl. 4—Suits Valuation Act (VII of 1887), ss. 7, 8, and 11.

An appeal lies from an order rejecting an application for a Receiver under section 503 of the Code of Civil Procedure, and the order on appeal is final under section 588. *Gossain Dulmir Puri* v. *Tekait Hetnarain* (6 C. L. R., 467) followed.

The Court to which such an appeal lies from the order of a Subordinate Judge is, under section 21 of Act XII of 1887, the High Court where the value of the suit is above Rs. 5,000, and the District Judge's Court in other cases.

For purposes of jurisdiction the words "value of the original suit" in section 21 of Act XII of 1887 are, in partition suits, to be taken to mean the value of the property in suit, and this is the valuation by which the Courts should be guided in such suits. *Kirty Churn Mitter* v. *Aunath Nath Deb* (I. L. R., 8 Cal., 757) followed.

The Court Fees Act (VII of 1870) s. 7, cl. 4, does not contemplate that a plaintiff should assign an arbitrary value to the subject-matter of the suit, and the provisions of the Suits Valuation Act (VII of 1887), ss. 7, 8, and 11, indicate that this was not the intention of the Legislature.

IN a suit for partition of moveable and immoveable property, consisting chiefly of trading concerns, the plaintiff valued the relief [681] sought at Rs. 4,200. On an application by the plaintiff for the appointment of a Receiver, the Subordinate Judge rejected the application. The order was reversed on appeal by the District Judge. The defendants appealed to the High Court, and also obtained a rule by way of motion to show cause why the order of the District Judge should not be set aside on the grounds that he had no jurisdiction to entertain an appeal in a matter arising out of a suit the subject-matter of which exceeded Rs. 5,000 in value, and that the plaintiff had not shown that the appointment of a Receiver was necessary for the realisation, preservation, or better custody or management of the property in suit. The defendants also obtained a rule for stay of proceedings pending the appeal.

Mr. *Woodroffe* and Dr *Troylokya Nath Mitter* for the Appellants.

Mr. *Evans* and Dr. *Rashbehari Ghose* for the Respondent.

The **judgment** of the Court (PETHERAM, C. J., and BANERJEE, J.) was as follows :—

This appeal and these rules arise out of an application by one Makhan Lal Adya for the appointment of a Receiver to take charge of certain properties, moveable

* Appeal from order No. 379 of 1889 against the order of F. Mc Laughlin, Esq., Judge of Hooghly, dated the 27th of November 1889.

and immoveable, which form the subject-matter of a suit for partition instituted by him against his co-sharers in the Court of the Third Subordinate Judge of Hughli. The suit was valued at Rs. 4,200, but defendants urged in both the Courts below, and stated in the affidavit upon which the Rule No. 8 of 1890 was granted, that the value of the property claimed was considerably over Rs. 5,000, and the correctness of this statement is not questioned before us.

The Subordinate Judge rejected the application. On appeal by the plaintiff, the District Judge has reversed the order of the Subordinate Judge, and held that a Receiver should be appointed.

Against that decision the defendants have come up to this Court by way of appeal and also by way of motion upon which the abovementioned Rule No. 8 of 1890 has been granted. The other Rule (No. 1613 of 1889) was obtained on an application for stay of proceedings pending the appeal. In their appeal the defendants contend that no appeal lies against an order rejecting an application for the appointment of a Receiver, such an order not being an order under s. 503 of the Code of Civil Procedure; that the so-called appeal to the District Judge should be regarded [682] as a fresh application to him for a Receiver, which he was competent to entertain, having regard to the provisions of s. 505 of the Code; that the Judge's order must consequently be regarded as an original order under section 503 for the appointment of a Receiver, and an appeal lies against it to this Court under s. 588; and that, as the order is bad on the merits, no sufficient case being made out for a Receiver, it should be set aside. In the Rule (No. 8 of 1890) it is contended that even if it be conceded that an appeal lies against an order rejecting an application for a Receiver, the appeal in this case lay to this Court according to s. 589 of the Code and s. 21 of the Bengal, North-Western Provinces, and Assam Civil Courts Act, as the value of the subject-matter of the suit was over Rs. 5,000; and that the decision of the District Judge was therefore passed without jurisdiction and should be set aside. On the other side it is argued that an appeal does lie against an order refusing an application for a Receiver; that the appeal in this case properly lay to the District Judge, the suit having been valued at less than Rs. 5,000; and that the order of the Judge was final under s. 588 of the Code.

Now the question whether an appeal lies from an order rejecting an application for a Receiver is, we think, concluded by authority. It was held in the case of *Gossain Dulmir Puri* v. *Tekait Hetnarain* (6 C. L. R., 467) that such an appeal does lie, and the same view was taken by a Full Bench of the Madras High Court in the case of *Venkatasami* v. *Stridavamma* (I. L. R., 10 Mad., 179). That being so, the order of the District Judge was an order passed in appeal, and no further appeal lies from it under s. 588 of the Code. The appeal to this Court must therefore fail.

But though an appeal lay against the order of the Subordinate Judge refusing the plaintiff's application for a Receiver, we think that appeal lay to this Court and not to the District Judge.

Section 589 of the Code of Civil Procedure provides that an appeal from an order, when such appeal is allowed by s. 588, shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order is made. And the Court to which an appeal lies from a decree of a Subordinate Judge in a suit is, under s. 21 of Act XII of 1887, the High Court [683] where the value of the suit is above Rs. 5,000, and the District Judge's Court in other cases. Now, though the expression "value of the suit" is not defined in Act XII of 1887, we do not think it means the amount at which the plaintiff chooses to value his suit. The Court-fees Act (s. 7, clause 4)

provides that for the purpose of determining the amount of Court-fee payable, the value of certain classes of suits should be taken to be the amount at which the plaintiff values the relief sought. But we do not think the Legislature ever intended to leave it to the plaintiff to choose the Court in which he should bring his suit for possession or partition of property by assigning an arbitrary value to the subject-matter of the suit. The provisions of the Suits Valuation Act (Act VII of 1887, ss. 7, 8 and 11) clearly indicate that that is not the intention of the Legislature. The present case does not come within any of the classes of cases in which, according to that Act, the Court-fee valuation and valuation for purposes of jurisdiction are declared to be identical. In the absence of any rules made under the last-mentioned Act, we think the correct rule to follow is that indicated in the observation of GARTH, C.J., in *Kirty Churn Mitter* v. *Aunath Nath Deb* (I. L. R., 8 Cal., 757), that for purposes of jurisdiction in partition suits we should be guided by the value of the property in suit. Now the value of the plaintiff's share in this case is unquestionably over Rs. 5,000, being not less than Rs. 20,000; and the valuation in the plaint was we think unwarrantably low. That being so, the appeal in this case lay to this Court and not to the Judge, and the order of the District Judge must therefore be set aside as passed without jurisdiction. We may add that the learned District Judge's order is not in our opinion a proper order on the merits of the case, as no sufficient ground for the appointment of a Receiver was made out.

The result is that the appeal must be dismissed, but the rule (No. 8 of 1890) made absolute. Rule No. 1613 of 1889, which was obtained merely for stay of proceedings, will be discharged.

We make no order as to costs.

Appeal dismissed and rule made absolute.

A. A. C.

NOTES.

[As regards appealability of an order appointing a receiver, *see* (1904) 31 Cal., 495.

As regards the value for jurisdiction, *see* also (1896) 22 Bom., 315; (1907) 6 C.L.J., 38.

As regards the meaning of '*value of the suit*,' *see* also (1896) 1 C.W.N., 136; (1899) 3 C.L.J., 197; (1902) P.R., 63; (1903) P.R., 28; (1904) P.R., 6; (1906) 31 Bom., 73; (1905) 3 C.L.J., 257; (1905) 32 Cal., 734; (1907) 6 C.L.J. 427.]

[684] CRIMINAL MOTION.

The 2nd April, 1890.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE BANERJEE.

In the matter of Ram Chandra Ghose............Petitioner

versus

The Bally Municipality............Opposite party.*

Bengal Municipal Act (Bengal Act III of 1884), ss. 6 (cl. 13), 30, and 217 (cl. 5)—Obstructing road not vested in municipality over which public have a right of way—Road.

The term "road" in clause 5 of section 217 of Bengal Act III of 1884 is not limited to roads vested in the Municipal Commissioners.

A person was charged at the instance of a municipality under that clause with obstructing a path through his paddy-field by erecting a fence at either end of it. It was found that the public had a right of way over the path, and the lower Courts convicted the accused of an offence under that clause. In revision it was contended that the conviction was bad, as the clause could only refer to a road which had vested in the Municipal Commissioners.

Held, for the above reasons that the conviction was right and must be upheld.

IN this case the petitioner was convicted of an offence under clause 5, section 217, Bengal Act III of 1884, at the instance of the Bally Municipality for obstructing a path by putting up fences across it. The path passed through the petitioner's land, and he claimed it as his own. The evidence showed that it consisted of an *al* or very low embankment, and the Deputy Magistrate found that the public had a right of way over it, and that they even passed over it when the crops were standing on both sides. He found also that the petitioner had erected fences across it at either end, and he accordingly convicted him under the section and sentenced him to pay a fine of Rs. 15, or undergo simple imprisonment for one week.

Amongst other contentions raised before the Deputy Magistrate, it was urged that the path had not vested in and did not belong to the Municipal Commissioners, and that the Municipality had no right to prosecute; but the Deputy Magistrate found that it was not necessary for the path to vest in the Commissioners or belong [685] to them to enable them to prefer a charge under section 217 of the Act, and that if the path were within the Municipal limits it was quite enough.

The petitioner appealed against the conviction to the Magistrate, but that officer dismissed the appeal, stating that he saw no reason to interfere.

The petitioner then applied to the High Court for a rule upon, amongst others, the following ground:—

That the path being merely a foot-path across a paddy-field and admittedly not belonging to the Municipality, the section under which he had been convicted had no application to the case.

A rule was issued upon that application, which now came on to be heard.

* Criminal Motion No. 48 of 1890 against the order passed by G. M. Currie, Esq., Magistrate of Howrah, dated the 10th of December, affirming the order passed by Babu Gogan Chandra Banerjee, Deputy Magistrate of Howrah, dated the 19th of June 1889.

Babu *Umbica Churn Bose* for the Petitioner.

Babu *Troylokia Nath Mitter* and Babu *Jagat Chunder Bannerjee* for the Opposite Party.

The **judgment** of the High Court (MACPHERSON and BANERJEE, JJ.,) was as follows :—

The petitioner has been convicted under clause 5, section 217, Bengal Act III, 1884, of obstructing a road. This road is nothing more than a path, but it has been found that the public have a right of way over it. The contention before us is that the conviction is bad, because the road referred to in the clause above mentioned means only a road which is vested in the Municipality, and that this road was not so vested. In the Act a road is defined to be " any road, street * * or passage, whether a thoroughfare or not, over which the public have a right of way." Section 30 enacts that all roads (not being private property and not being maintained by Government or at the public expense) shall vest in and belong to the Commissioners. We see no ground for holding that the word " road " in clause 5 of section 217 is limited to roads vested in the Municipality, and does not include all roads within the definition given in the Act. There is nothing in the context which would warrant us in putting the more narrow construction on it, and it is noticeable that in the first clause of that section the words " public road " are used.

The rule must therefore be discharged.

H. T. H. *Conviction upheld and rule discharged.*

---

[686] PRIVY COUNCIL.

The 19th November, 1889.

PRESENT :

LORD MACNAGHTEN, SIR B. PEACOCK, AND SIR R. COUCH.

Gobind Lal Roy............Plaintiff

and

Hemendra Narain Roy Chowdhry... ....Defendant.

[On appeal from the High Court at Calcutta.]

Lease—Construction of lease as to the inheritance of it by the heir on the lessee's death.

An ijara for one hundred and twenty-five years granted to a wife stated that it was for the performance of pious acts by her, and that on her death her sons were to take. Her only son died before her, leaving a son.

Held, that the construction that the grandson inherited the term on the death of the lessee was correct.

Tej Chunder Bahadoor v. *Srikanth Ghose* (3 Moore's I. A, 261), referred to.

APPEAL from a decree (13th May 1887) of the High Court, affirming a decree (22nd March 1886) of the Subordinate Judge of Rungpore.

This suit was brought by the present appellant against the respondent to obtain possession of three villages. It raised the question whether the plaintiff, within whose putni estate the villages, but for an outstanding ijara, would have been included, was entitled to treat that ijara as ended by the deaths of the grantees.

The defendant's grandfather, Bhairabendra Narain Surma, within whose zemindari the villages then were, granted an ijara, dated February 17th, 1843, of the villages for a hundred and twenty-five years to his wife Hara Sunderi in these words:—"The ijara is granted to you for the performance of pious acts. At present you have a son, Jagadindra Narain Surma, and if other sons or another son be born, and if during the term of the ijara you die, then they will in equal shares enjoy the profits down to the end of the ijara."

Jagadindra, having inherited the zemindari of which the villages were part, granted a putni to the present plaintiff. It contained the words: "I convey to you my powers of making measurement, and jummabundi assessment of rent, and enhancement, making settlement, and ejectment of tenants."

[687] Jagadindra died in 1883, and his mother Hara Sunderi died in 1884. But Jagadindra left a son, Hemendra Narain, whom the plaintiff now sued, alleging that the ijara was only to last for the lives of Hara Sunderi and her sons, and that upon the deaths of her son Jagadindra and herself it came to an end, so that the plaintiff as putnidar was entitled to khas possession of the three villages.

The defence was that the ijara vested in Hara Sunderi and her heirs down to the end of the term of years.

Both the Courts below construed the ijara in favour of the defendant. The High Court (MITTER and BEVERLEY, JJ.) held that the ijara was to Hara Sunderi and her heirs.

On this appeal,

Mr. *T. H. Cowie*, Q.C., and Mr. *J. D. Mayne*, for the Respondent, argued that upon the true construction of the ijara it was a personal grant to Hara Sunderi and her sons. When her son died and she died, it ceased to operate, not being intended for the benefit of any heirs more distant than those specified. Although in *Tej Chund Bahadoor* v. *Srikanth Ghose* (3 Moore's I. A., 261, at p. 272) it was said that the grantor was not to be taken to have limited his grant, when made agreeably to law and custom, unless he had done so by qualifying words, the expressions used here were sufficient to make a limitation to the sons only.

Mr. *R. V. Doyne*, for the Respondent, was not called upon.

Their Lordships' **judgment** was delivered by

Sir B. Peacock —Their Lordships are of opinion that the decision of the High Court was correct. Each case must be determined on its own circumstances, and each document must be construed according to the words which are contained in it. Their Lordships are of opinion that the High Court put a proper construction upon the document. In their judgment they say:—"There is nothing in that lease which would go to show that it was the intention of the grantor to limit it to a shorter period." That is quite in accordance with the decision in *Tej Chund Bahadoor* v. *Srikanth Ghose* (3 Moore's I. A., 261 at p. 272) which was cited by Mr. *Mayne* in the course of the argument. Then on

the same page of their judgment the High Court say:—" In this case it seems to us that the reference [688] to the sons was made in order to indicate that the ijara was not to come to an end on the death of Hara Sunderi. Even if these words were not used the lease, under its terms, would have descended to the heirs of Hara Sunderi; but it was probably thought necessary to make that point clear; and in order to make it clear the last condition, that the ijara should continue to the benefit of the son or sons of Hara Sunderi, was inserted." Their Lordships are of opinion that the ijara was to Hara Sunderi and her heirs, and that is the proper construction to be put upon the lease. In this case the widow had no daughters, and it is stated that the only issue was the son who was named. Their Lordships think that the High Court have put the proper construction upon the document, and they will therefore humbly advise Her Majesty that the decision of the High Court be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. *G. Thatcher.*

Solicitors for the Respondent: Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[*See* also (1904) 31 Cal., 561.]

[17 Cal. 688]

PRIVY COUNCIL.

The 22nd November, 1889.

PRESENT:

LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Biseswar Roy and another......... ...Plaintiffs

and

Shoshi Sikar Eswar Roy and another............Defendants.

[On appeal from the High Court at Calcutta.]

Court of Wards Act (Bengal Act X of 1879), s. 55—Suit rejected when filed on behalf of a minor under the Court of Wards without sanction of that authority to proceed with it.

Where, under s. 55 of the Bengal Court of Wards Act, IX of 1879, the manager of an estate authorized the plaintiff, in order to save limitation, to institute a suit on behalf of the Court of Wards, which refused afterwards to sanction the proceeding with the suit, *held*, that the Judge rightly ordered that the suit be rejected, as incapable, under the above section, of being prosecuted.

APPEAL from a decree (26th January 1886) of the High Court, affirming orders (14th August 1880 and 27th February 1884) of the Subordinate Judge of Rajshahye.

[689] The question raised on this appeal was whether a plaint filed on behalf of two minors under the Court of Wards, Kumar Biseswar Roy and

Kumar Kasiswar Roy, by one Biseswar Moitra had been rightly rejected by the Subordinate Judge, having been by him struck off the file of pending suits as incapable of being prosecuted for want of the sanction of the Court of Wards.

Raja Biseswar Roy left a widow, Rani Jai Sunderi Debi, the grandmother of the appellants and of the second respondent, between whom it was contested which had the right of succession to her estate. She died in 1867, leaving a son, Moheswar Roy, father of these appellants. He died in 1873, and under an order of 24th June 1874, made by the District Judge of Rajshahye under the 12th section of Act XL of 1858 (the Bengal Minors' Act), the Collector took charge of these appellants' estates.

By section 2, Bengal Act IX of 1879, "all persons and properties which at the commencement of this Act are under the charge of the Collector by virtue of an order of the Civil Court under section 12 of Act XL of 1858 shall from such commencement be deemed to be under the charge of the Court of Wards." From 1879, therefore, the minors came under the control of the Court of Wards; and upon this taking place, the Collector appointed to be manager of their estate one Hurrogobind Bose, who had also been manager under the Court of Wards of the estate of their cousin Kumar Shoshi Sikar Eswar Roy, now the first respondent. His action in regard to the estate of Rani Jai Sunderi was one of the matters of complaint in this suit, of which the enforced termination was now in question. To obtain for the minors, now appellants, two-thirds of their deceased grandmother's property, Biseswar Moitra, describing himself as their "authorised guardian and well-wisher," brought this suit on the 19th November 1879. He had written authority, dated 19th November 1879, from Hurrogobind, who purported to act under the direction of the Commissioner and to be authorised by the Collector in charge, to sue at his (Biseswar's) own risk, in order to prevent the application of limitation to the minors' claim.

Afterwards, on the 8th May 1880, the Collector authorised Biseswar Moitra to act as next friend; but whether the Collector was empowered so to do was one of the present questions.

[690] On the 14th August 1880, the Subordinate Judge, after several times postponing the suit to enable Biseswar Moitra to obtain the permission of the Board of Revenue to prosecute the suit, ordered that the plaint should be rejected and the suit struck off the file.

On the 27th February 1884, Kumar Biseswar petitioned the Judge to restore the suit to the file, he having attained majority, and having received possession from the Court of Wards. A similar petition was preferred by Kumar Kasiswar, the other appellant, who had reached eighteen years of age.

On the 30th June, the Subordinate Judge dismissed both petitions, being of opinion that the plaint had been properly rejected, and that he had no jurisdiction to restore it to the file.

An appeal from this order, and also from the order of 14th August 1880, having been admitted, a Division Bench (MACDONELL and BEVERLEY, JJ.) dismissed it and affirmed the order rejecting the plaint. They said—

"We find from the proceedings of the Board of Revenue dated the 25th February 1880 that the question of this suit, and of the proper person to conduct it on behalf of the minors, was under the consideration of the Court of Wards, and from that resolution it is clear that the Court of Wards intended to reserve to itself the power of appointing a next friend of the minors for the purposes of this suit, if it should determine that the suit should be proceeded with; and on the 28th May 1880, only twenty days subsequent to the date of the Collector's letter, we find a letter from the Court of Wards to the effect that they do not authorise the prosecution of the suit. We are driven, therefore, to the conclusion that the Collector's

letter of the 8th May 1880 was written without authority, and that it did not really convey the sanction of the Court of Wards for the institution or prosecution of this suit.

"Then it is said that under the proviso to section 25, Act IX of 1879, the institution of this plaint was authorised by the manager, Hurrogobind Bose; and we are referred to a letter written by Hurrogobind Bose to Biseswar Moitra, dated 17th November 1879, upon which this plaint was filed, authorising him at his own risk and responsibility to institute this suit in order to prevent the application of limitation.

"It is contended before us that this authority is sufficient, and that it was not necessary that the plaint should have been filed in accordance with sections 51 and 52 of the Act, but that the manager had the power of authorising any third person to institute the suit on behalf of the minors. We are unable to adopt this view. We think that the plain meaning of section 55 is this: That suits are not to be instituted on behalf of wards [691] of Court without the authority of some order of the Court of Wards, provided that in special cases, in order to save suits from being barred by limitation while the order of the Court is being applied for, the manager of the estate may of his own motion cause a plaint to be filed; but the section goes on distinctly to say that no further proceedings in the suit so filed shall be taken without the sanction of the Court. We see nothing in this section to override the plain provisions of sections 51 and 52, which prescribe the manner in which suits are to be instituted on behalf of minors. In such suits either the manager, or the Collector, or some other person appointed by an order of the Court of Wards, must be named as next friend. In the present case neither the Collector nor the manager, nor any person authorised by the Court of Wards, was named as next friend, and we therefore find that the suit was brought in an improper form, and for this reason alone we think that it was properly rejected.

"For these reasons, then, we think that the present appeal must fail. The appeal is dismissed with costs."

Mr. *R. V. Doyne*, for the Appellants, argued that, reference being made to the 15th section of the Act IX of 1879, the letter of 17th November 1879 conferred on Biseswar Moitra an authority to sue on behalf of the present appellants sufficient to satisfy the 55th section of the Act. Also in regard to the letter of 8th May 1880 it was to be presumed that the Collector was acting under the orders of the Court of Wards, and in accordance with the resolution of 25th February 1880. The Collector after that could not, by his letter of 28th May 1880, interfere with the hearing of the suit, which had been duly instituted. At most, the withdrawal of authority should only have the effect of staying the suit until these appellants should be released from the control of the Court of Wards.

Mr. *J. D. Mayne*, for the Respondents, was not called upon by their Lordships, whose judgment was delivered by

Lord Hobhouse.—The matter in dispute in this case lies within a very narrow compass. The 55th section of the Bengal Court of Wards Act, Act IX of 1879, provides that "no suit shall be brought on behalf of any ward unless the same be authorised by some order of the Court"—(that is, the Court of Wards): "provided that a manager may authorise a plaint to be filed in order to prevent a suit from being barred by the Law of Limitation; but such suit shall not be afterwards proceeded with, except under the sanction of the Court." The appellants in the year 1879 were wards of Court, and [692] Hurrogobind Bose had been appointed manager of their estate. On the 17th November 1879 Hurrogobind Bose wrote a letter to the plaintiff in this suit, Biseswar Moitra, authorising him to institute a suit on behalf of the wards at his own risk and responsibility, in order to prevent the application of limitation. The letter refers to applications to the Collector and to the Commissioner, and to opinions expressed by them, but it does not mention any order of the Court of

Wards, nor does it purport to come from the Court of Wards at all. It is an authority of the manager under the second clause of section 55 of the Act to Biseswar Moitra to institute a suit for the purpose of saving the time of limitation. On the same day the plaintiff instituted the suit. It seems to have been doubted in the High Court whether he had authority to institute the suit. Their Lordships consider that the manager had the right to give Biseswar Moitra the authority, and that the suit was properly instituted. Then came the question whether the suit should be prosecuted. Biseswar Moitra took immediate steps to get an authority from the Court of Wards to prosecute the suit, and he applied to the Civil Court several times to give him time to produce his authority to prosecute the suit. On the 8th May 1880 a letter was written, which, if it came from the Court of Wards, would show that they were then of opinion that the suit should go on, for it purports to be an authority from the Officiating Collector of Rajshahye, authorising Biseswar Moitra to act as next friend of the infants. But it does not purport to come from the Court of Wards, and it is quite clear that nobody treated it as being an authority from the Court of Wards, because on the 10th May an application was made to the Civil Court to postpone the case, without any mention of the letter of the 8th May as being an authority to prosecute the suit. However that may be, on the 28th May a letter was written which does purport to convey the opinion of the Court of Wards. It was written by the Assistant Collector to the Government Pleader, and the writer requested the Government Pleader "to take steps at once to inform the Court and intimate to the Mookhtar of the junior branch, Biseswar Moitra, that the Court of Wards does not authorise the suit." That letter was communicated to the Court. On the same day an application was made to the Court, and the letter was produced which refused sanction to the [693] prosecution of the case. Upon that the plaintiff applied for time to get the sanction of the Court of Wards, and time was given him and on two subsequent occasions further time was given that he might get the sanction of the Court of Wards. Ultimately the time was enlarged until the 14th of August, and on the 14th of August, there being nothing said in contradiction of the letter of the 28th of May, the Subordinate Judge ordered that the case should be struck off the file. It appears to their Lordships not only that he had jurisdiction to strike the case off the file, but that he was quite right in doing so. He had before him a suit which, however lawfully instituted, was by law incapable of being prosecuted without a sanction, which the plaintiff was unable to obtain.

Their Lordships therefore are of opinion that this appeal should be dismissed with costs; and they will humbly advise Her Majesty in accordance with that opinion.

Appeal dismissed.

Solicitors for Appellant: Messrs. *Watkins and Lattey.*

Solicitors for Respondent: Messrs. *T. L. Wilson and Co.*

C. B.

[17 Cal. 693]
PRIVY COUNCIL.

The 23rd November, 1889.

PRESENT:

LORD ASHBOURNE, LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. C

Gaur Mohun Chakerbati............Appellant

and

Tarasunderi Debi...... .....Respondent.

[On petition referring to an appeal from the High Court at Calcutt

Privy Council, Practice of—Procedure—Circumstances and terms of substitution of an appellant.

An appellant, after the transmission of his appeal to England, obtained leave in the High Court to withdraw it. The appeal involved the rights of a minor, party to the suit, whose mother and guardian obtained an order for her to be substituted for the withdrawing appellant, on the terms that she should give security to the satisfaction of the High Court for costs already ordered, and should undertake to abide by any order as to general costs.

THIS was a petition preferred by Bamasunderi Debi, widow of the late Dwarkanath Chakerbati, who died in January 1886, [694] leaving also another widow, the respondent Tarasunderi Debi. The petitioner asked to have her name, or that of her adopted son, Debender Nath Chakerbati, through her as his guardian, substituted in the abovenamed appeal for that of the appellant, Gaur Mohun, who after the transmission of the record to England had applied to the High Court for leave to withdraw.

The appeal raised the question whether Dwarkanath had, by his will, given to the petitioner the power which she had purported to exercise in adopting Debender Nath. The execution of the will was denied by Tarasunderi, by whom Dwarkanath had a son who survived him, but this son had since deceased. Probate of the will, having been granted under Act V of 1881, was afterwards, on 23rd April 1888, revoked.

The appellant Gaur Mohun, on 17th February 1888, had obtained a certificate giving leave to appeal, and the petitioner now represented the injury that would be caused to the minor should the appeal be discontinued. The petition set forth that an application had been made on the 5th June 1889 to the High Court for leave to substitute the petitioner Bamasunderi, either as executrix appointed by the will or as guardian of the adopted minor, Debender Nath. This, however, had been refused, on the ground that it was for their Lordships, and not for the High Court, to dispose of the matter.

Mr. *R. V. Doyne* supported the Petition.

Mr. *T. H. Cowie*, Q.C., appeared for the Respondent, Tarasunderi.

Their Lordships' **judgment** was that the petitioner ought to be substituted for the withdrawing appellant on the terms that she gave security to the satisfaction of the High Court for the costs already incurred, and undertook to abide by such order as might be made as to the general costs.

Solicitor for the Petitioner: Mr. *G. Stevens.*

Solicitors for the Respondent: Messrs. *Sanderson, Holland, and Adkin.*

C. B.

NOTES.

[*See* also (1909) 10 C.L.J., 331.]

---

[695] APPELLATE CIVIL.

The 18th April, 1890.

PRESENT :

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Gopal Chunder Das............Defendant

versus

Umesh Narain Chowdhry and others............Plaintiffs.*

Bengal Tenancy Act (VIII of 1885), s. 188—Suit for enhancement of rent or for additional rent—Joint proprietors.

Having regard to the provisions of section 188 of the Bengal Tenancy Act 1885, where two or more persons are joint proprietors, they must all join in bringing a suit for enhancement of rent or for additional rent.

Guni Mahomed v. *Moran* (I. L. R., 4 Cal., 96) referred to.

THIS appeal arose out of a suit for enhancement of rent and additional rent under sections 30 and 52 of the Bengal Tenancy Act, 1885. The suit was brought by Umesh Narain Chowdhry and five others, who were the proprietors of an eight-annas share in mouzah Ghope Selanda Kole Chinakhara in zillah Pubna against their tenant Gopal Chunder Das (defendant No. 1), and their co-proprietors of the remaining eight-annas share, Grish Chunder Rahut and Durga Nath Rahut, who were made *pro forma* defendants.

The facts of the case are stated in the judgment of the High Court.

Baboo *Sreenath Das* and Baboo *Grija Sunker Mozoomdar* for the Appellant.

Dr. *Rash Behari Ghose* and Baboo *Mohini Mohun Chuckerbutty* for the Respondents.

The **Judgment** of the High Court (NORRIS and MACPHERSON, JJ.) was as follows : -

This is a suit under the Bengal Tenancy Act to enhance the rent of the tenant defendant, and to obtain additional rent for land which he is said to hold in excess of the area for which rent has been previously paid by him.

The plaintiffs are the proprietors of an eight-annas share of the mehal to which the holding of the defendant appertains, and [696] the defendants 2 and 3 are proprietors of the remaining eight annas.

The plaint sets out that the plaintiffs and the co-sharer defendants are in joint possession by making separate collections ; that the tenant defendant is in possession of a temporary ryotty jote of 218 bighas 15 cottahs at a variable rent of Rs. 95-7, which jote is recorded in the name of his father in the sheristah

* Appeal from Appellate decree No. 134 of 1889, against the decree of Baboo Buloram Mullick, Subordinate Judge of Pubna and Bogra, dated the 11th of January 1889, affirming the decree of Baboo Debendro Nath Roy, Munsif of Shazadpore, dated the 30th of June 1888.

of the plaintiffs and of their co-sharers; that the land which the defendant really holds amounts to 242 bighas 1 chattack; that they are entitled to rent for the excess area and to enhanced rent for the land in the holding, the grounds on which enhancement is claimed being all those specified in section 30 of the Tenancy Act. They accordingly pray that the entire rent may be assessed at Rs. 348-4-5, and that a moiety of this may be decreed to them on account of their share.

The tenant defendant pleaded *inter alia* that the plaintiffs being only fractional shareholders could not alone bring this suit either for enhanced or additional rent; that although the rent was paid separately to the plaintiffs and to their co-sharers in proportion to their respective shares, there was no separate tenancy under each; that he was not in possession of the quantity of land alleged; that the rent was less than that stated; and that his jotes were kaimi and mokarari and had been admitted to be so by the co-sharer defendants.

It appears that before the new Bengal Tenancy Act came into operation the plaintiffs had brought a suit to enhance the defendant's rent. This was dismissed on account of the invalidity of the notice of enhancement, but it was proved in that suit that the defendant was in possession of 242 bighas of land. It is only necessary for the purpose of this appeal to allude to three issues which the Courts had to determine. These were—

1*st.*—Could the plaintiffs maintain this suit as regards the enhanced rent?

2*nd.*—Could they maintain it as regards the additional rent for the excess area?

3*rd.*—Was the decision in the previous case conclusive as to the extent of land in the defendant's possession?

The Munsif held that under section 188 of the Tenancy Act the plaintiffs could not by themselves sue for enhanced rent, as in such [697] a suit all the landlords must join, but that there was nothing to prevent their suing for the additional rent on account of the excess area. He further held that the question of the area of the land was *res judicata* by reason of the previous decision; and on these findings, and accepting the defendant's evidence as to the prevailing rate, he gave the plaintiffs a modified decree. The Subordinate Judge, on the appeal of both parties, reversed the Munsif's decision on the first of the issues referred to above, and, upholding it as regards the other two issues, remanded the case in order that the other questions which arose might be disposed of.

The defendant, who is the appellant before us, contends that the decision of the Subordinate Judge on all the three issues is wrong. We think the Munsif was right and the Subordinate Judge wrong in the construction of section 188. That section is as follows:—"When two or more persons are joint landlords anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together, or by an agent authorised to act on behalf of both or all of them." Section 28 provides that the rent of an occupancy ryot, when paid in money, shall not be enhanced except as provided by the Act; and the following sections prescribe the mode of enhancement, the circumstances under which, and the extent to which, it may be made. As regards the mode, it may be by contract subject to certain stringent conditions, or by suit; and section 30, which relates to a suit, commences as follows:—"The landlord of a holding held at a money rent by an occupancy ryot may, subject to the provisions of this Act, institute a suit to enhance the rent on one or more of the following grounds, namely." Section 188, is therefore, as one of the provisions of the Act, imported into

s. 30, and the only question seems to be whether the plaintiffs and their co-sharers are joint landlords of the holding within the meaning of s. 188. It is clear, we think, that the suit must be to enhance the rent of the entire holding, and that the suit must be brought by all the joint landlords, the landlord being the person or persons immediately under whom a tenant holds.

The allegations in the plaint show pretty clearly that the plaintiffs are not the sole landlords of the holding in question. It forms part of an undivided estate, of which they are only fractional [698] proprietors, and they are only entitled to receive a fraction of the entire rent payable. Whether they have joint or separate sheristas, the holding is recorded as one holding bearing one entire rent. This rent would be payable jointly to all the landlords (in this case the proprietors) but for an arrangement by which they collected separately their respective shares. It has been held, however, and it is only necessary to cite as authority the Full Bench case of *Guni Mahomed* v. *Moran* (I. L. R., 4 Cal., 96), that such an arrangement does not give rise to a separate tenancy, and that the original tenancy under all the landlords still continues. The case has indeed proceeded throughout on the understanding that the plaintiffs and their co-sharers were joint landlords, the only question being whether s. 188 applied. In our opinion it does apply, and was intended to apply to a case like this. So far, therefore, as the enhancement is concerned, the suit will not lie at the instance of the plaintiffs alone.

We think also that the suit for additional rent on account of the excess land will not, as framed, lie. It is true that s. 52 differs from s. 30 in this, that it merely declares the liability of the tenant to pay additional rent, and the circumstances which the Court should take into consideration if a suit is brought to obtain it, and that it does not expressly convey any authority to the landlord to bring a suit or import the provisions of s. 188. But the same principle applies alike to a claim for enhanced rent and to a claim for additional rent. The land, which is said to be in excess of the area for which rent has been previously paid, has been held, rightly or wrongly, as part of the original holding.. There is here no allegation that it has been taken by trespass. If a decree is obtained, the excess land will be annexed to the land of the original holding, and the additional rent will be added to the original rent. There will be no new holding created. If, therefore, some of several joint landlords cannot enhance the rent of the original holding, they cannot, it seems to us, any the more add to that rent in any other way, and they cannot increase the area of the holding any more than they can reduce it. The right of some of several co-sharers to collect separately their share of the entire rent of an undivided holding is quite distinct. It rests on an [699] arrangement between the co-sharers and the tenants as to the mode in which the entire rent shall be collected, but which preserves intact the original tenancy both as regards the area of the holding and the rent paid. We cannot, therefore, see the analogy, which both the Munsif and the Subordinate Judge find to exist, between a suit for rent and a suit for additional rent when the parties suing are some only of several co-sharers.

For the reasons stated we think the suit is not maintainable by the plaintiffs, and it is unnecessary, therefore, to determine the remaining point, viz. whether the question of area is *res judicata*, by reason of the former decision. We therefore decree the appeal, reverse the decision of the Subordinate Judge, and dismiss the suit with costs in all Courts.

C. D. P. *Appeal allowed.*

NOTES.

[See the Notes to 17 Cal., 390 supra. *See* also 19 Cal., 593; 610; 755; 25 Cal., 917; 33 Cal., 1010.]

[17 Cal. 699]

FULL BENCH.

The 18th June, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY, AND MR. JUSTICE GHOSE.

Prem Chand Dey............Decree-holder

versus

Mokhoda Debi............Judgment-debtor.*

Jurisdiction—Sale in execution of a decree—Property outside jurisdiction of Court executing decree—Code of Civil Procedure (Act XIV of 1882, ss. 16, 223, 649).

A Court has no jurisdiction, in execution of a decree, to sell property over which it had no territorial jurisdiction at the time it passed the order of sale.

The decree-holder at a sale under a mortgage decree purchased the mortgaged property with leave of the Court. Before the order of sale was passed the mortgaged property had been transferred by an order of Government to the jurisdiction of another Court. *Held* by the Full Bench:—That the sale must be set aside as being without jurisdiction.

Kamini Soondari Chowdhrani v. *Kali Prosonno Ghose* (L. R., 12 I. A., 215; I. L. R., 12 Cal., 225) followed.

IN this case one Prem Chand Dey, an assignee of a mortgage over certain properties at that time within the jurisdiction [700] of the Munsif of Bishenpur, obtained in the Court of the Munsif of Bishenpur by consent a decree under s. 88 of the Transfer of Property Act against the mortgagor. This decree provided that the judgment-debtor should pay the sum due under the mortgage by the 12th April 1887, and in default the mortgaged property should be sold. Execution of this decree was taken out in 1887 against the judgment-debtor, and in 1888 the mortgaged property was sold, the decree-holder himself, with leave of the Court, being the purchaser thereof. An objection was then raised by the judgment-debtor that inasmuch as the property was not within the jurisdiction of the Munsif of Bishenpur, but had by an order of Government been transferred with other lands to the jurisdiction of another Munsif, the sale was invalid. This transfer from one jurisdiction to another took place about two months before the institution of the suit on this mortgage. The objection raised by the judgment-debtor was allowed by both the lower Courts. The decree-holder appealed to the High Court, and the case came on for hearing before Mr. Justice PRINSEP and Mr. Justice HILL, who passed the following ORDER: —"Two questions arise for our decision in this second

---

* Full Bench on appeal from Order No. 92 of 1889, from an order of Babu Brojendro Kumar Seal, District Judge of Bankura, dated the 14th December 1888, confirming the order of Babu Shoshi Bhusan Chatterji, Munsif of Bishenpur, dated the 18th September 1888.

appeal: first, whether in the course of proceedings in execution to set aside a sale held in execution of a decree it is competent to the debtor to raise for the first time an objection going to the jurisdiction of the Court which passed the decree, even to the validity of the decree itself. Next, whether, supposing that an objection to the validity of the decree itself is untenable in the proceedings in execution of that decree, the sale could properly be held by the Court which admittedly had not jurisdiction at the time that the sale took place over the lands which were to be sold. Our inclination is to disallow the first objection, and to hold that in the course of proceedings in execution of a decree it is not competent to a judgment-debtor for the first time to dispute the jurisdiction of the Court to try the suit, and to ask to have the particular decree declared to be inoperative, although he has not objected to it in the appeal allowed by law. This, no doubt, is a point of great importance, on which it is necessary to have the decisions of the lower Courts uniform. But if we were to hold, as we are inclined to do, that this objection could not properly be raised in the present stage of the proceedings, we [701] should feel bound to refer the matter for consideration by a Full Bench of this Court, because we are not disposed to agree with the view of the law expressed by another Division Bench in the case of *Kartik Nath Pandey* v. *Tilukdhari Lall* (I. L. R., 15 Cal., 667). In our opinion a Court of Execution is not competent to sell properties under an order for sale passed under section 88 of the Transfer of Property Act, if at the time when that sale is held that Court has no longer jurisdiction over the lands which it is proposed to sell. We think rather that, having regard to the terms of section 223,* clause (*c*) of the Code of Civil Procedure, execution should be transferred to a Court having juris-

Court by which decree may be executed.

*[Sec. 223 :—A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained,

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree directs the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing that the decree should be executed by such other Court.

The Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto.

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure.

If the decree has been passed in a case cognizable by a Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificate respectively mentioned in clauses (a), (b) and (c) of section 224 ; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, if the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.]

diction over the immoveable property, and therefore alone competent to hold such sale. We therefore desire to have the opinion of a Full Bench of this Court on both the points in this case."

Baboo *Rash Behari Ghose* (with him Baboo *Nolini Runjan Chatterji*) for the Appellant:—The objection to jurisdiction was not raised until the execution proceedings, and in that stage it comes too late; *Sadasiva Pillai* v. *Ramalinga Pillai* (15 B. L. R., 382). You cannot raise jurisdiction at a late stage of proceedings; *Kandoth Mammi* v. *Neelamcherayil Abdu Kalandan* (8 Mad., H. C., 14), *Manohar Bhivra* v. *Potanis* (2 Bom., H. C., 396). No consent even can give jurisdiction—*Meenakshi Naidoo* v. *Subramaniya Sastri* (L. R., 14 I. A., 160; I. L. R., 11 Mad., 26), *Ledgard* v. *Bull* (L. R., 13 I. A., 134; I. L. R. 9 All. 191).

The order must be accepted as valid and binding. The following cases show that you cannot raise the plea of jurisdiction at a late stage of the proceedings—*Modun Mohun Ghose Hazra* v. *Baroda Soondari Dasia* (8 C. L. R., 261), *Bishenmun Singh* v. *Land Mortgage Bank of India* [I. L. R., 11 Cal., 244 (248)], *Ooma Soondaree Dossee* v. *Bepin Behary Roy* (13 W. R., 292), *Radha Govind Gossami* v. *Ooma Soondaree Dossee* (24 W. R., 363), *Naro Hari* v. *Anpurnabai* [I. L. R., 11 Bom., 160 (note), 170]. A somewhat similar, case to the last is that of *Revell* v. *Blake* [L. R., 7 C. P., 300 (304)]. I say that the jurisdiction of the Munsif is derived from the Civil Courts Act; he may try cases under [702] Rs 1,000 but he cannot try a case of a person whose land is outside his jurisdiction. When the matter of jurisdiction is a question of fact, the Munsif will have jurisdiction, for the superior Courts will not interfere with the findings. See *Brown* v. *Cocking* (L. R., 3 Q. B., 672). There is also a distinction between a voluntary and an involuntary submission to jurisdiction; you cannot after a voluntary submission turn round and question it. *Ex parte Pratt* [L. R., 12 Q. B. D., 334 (341)]. Where it is a voluntary submission it cannot be objected to. *The Queen* v. *Judge of County Court of Shropshire* (20 Q. B. D., 242, 246)., *Broad* v. *Perkins* (L.R., 21 Q. B. D., 533), *Latchman Pundeh* v. *Moddan Mohun Shye* (I. L. R., 6 Cal., 513), and *Maseyk* v. *Steel* (I. L. R., 14 Cal., 661.)

Baboo *Srinath Dass*, Baboo *Sharoda Churn Mitter*, and Baboo *Shaumbhu Chunder Dey* for the Respondents, were not called upon.

The opinions of the Full Bench (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.) were as follows:—

Petheram, C. J. (PRINSEP, PIGOT, and O'KINEALY, JJ., concurring).—This was a suit brought on a mortgage of 139 bighas of land forming part of mouzah Bouridanga Gopinathpur. It was brought in the Court of the Munsif of Bishenpur, and by consent it was decreed that the debtor should pay the mortgaged debt by the end of Choit 1293, and, in default, that the mortgaged property should be sold. Execution was taken out in 1887, and on the debtor paying Rs. 60 the execution proceedings were struck off. Execution was again sued out in 1888, when the property was sold and purchased on the 21st May by the decree-holder for Rs. 50. It has been found by both Courts that at the time the suit was brought, and when the order for sale was passed, the mortgaged property was wholly within the jurisdiction of the Munsif of Bankura, and not within the territorial jurisdiction of the Munsif of Bishenpur, who executed the decree.

Both Courts have refused to confirm the sale; and the Division Bench of this Court, which heard the case in appeal, has asked our opinion on the following question, viz., whether a Court in execution of decree is competent to sell property, if, at the time the sale [703] is held, the Court has no longer jurisdiction over the land which it is proposed to sell.

We are of opinion that the Court has no such jurisdiction. By section 16 of the Code of Civil Procedure, suits for the recovery of immoveable property, or for the determination of any other right or interest in immoveable property, must be instituted in the Court within the local limits of whose jurisdiction the property is situate. This shows that the object of the Code is to limit the territorial jurisdiction of the Courts in regard to the property that they are entitled to deal with. The case of *Kamini Soondari Chowdhrani* v. *Kali Prosunno Ghose* (L. R., 12 I. A., 215; I. L. R., 12 Cal., 225) strongly supports this opinion. In that litigation a suit for foreclosure relating to lands in the 24-Pergunnahs was dismissed in the 24-Pergunnahs Court, and an action upon a covenant in the mortgage deed relating to lands in Nuddea was also dismissed in the Nuddea Court. On appeal the High Court upheld the decision of the Nuddea Court, but decreed the appeal made from the Court of the 24-Pergunnahs, and, remanding the latter case, directed that Court to determine certain questions relating to the village of Alumpur, within the district of Nuddea. Against that decree there was an appeal to the Privy Council, and their Lordships set aside the decree on the broad ground that the High Court in its Appellate capacity was not in a position to give jurisdiction to the Court of the 24-Pergunnahs, so as to enable the latter Court to deal with a case commenced and prosecuted in Nuddea relating to lands in that district. It would seem, therefore, that the Courts in this country have no power to determine any right or interest in immoveable property lying wholly outside their local jurisdiction. Nor does the argument in favour of the extended jurisdiction of the Courts in the *mofussil* based on section 223 appear to us to be supported by that section. So far as the Procedure Code is concerned, execution of a decree is only a continuation of the suit, and there appears no legitimate reason why a Court in the later stage of a suit should have greater powers than it possessed at its institution. But however that may be, a comparison of s. 223 with the last paragraph of s. 649 seems to us to indicate that territorial jurisdiction is a condition precedent to a Court executing a decree.

[704] We are, therefore, of opinion that the Court below not having, at the time it passed the order of sale, territorial jurisdiction over any portion of the property sold, and this being a suit between the decree-holder and the judgment-debtor, that the Judge was right in refusing to confirm the sale.

In the result the appeal will be dismissed with costs.

Ghose, J.—I agree in holding that the Munsif of Bishenpur had no jurisdiction to sell the property, and that therefore he was right (and so also was the Judge of the Appellate Court) in refusing to confirm the sale. And this, I should think, he was bound and competent to do when he found that he had no jurisdiction to hold the sale. I do not understand that the last portion of the judgment just delivered by the Chief Justice is intended to decide, or suggest, that if a third party, and not the decree-holder, were the purchaser, the Courts below would not be right in making the order they did, and it is therefore not necessary to discuss that matter in this case.

A. A. C. *Appeal dismissed.*

NOTES.

[*See* also (1891) 18 Cal., 526; (1891) 19 Cal., 13; (1894) 21 Cal., 639; (1895) 22 Cal. 871; (1897) 23 Bom., 23; (1903) 27 Mad., 118.]

[17 Cal. 704]
APPELLATE CIVIL.

The 7th March 1890.
PRESENT :
MR. JUSTICE TOTTENHAM AND MR. JUSTICE AMEER ALI.

Mohini Mohan Das (Judgment-debtor)............Petitioner
versus
Satis Chandra Roy and others (Decree-holders)............Opposite party.*

Valuation of suit—Suit for possession and mesne profits—Value of the original suit—Act XII of 1887, s. 21.

In a suit for possession and mesne profits, the value of the original suit for the purposes of s. 21 of Act XII of 1887 depends not merely upon the value of the property sought to be recovered, but also upon the value or amount of the profits recoverable.

SATIS CHANDRA ROY and others (the opposite party) brought a suit in the Court of the Subordinate Judge of Dacca against Mohini Mohan Das and Mary Pogose (the petitioners) and another for the recovery of possession of certain immoveable property and for mesne profits, but did not state the amount they [705] claimed on account of mesne profits. They valued the suit at Rs. 4,000 and paid the Court-fee on that amount, undertaking to pay a further Court-fee on any sum that might be found due to them. They obtained a decree for possession, which directed that mesne profits should be ascertained in execution. There was no appeal from this decree. In the execution proceedings mesne profits were assessed at Rs. 6,188-2-0, upon which sum an additional Court-fee was paid. On the 24th August 1889 the Subordinate Judge passed an order disallowing the petitioners' objections as to their liability under this assessment. From this order the petitioners appealed to the District Judge of Dacca, who returned the memorandum of appeal on the ground that the appeal lay to the High Court and not to him. Thereupon, the petitioners obtained from NORRIS and GHOSE, JJ., a rule in the following terms:—

"Let a rule issue upon the opposite party to show cause before this Court why the District Judge of Dacca should not be directed to hear the appeal in this petition specified, or why this petition should not be registered as a memorandum of appeal to this Court from the order of the Subordinate Judge dated the 24th August 1889, and let the record be sent for."

On the rule coming up for argument,

Baboo *Mohini Mohun Roy* and Baboo *Lal Mohun Das* for the Petitioners;

Baboo *Promotho-Nath Sen* for the Opposite Party;

The contentions of the parties appear from the judgment of the High Court (TOTTENHAM and AMEER ALI JJ.) which, omitting the facts, was as follows:—

The question involved in this rule is whether, under s. 21 of Act XII of 1887, the appeal of the judgment-debtors lies in this Court or in the Court of the District Judge.

For the petitioners it is contended that the expression "value of the original suit" in s. 21 of Act XII of 1887 means the valuation fixed upon by the plaintiff at the outset, without regard to the value of the relief sought or the amount of the mesne profits that might be found due to the plaintiff; and it has been urged that to hold that the appeal from the decree for

* Civil Rule No. 1706 of 1889 against the order of Baboo Krishna Chandra Chatterjee, Subordinate Judge of Dacca, dated the 24th of August 1889.

possession should lie to the District Judge, and that the appeal on the question of mesne profits should lie to this Court, would involve an anomaly. [706] For the decree-holders it has been contended that the value of the suit depends not merely upon the value of the property sought to be recovered, but also upon the value or amount of the profits recoverable. We think this contention is correct.

Under section 50 of the Code of Civil Procedure, the plaintiff, in a suit for mesne profits or for money to be ascertained on the taking of unsettled accounts, is allowed to value his claim *approximately*. Accordingly when a claim for mesne profits is joined to a claim for the recovery of land, the plaintiff may either fix a nominal or approximate value on the latter part of his claim, or not fix any value at all. In either case the amount of mesne profits is usually reserved for enquiry after the preliminary decree for possession. When the enquiry as to the amount of mesne profits recoverable is reserved, the decree for possession is only a partial decree: the final decree is made only after the mesne profits have been ascertained. Now, in such cases the value of the suit is made up of two elements, viz., the value of the property claimed and the amount of the mesne profits. Should the plaintiff put any approximate value upon his claim for mesne profits, the value of his suit for the purpose of determining the forum of appeal from the preliminary decree would be constituted of two known elements, viz., the value of the property plus the assessed amount of mesne profits, and the appeal would lie to this Court or to the District Judge's Court, as the value of the two elements together exceeds Rs. 5,000 or falls below it. But when no amount is fixed approximately or nominally upon the mesne profits, it is an unknown quantity, and the value of the suit, so far as the appeal from the preliminary decree for possession is concerned, is the value of the property alone, which would determine the forum of appeal. When the amount of mesne profits has been ascertained, the value of the original suit is the value of the property sued for, plus the mesne profits, and the appeal would lie accordingly.

We do not think there is any anomaly involved in this conclusion. We think that the "value of the original suit" depends on, and is involved in, the value of the relief sought; and when once the final decree ascertaining the amount of mesne profits is made, the precise value of the suit becomes ascertained. Until then it is a variable quantity. To hold otherwise would be to declare [707] that the Legislature intended that only one component part of the value should be taken into consideration for determining the forum of appeal and not the other.

We accordingly hold that, under s. 21 of Act XII of 1887, the appeal in this case lies to this Court and not to the District Judge, and we direct that the appeal of the petitioners be registered accordingly. No costs of the rule.

C. D. P. *Rule made absolute.*

NOTES.

[*See* also **(1907) 34 Cal., 954**; (1904) 31 Cal., 365; (1894) 21 Cal., 550.]

[17 Cal. 707]
APPELLATE CIVIL.

The 25th March, 1890.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE AMEER ALI.

Krishna Prosad Nag and others ....Defendants,

versus

Maizuddin Biswas and another............Plaintiffs.*

Small Cause Court, Mofussil—Provincial Small Cause Court Act (IX of 1887)—Jurisdiction—Suit for damages for the forcible cutting and carrying away of grass.

Act IX of 1887 does not exclude from the jurisdiction of the Small Cause Court a suit for damages for the forcible cutting and carrying away of grass.

Sungram Singh v. *Juggun Singh* (2 N. W., H.C., 18); *Daur Sinha* v. *Rughnundun Sinha* (3 N. W., H. C., 101); *Darma Ayyan* v. *Rajapa Ayyan* (I. L. R., 2 Mad., 181); and *Manappa Mudali* v. *Mc Carthy* (I. L R., 3 Mad., 192), referred to.

THIS was a rule under s. 25 of the Provincial Small Cause Court Act of 1887.

Maizuddin Biswas and another instituted a suit for damages in the Court of Small Causes at Furreedpore against Krishna Prosad Nag and others (among whom were the petitioners), making their co-sharers *pro formâ* defendants. The plaintiffs alleged that they and their co-sharers were the lessees of a plot of re-formed chur land called Chur Madhubdia in pergunnah Pas Pashur, and that in the month of Bhadro 1293 (August-September 1886) the principal defendants had trespassed on their land and forcibly cut and carried away the grass growing on 50 bighas thereof. The plaintiffs claimed from the principal defendants the sum of Rs. 250 as damages in respect of their share of the grass that [708] had been cut and carried away. The principal defendants pleaded, *inter alia*, want of jurisdiction of the Court, and also denied the plaintiffs' title.

The Judge found as a fact that the principal defendants had no right or interest in the land, that they were trespassers and had wrongfully cut and carried away the grass growing on the land. Accordingly, on 29th August 1889, the Judge gave the plaintiffs a decree for Rs. 240 with costs against the principal defendants except three of them.

Thereupon, these defendants moved the High Court under s. 25 of Act IX of 1887, and obtained a rule calling on the plaintiffs to show cause why the decree of the 29th August should not be set aside.

On the rule coming up for argument —

Baboo *Srinath Das* and Baboo *Grija Sunker Mozumdar* for the Petitioners.

Dr. *Rash Behari Ghose* and Baboo *Harendra Nath Mookerjee* for the Opposite Party.

* Civil Rule No. 1615 of 1889 against the decree of Baboo Troilokhya Nath Mitter, Judge of the Court of Small Causes, Furreedpore, dated the 29th of August 1889.

The contentions of the parties appear from the **judgment** of the High Court (TOTTENHAM and AMEER ALI, JJ.), which was as follows:—

The question involved in this rule is whether, having regard to the provisions of article 31 of the second schedule to the Provincial Small Cause Court Act (Act IX of 1887), a suit for damages for the forcible cutting and carrying away of grass is cognizable by the Court of Small Causes. The plaintiffs instituted this suit in the Small Cause Court of Furreedpore upon the allegation that they were the lessees of a piece of land, and that the defendants had wrongfully trespassed on the same and cut and carried away the grass growing thereon.

The defendants had, among other pleas, raised an objection to the jurisdiction of the Court, and also denied plaintiffs' title to the land. The Judge, however, found as a fact that the defendants had no sort of connection with the land in question, and that they had wrongfully taken the grass as alleged in the plaint, and accordingly decreed the plaintiffs' claim. The defendants, thereupon, obtained a rule from a Division Bench of this Court under section 25 of the Provincial Small Cause Court **[709]** Act, calling upon the plaintiffs to show cause why the decree of the Judge should not be set aside. Upon the hearing of the rule it was contended on behalf of the defendants that in view of the last clause of the article already mentioned, the Small Cause Court had no jurisdiction to entertain the suit. It is said that the words "profits of immoveable property . . . . wrongfully removed by the defendant" include crops or produce of land forcibly carried away. We are of opinion that article 31 does not except from the jurisdiction of the Court of Small Causes suits for damages for trespass and for the forcible appropriation of crops or the produce of land. A reference to the words of articles 30 and 31 will render this perfectly clear. Article 30 excludes from the cognizance of the Small Cause Courts a suit for an account of property and for its due administration under decree, and article 31 declares "any other suit for an account, including a suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant," to be likewise beyond the jurisdiction of Courts of Small Causes. From the collocation of the articles it is manifest that the suits referred to in the last clause of article 31 are of the same nature, *ejusdem generis*, as those previously described. That clause, in our opinion, applies to cases where a person under some claim of title has received the profits of immoveable property and the rightful owner, on the establishment of his title, seeks to recover the same. The article clearly means to treat such a suit as one for an account. An examination of section 6 of Act XI of 1865 and of some of the cases decided thereunder would show that suits for damages for trespass on land were never intended to be excepted from the jurisdiction of the Small Cause Court. Section 6 of Act XI of 1865 provided that "claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for *damages*" with certain limitations not necessary to mention here, should be cognizable by the Courts of Small Causes.

In the case of *Sungram Singh* v. *Juggan Singh* (2 N.W.H.C., 18), no doubt it was held that a suit for assessed mesne profits within the pecuniary limit prescribed in the section, "being a suit for damages," **[710]** was cognizable by the Small Cause Court, but that case has never been followed. It would seem that the Legislature, in order to remove all doubts on the point, expressly exempted suits for mesne profits from the cognizance of the Courts of Small Causes. It may be remarked also that the language of the last clause of article

31 is uniform with that of article 109 * of the Limitation Act, which relates to suits for mesne profits; and this fact, too, would indicate that the Legislature, in article 31 of the 2nd schedule of the Small Cause Court Act, was providing for the same class of suits. Under section 6 of the old Act a suit for the wrongful reaping and carrying off the produce of lands was held to be cognizable by a Court of Small Causes—*Daur Sinha* v *Rughnundun Sinha* (3 N.W. H. C., 101). In the case of *Darma Ayyan* v. *Rajappa Ayyan* (I. L. R., 2 Mad., 181), it was alleged by the plaintiff that he and the first defendant were in joint possession of a parcel of land, and that his share of the produce for the year 1887 was carried away by the first defendant with the aid of the second defendant. He accordingly claimed Rs. 187 as the value of his share of the produce. The defendants pleaded that the plaintiff had no right to the possession of the land. In the face of this objection the High Court held that the Small Cause Court had jurisdiction to entertain the suit. In another case, *Manappa Mudali* v. *McCarthy* (I L. R., 3 Mad., p. 192), decided by a Full Court consisting of TURNER, C.J., INNES, KERNAN, and AYYAR, JJ., it was conceded that a suit for damages for the wrongful cutting and carrying away of bamboos or any other produce of land was cognizable by the Small Cause Court, and the only question discussed was whether an objection as to the title of the plaintiff to the land would oust the jurisdiction. It was held that the jurisdiction is not ousted when the objection is raised incidentally.

We hold that the present Act has altered in no way the cognizability by Small Cause Courts of suits for trespass on land and the wrongful appropriation of produce, and that the present suit was properly maintainable in the Court of Small Causes.

The other objections taken in the petition have not been pressed, nor have they any force. The rule accordingly is discharged with costs.

C. D. P. *Rule discharged.*

NOTES.

[This was followed in (1891) 18 Cal., 316; (1892) 15 Mad.. 298; see also **(1896) 23 Cal., 884**; (1895) 22 Cal., 877.]

---

* [Art. 109 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years.	**When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal when he recovers possession.]**

[711] FULL BENCH.

The 18th June, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR. JUSTICE PIGOT, MR. JUSTICE O'KINEALY, AND MR. JUSTICE GHOSE.

Punchanun Bundopadhya, minor, by his mother and guardian Kamini Debi............Plaintiff

versus

Rabia Bibi and others............Defendants.*

Execution of decree—Claims to attached property—Questions arising between the parties or their representatives—Code of Civil Procedure (Act XIV of 1882), ss. 234, 244, 278—283.

Held by the FULL BENCH :—An objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under s. 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under ss. 280 and 281, as provided by s 283.

Held by the majority of the Full Bench (PRINSEP, O'KINELAY, and GHOSE, JJ) :—Sections 278 to 283 of the Civil Procedure Code do not cover the case of any contest between parties to the suit or their representatives, on the record of the suit in regard to the execution, discharge, or satisfaction of a decree. The effect of the decision between such parties is that the right to enforce or oppose execution is determined under s. 244, subject to the result of such appeal as is allowed by law.

Per PRINSEP and O'KINEALY, JJ.:—Section 244 should be liberally construed to prevent litigation.

THIS was a reference to a Full Bench made by a Division Bench (PRINSEP and HILL, JJ.) on the 12th July 1889: the referring order was as follows:—

"The predecessor of the plaintiff obtained a decree on the 28th of December 1881, on a mortgage bond, against the husband of defendant No. 1. In execution a portion only of the mortgage debt was satisfied by sale of the mortgaged properties. During the proceedings in execution the mortgagor-debtor died, and in the course of further proceedings taken in execution of that decree after his death against his widow as his representative [712] certain property was attached as forming portion of his estate. The widow objected on the ground that this property had been sold to her on the 1st January 1883, that is, after the decree and before the attachment. Her objection was allowed, and the property was released from attachment. The decree-holder now sues to have it declared that the sale was fraudulent and collusive; that the property was that of the judgment-debtor, and therefore liable in satisfaction of the decree against him.

"An objection was taken and allowed by the Court of First Instance that the suit was barred by s. 244 of the Code of Civil Procedure, inasmuch as the matter could be properly tried only in execution of the decree as between the decree-holder and the defendant No. 2, the representative of the original

* Full Bench on Appeal from Original Decree No. 194 of 1888 against the decree of Babu Madhub Chunder Chuckerbati, Subordinate Judge of Burdwan, dated the 31st of May 1888.

debtor, as it related to the execution, discharge, or satisfaction of the decree. That is the only point which has as yet been heard by us on appeal. The decisions of this Court and the other High Courts have not been uniform in respect of this very important point, on which the case law may be said to commence with the judgment of their Lordships of the Privy Council in the case of *Chowdhry Wahed Ali* v. *Jumaee* (11 B. L. R., 149). These cases are set out in the judgment of the lower Court, but we would add to them two more recent cases—*Raj Rup Singh* v. *Ram Golam Roy* (I. L. R., 16 Cal., 1) and *Gour Moni Dabee* v. *Jagut Chandra Audhikari* (I. L. R., 17 Cal., 57), decided by another Division Bench on the 21st May last. We think it most desirable that the expression of an opinion by a Full Bench on this point should be obtained so as to ensure the uniformity of procedure in the future, and we may add that we have hesitation in following in this case the rule laid down in *Raj Rup Singh* v. *Ram Golam Roy* (I. L. R., 16 Cal., 1). We therefore refer, for the consideration of a Full Bench, the following point:—Whether an objection taken by one who has become the representative of the original judgment-debtor in the course of execution of a decree, to the effect that the property attached in satisfaction thereof is his own private property, and not held by him as such representative, is a matter cognizable only under s. 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate **[713]** suit by a party against whom an adverse order may have been passed under ss. 280 and 281 as provided by s. 283."

Baboo *Srinath Doss* (with him Baboo *Tarruck Nath Sen* and Baboo *Benode Behari Mukerji*) for the Appellant.

Dr. *Rash Behari Ghose* and Baboo *Lal Mohun Das* for the Respondents.

The following cases were referred to in the course of the arguments :—

Chowdhry Wahed Ali v. *Jumaee* (11 B. L. R., 149), *Wahed Ali* v. *Jumaee* [2 B. L. R. F. B. 73; 11 W. R. (F. B.) 1], *Buddu Ramaiya* v. *Venkaiya* (3 Mad. H. C. 263), *Ameeroonnissa Khatoon* v. *Meer Mahomed Hossein Chowdhry* (20 W. R., 280), *Abedoonissa Khatoon* v. *Ameeroonnissa Khatoon* [L. R., 4 I. A., 66 (74)], *Kanailal Khan* v. *Sashi Bhuson Biswas* (I. L. R., 6 Cal., 777), *Baba Mahomed* v. *Webb* (I. L. R., 6 Cal., 786), *Kameshwar Pershad* v. *Run Bahadur Singh* (I. L. R.. 12 Cal., 458), *Hira Lal Chatterji* v. *Gourmoni Debi* (I. L. R., 13 Cal.. 326), *Basudeo Narain Singh* v. *Seolojy Singh* (I. L. R., 14 Cal., 640), *Haragobind Das Koiburto* v. *Issuri Dasi* (I. L. R., 15 Cal., 187), *Roop Lall Dass* v. *Bekani Meah* (I. L. R., 15 Cal., 437), *Raj Rup Singh* v. *Ram Golam Roy* (I. L. R, 16 Cal., 1), *Nga Tha Yah* v. *Burn* (2 B. L. R, F. B. 91; 11 W. R., F. B. 8), *Gour Moni Dabee* v. *Jugat Chandra Audhikari* (I. L. R., 17 Cal., 57), *Arundathi Ammyar* v. *Natesha Ayyar* (I. L. R., 5 Mad., 391), *Arunachala* v. *Zemindar of Sivagiri* (I. L. R., 7 Mad., 328), *Ravunni Menon* v. *Kunju Nayar* (I. L. R., 10 Mad., 117), *Nimba Harishet* v. *Sitaram Paraji* (I. L. R., 9 Bom., 458), *Bahori Lal* v. *Gauri Sahai* (I. L. R., 8 All., 626), *Mulmantri* v. *Ashfak Ahmad* (I. L. R., 9 All., 605).

The **opinions** of the Court (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.) were as follows :—

Petheram, C. J.,- My answer to the question put to the Full Bench is, that an objection taken by one who has become the representative of the original judgment-debtor in the course of **[714]** the execution of a decree to the effect that the property attached in satisfaction thereof is his own private property and not held by him as such representative, is a matter cognizable only under s. 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under ss. 280 and 281, as provided by s. 283.

Section 234 provides that when a judgment-debtor dies before the decree has been fully executed, the decree-holder may apply to execute it against the legal representative of the deceased, and the section goes on to limit the liability of the legal representative to assets of the deceased which have come to his hands, and gives the Court power to compel him to produce accounts, so that under s. 234 a question may arise between the decree-holder and the legal representative of the deceased as to whether the legal representative has or had assets of the deceased which are liable to answer the decree-holder's claim.

In the present case, although the question takes the form of an enquiry whether certain property, which is admittedly in the hands of the person against whom an order has been made under s. 234, came to her as the heiress of the deceased or by some other title, it is in fact the very question contemplated by s. 234, whether the legal representative has or has had assets of the deceased, and so is liable to satisfy the claim of the decree-holder.

Section 244 provides that all questions between the parties to the suit, or their representatives, relating to the execution, discharge, or satisfaction of the decree, shall be determined by order of the Court executing the decree, and not by separate suit: and I think that this question under s. 234, whether the legal representative has or has had assets, must be a question between him and the decree-holder relating to the execution of the decree, and so comes within the operation of s. 244. Mr. Justice WILSON, in the case of *Raj Rup Singh* v. *Ram Golam Roy* (I. L. R., 16 Cal., 1), has taken the same view of the section, and after an elaborate examination of the authorities comes to the conclusion that they support that view, and it is not necessary for me to add more than that I entirely agree with his judgment.

[715] Our attention has been called to a reported case of later date than the judgment of Mr. Justice WILSON, that of *Gour Moni Dabee* v. *Jugut Chandra Audhikari* (I. L. R., 17 Cal., 57). In that case the learned Judges, TOTTENHAM and BANERJEE, JJ., say that questions raised under the provisions of s. 234 must be decided under s. 244. The other questions which were discussed in their judgment do not arise in this reference.

Pigot, J.—I agree that upon the authorities the matter was one cognizable under section 244, and that therefore a separate suit will not lie.

O'Kinealy, J.—It appears from the record of this case that the predecessors of the plaintiff obtained a mortgage decree on the 28th December 1881 against the husband of defendant No. 1, and that during the proceedings in execution the mortgagor died, and the defendant Rabia Bibi was placed on the record as his representative. Subsequently certain property was attached as forming a portion of the mortgagor's estate, and on the widow objecting, her objection was allowed and the property released from attachment. This order is to be found at page 46 of the paper-book, and runs as follows:—

"The oral and documentary evidence offered by the claimant proves that she is in possession of the properties claimed from before the date of attachment, under a *kobala* executed by her late husband in part satisfaction of her *den-mohur*.

"The decree-holder has failed to rebut this evidence. I accordingly allow the claim. The property claimed shall be released from attachment. Vakeel's fee, Rs. 20, and other costs of the claimant, shall be borne by the decree-holder."

In this state of facts the learned Judges of the Division Bench, who heard this case, have referred to us for consideration the following question:—

"Whether an objection taken by one who has become the representative of the original judgment-debtor in the course of execution of a decree, to the effect that the property attached in satisfaction thereof is his own private property, and not held by him as such representative, is a matter

cognizable only under s. 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an [716] adverse order may have been passed under s. 280 and 281, as provided by s. 283."

Section 244 (c) states that a Court executing a decree shall determine, among other questions.—

" Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree."

This section, with the exception of the words " or their representatives," is the same as s. 11 of Act XXIII of 1861, and the meaning to be attached to it has been the subject of discussion on several occasions before their Lordships of the Privy Council.

In the case of *Wahed Ali* v. *Jumaee* (2 B. L. R., (F.B.) 73), the facts were as follows:—A suit for possession of immoveable property and mesne profits was brought against certain defendants, among whom were Wahed Ali and his daughter Mussummat Jumaee. Wahed Ali died, and an application was made in January 1856 to have his son, Mullick Inayet Hossein his daughter, Mussummat Jumaee, and others, made defendants, as being his heirs and representatives. Ultimately in the High Court the claim against Mussummat Jumaee personally was dismissed, but possession with mesne profits was decreed against her in her representative capacity.

In execution of the decree Mussummat Jumaee's private property was sold notwithstanding her objections, and Wahed Ali became the purchaser. This sale was confirmed on the 15th March 1864, and after its confirmation Mussummat Jumaee brought a suit to cancel the sale held in the execution proceedings and to obtain her property. The case came before a Full Bench of this Court, and the majority of the Judges held that Mussummat Jumaee was only a party in her representative capacity, and that the Legislature only intended that parties in their own right, and not parties in their representative character, should come within the purview of s. 11 of Act XXIII of 1861. They therefore decided that a regular suit would lie. This case was appealed to the Privy Council, and their Lordships held that where a decree was passed against a person in his representative capacity, he was a party to the suit in respect of any question that might arise [717] between him and the other parties relating to the execution of the decree within the meaning of s. 11 of Act XXIII of 1861. So far therefore it has been settled that a party sued in his representative capacity and against whom a decree has been obtained is, in regard to any claim that he may make in his own right to property attached, a party within the meaning of s. 11 of Act XXIII of 1861.

The next case in which an interpretation was put under s. 11 of Act XXIII of 1861, was that of *Abedunnessa* v. *Amirunnessa*, in the Privy Council (L. R., 4 I. A., 66). That was a case in which, after the death of the decree-holder, a contest arose between two parties Wajid Ali and another as to which of them was to be treated as his legal representative. At last it was held that Wajid Ali was the representative. A suit was then instituted to declare that Wajid Ali was not the legal representative, and for an injunction to prohibit execution of the decree in the previous suit. So far as the present case is concerned, it is only necessary to state what their Lordships of the Privy Council said in regard to s. 11, Act XXIII of 1861.

They say,—

"Their Lordships quite accede to the view of the learned counsel for the appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: 'any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree.' There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree" (L. R., 4 I. A., 74).

They then further add, by way of pointing out the rules which should guide a Judge in deciding whether a person was a party or not, that Wajid Ali "was in no proper sense of the word a party to the suit. No rights of Wajid Ali were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied [718] for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit," under s. 11, Act XXIII of 1861.

Since then, the words, "or their representatives," have been added to the section by the Legislature, and following the rules laid down by their Lordships of the Privy Council, it appears to me that s. 244 embraces all cases where there is an existing decree, in which the contest is between parties whose names were on the record when the judgment was given or the decree made, or their representatives, and where some right has been determined or considered between the parties or their representatives, such right relating to the execution, discharge or satisfaction of the decree. In the present case all these conditions are fulfilled. I therefore think that, unless we were to unduly narrow the scope of a section, which should be liberally construed in order to prevent litigation, the question arising in this case was one under s. 244 of the Code of Civil Procedure.

The next point is, whether this claim can be considered to be a claim coming within the provisions of ss. 278 to 283 of the Civil Procedure Code. These sections correspond to s. 246 and the following sections of Act VIII of 1859, the scope of which was twice considered in Full Bench decisions of this Court. In *Wahed Ali* v. *Jumaee* [2 B. L. R., (F. B.), 73], it was decided that ss. 246 and 247 did not apply to a case in which the party on the record, in a representative capacity, claimed the release of property attached in execution of the decree on the ground that it belonged to himself. In the course of his judgment, Sir BARNES PEACOCK states:—

"If the plaintiff had made an application under that section" (meaning s. 246 of Act VIII of 1859), "her claim must have been disallowed, for the property was in her possession, on her own account, and not on account of any third person.

In s. 281 of the present Code, it is stated –

"If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy [719] of a tenant or other person paying rent to him, the Court shall disallow the claim."

There is no difference between the present law and Act VIII of 1859, so far as the present reference is concerned; and I think, adopting the reasoning in the case of *Wahed Ali* v. *Jumaee*, that ss. 278 to 283 have no application to such a claim; but further, I am of opinion that ss. 278 to 283 have

no reference to any claim raised in execution of a decree between parties on the record or their representatives. Section 278 states: —

"If any claim be preferred to, or any objection be made to, the attachment of any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection, with the like power as regards the examination of the claimant or objector, *and in all other respects as if he was a party to the suit.*"

In other words, it suggests that a party making the claim is not a party to the suit; for if the meaning of the law is that parties to the suit may, under certain conditions, make a claim to the property attached, the latter portion of this section would have no meaning. No doubt it has been laid down that under s. 280, if the result of the investigation be that the Court is satisfied that the property was not, when attached, in the possession of the judgment-debtor, or of some person in trust for him, the property must be released; and it has been argued that this shows that a trustee in possession, who has unsuccessfully put forward in an execution proceeding, the title of a person other than the judgment-debtor, as the beneficial owner, may subsequently bring a regular suit to establish his right to or interest in the property. I think on consideration, that this argument is not sound. The section itself does not state who are to be the parties to the execution proceeding, but points out what should guide a Judge in deciding the contest; and that this is the true construction is shown by the concluding portion of s. 278. A similar interpretation was placed upon s. 246, Act VIII of 1859, in the case of *Nga Tha Yah* v. *Burn* [2 B. L. R., (F.B.), 91; 11 W. R. (F.B.), 11. In that case the Court decided that it is for the claimant, and not for the execution creditor, to begin, and he must show his own title to the property and not the title of any third **[720]** party with whom he has no connection. Sir BARNES PEACOCK, in referring to s. 246 of Act VIII of 1859, indirectly shows that, in his opinion, the claim must have been a claim of a party not on the record. He says:— "In the early part of the section, the Court is directed to investigate the claim with the like powers, as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in s. 220. It is said that the words are remarkable; they are not that the claim is to be investigated as if the claimant were a party to the suit, but 'as if the claimant had been originally a defendant to the suit,' that is, the suit in which the execution issued But I take it that the meaning really is 'that the Court is to have the same powers of investigation as if the claimant was a party to a *suit* which would give them power to summon the claimant and to dispose of the case against him, if he should refuse to attend." (2 B. L. R., F. B., 100.)

Again, in dealing with the nature of the claim which must be preferred, he states—"If the Nazir were to seize goods, believing them to be in the actual possession of a defendant, the claimant would have to prove that the Nazir had seized the goods of the claimant as the goods of the judgment-debtor. In an ordinary case, if the Sheriff wrongly seizes goods, the real owner brings an action against the Sheriff for seizing goods belonging to him. In such a case the claimant would have to begin and prove that the goods belonged to him. If he could show that the goods were in his actual possession, that would be *primâ facie* evidence that they were his property, and not the property of the judgment-debtor. So, if he could prove that the judgment-debtor was his servant, and had the goods in his possession as his servant, that would prove his case. But no one would contend that the Sheriff would have to begin and prove that the goods belonged to the debtor. Even if they were not the debtor's, the

claimant would not have a right to interfere unless he proved that they belonged to him, or were in his possession." (2 B. L. R. F. B. 98.)

I think, therefore, that ss. 278 to 283 of the present Code do not cover the case of any contest between parties to the suit, or **[721]** their representatives on the record of the suit, in regard to the execution, discharge or satisfaction of a decree, whether the claim set up be a claim on the ground that the property is that of a person on the record or belongs to any third party. It seems to me that the effect of the decision between such parties is, that the right to enforce or oppose execution against the property in dispute is decreed and finally determined under s. 244, subject to the result of such appeal as is given to them by law.

Prinsep, J.— I am of the same opinion.

Ghose, J.— I am also of opinion that an objection taken by a person, who has become the representative of a judgment-debtor in the course of the execution of a decree, to the effect that the property attached in satisfaction thereof is his own property, is a matter cognizable only under s. 244 of the Civil Procedure Code, and not the subject-matter of a separate suit. And I agree with Mr. Justice O'KINEALY in thinking that the matter does not fall within ss. 278 to 283, and that the effect of a decision upon the objection of the representative is that the question of the liability or otherwise of the property to satisfy the decree is determined under s. 244, subject to the result of such appeal as is allowed by law.

A. A. C.

NOTES.

[Where the judgment-debtor pleads that he is in possession not in his own right, the case does not fall within sec. 47, C.P.C., 1908 :—(1911) 14 C.L.J , 425 : 39 Cal., 298 : 16 C.W.N., 26 ; (1912) 16 C.W.N., 959 ; (1898) 23 Bom., 237 ; (1901) 6 C.W.N., 63 ; 6C3 ; (1898) 23 Mad., 195 ; (1908) 31 Mad., 125. It is otherwise when the right set up is one in his own right :— (1905) 28 All., 51 ; (1899) 21 All., 323 ; (1902) 26 Mad., 501 ; (1905) 34 Cal., 642 ; (1900) 27 Cal., 54 ; (1910) 34 Bom., 546.

As regards appealability *see* also (1895) 17 All., 245 ; (1899) 27 Cal., 34; (1908) 35 Cal., 364. The question whether a certain property is liable to be seized in execution is one relating to execution within sec. 47, C.P.C., 1908 :—(1910) 34 Bom., 546.

As regards the liberal interpretation of sec. 47, C. P. C., 1908, the Privy Council made similar observations in (1892) 19 Cal., 683 at 689. *See* also (1900) 27 Cal., 810; (1896) 24 Cal., 473 ; (1900) 23 All., 116 ; (1898) 24 All., 209 ; (1899) 23 Mad., 55 ; (1906) 33 Cal., 857.]

[17 Cal. 721]

APPELLATE CIVIL.

The 2nd April, 1890.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

Gokhul Sahu and others............Plaintiffs

versus

Jodu Nundun Roy and another............Defendants.

Gobind Sahu and others............Defendants

versus

Luchmi Narain Roy and others............Plaintiffs.*

Bengal Tenancy Act (VIII of 1885), s. 106— Decision of a Revenue Officer under— Res judicata.

A question heard and decided by a revenue officer under s. 106 of the Bengal Tenancy Act is *res judicata* between the same parties in a subsequent suit in a Civil Court.

* Appeals from Appellate Decrees Nos. 691 and 738 of 1889 against the decrees of Baboo Upendra Chundra Mullick, Subordinate Judge of Tirhoot, dated the 30th of January 1889, affirming the decrees of Baboo Joogulkishore, Munsif of Mozufferpore, dated the 31st of December 1887.

[722] *Hurri Sunker Mukerjee* v. *Muktaram Patro* (15 B. L. R., 238) not applied.

UNDER an order passed under s. 101 of the Bengal Tenancy Act, 1885, a survey was made and a record of rights prepared in respect of mouzah Bishunpore Soamai, also called mouzah Memari Kandh, Chuckla Nai, pergana Bisara, in the district of Mozufferpore. During the preparation of the record of rights one bigha five cottas of land situate within this mouzah were claimed by Luchmi Narain Roy, Jodu Nundo Roy, and Rambelas Roy (hereinafter called the Roys) as mal or rent-paying land appertaining to their estate, while Gokhul Sahu and four others (hereinafter called the Sahus) claimed the land as part of the five bighas of rent-free brohmutter land purchased by them along with other properties under a deed of sale dated 7th March 1883. After a full enquiry into the dispute between the Roys and the Sahus, the Revenue Officer, on 21st August 1886, by an order under s. 106 of the Act decided that this one bigha five cottas of land was the mal land of the Roys and liable to pay rent. Against this order the Sahus appealed under s. 108 to the Special Judge appointed under that section; and on 28th April 1887 the Special Judge reversed the order of the Revenue Officer, holding that the land was the rent-free brohmutter land of the Sahus. From this decision of the Special Judge there was no second appeal: but both parties filed separate suits in the Civil Court.

On the 10th June 1887 the Sahus brought a suit (No. 389 of 1887) to recover from the Roys the sum of Rs. 59-10-9 as damages for having wrongfully cut and carried away their crops from this one bigha five cottas of land. The Roys alleged that the land was their mal land, and denied that the crops belonged to the Sahus. Suit No. 489 of 1887 was in respect of the same piece of land, and was instituted on the 7th July by the Roys against the Sahus and their vendors. In this suit the Roys alleged that the land was their mal land, and was situate within their putti; that they were in possession; and that neither the Sahus nor their vendors had ever been in possession of it. They further alleged that the Judge's order of 28th April 1887 was made *ex parte*, and contended that it was illegal and ought to be set aside. Accordingly, they prayed for a [723] declaration that the land was their mal land, for confirmation of possession, and that the Judge's order of 28th April 1887 should be set aside. The Sahus alleged that the land in suit was part of the five bighas of brohmutter land which they had purchased under a deed of sale dated 7th March 1883, and that they had been in possession since the date of their purchase; that by a sanad dated Kartick 1199 Fusli (October 1792) these five bighas of brohmutter land were granted to one Bahuran Misser, and that they had purchased them from the heirs of Bahuran Misser. They denied that the Roys or their predecessors in title had been in possession within 12 years prior to the institution of the suit, and contended that the suit was barred by limitation. The Sahus also pleaded that the Judge's order of 28th April 1887 was a bar to the suit under s. 13 of the Code of Civil Procedure.

The two suits were tried together by the Munsif.

The only issue material to this report was whether the suit of the Roys was barred under s. 13 of the Civil Procedure Code.

The Munsif found that the sanad of Kartick 1199 Fusli (October 1792) had been granted by the predecessors in title of the Roys, but held that the Sahus had failed to prove that the land was their rent-free brohmutter land and that they had raised the crops in suit. He held that the suit of the Roys was not barred under s. 13 of the Civil Procedure Code or by limitation; and that the land was the *mal* land of the Roys. Accordingly, the Munsif dismissed

the suit of the Sahus and decreed that of the Roys. This decision was affirmed by the Subordinate Judge.

The Sahus filed separate appeals in each case in the High Court.

Baboo *Sreenath Banerjee* for the Appellants.

Baboo *Manmatha Nath Mitter* for the Respondents.

The **judgment** of the High Court (PIGOT and BEVERLEY, JJ.) was as follows:

These appeals raise a very important question under the Bengal Tenancy Act, and it is to be regretted that the facts out of which they arise are not more fully before us.

It would appear, however, that under the provisions of chapter X of the Bengal Tenancy Act a measurement was made and a record of rights prepared in respect of a certain local area within which the land in suit is situated. The terms of the order made **[724]** under section 101 of the Act and the particulars specified therein in accordance with section 102 are not on the record; but it is admitted that one party (whom we shall call the Roys) claimed this land as rent-paying land appertaining to their estate, while the other party (whom we may call the Sahus) claimed it as their rent-free brohmutter land. This dispute having been enquired into by the Revenue Officer under sections 106 and 107 of the Act, he decided that the land was *mal* land and liable to pay rent.

Against this decision the Sahus appealed under section 108 to the Special Judge appointed under that section—the Special Judge, it may be mentioned being the District Judge of Tirhoot, and he reversed the decision of the Revenue Officer and held that the land was rent-free.

From that decision there was no second appeal.

Both parties, however, filed suits in the Civil Court. The Sahus sued the Roys for damages for having cut and carried the crops of the land, while the Roys sued the Sahus to set aside the Judge's decree and for a declaration that the land was *mal* and not the brohmutter of the Sahus. The two suits were tried together by the Munsif, who gave the Roys a decree and dismissed the suit of the Sahus. On appeal this decision was affirmed by the Subordinate Judge.

One point which was taken and argued in both the lower Courts was that the decision of the Special Judge under section 108 of the Act operated as *res judicata* between the parties, and that no suit would lie to set it aside; and this is the point that has been pressed upon us in second appeal No. 738.

The question is one of very great difficulty, having regard to the provisions of the Bengal Tenancy Act on the subject. That Act nowhere defines with sufficient clearness the extent, scope, and object of the so-called record of rights. Section 102 in truth specifies certain particulars which *may* "either without, or in addition to other particulars," be recorded. The particulars there specified are such as presuppose the existence of a tenancy—such as the name and class of the tenant, the land held by him, the rent payable therefor and the nature of that rent, and the special conditions and incidents (if any) of the tenancy. If no relationship of landlord and tenant existed in respect of any particular piece of land, it seems to us to be at least doubtful whether any **[725]** entry could be recorded regarding it unless the order made under section 101 specially directed such entry to be made as one of the "other particulars" not specified in section 102.

In the present case we think we must take it upon the finding of the lower Courts that the Sahus are "tenants" within the meaning of the Act, and that the Revenue Officer was justified in making an entry regarding the land in suit.

By section 3, clause (3), a "tenant" is defined to mean "a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person." Now the brohmutter sanad of Kartick 1199 F. S., under which the Sahus claim to hold, is found by the Munsif to have been granted by the predecessors of the Roys, and if genuine it operates as a special contract, but for which the Sahus would be liable to pay rent to the Roys. That being so, the Sahus, we think, are according to their own case tenants within the meaning of the Act, and the Revenue Officer therefore had jurisdiction to enter the particulars of the land in suit in his record of rights.

The next point is whether the Revenue Officer having heard and decided the dispute under section 106, his decision will operate as *res judicata* in a subsequent suit brought to try the same question in a Civil Court between the same parties.

In the case of *Hurri Sunker Mookerjee* v. *Muktaram Patro* (15 B. L.R., 238) it was held by a Full Bench of this Court that a judgment by a Collector in a suit under Act X of 1859 declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be lakheraj is not conclusive in a subsequent suit between the same parties for arrears of rent under Bengal Act VIII of 1869. That decision was based on the principle that the decision of a Revenue Court on a question of title is no bar to the trial of the same question by the ordinary Civil Courts.

But by section 107 of the Bengal Tenancy Act the Revenue Officer is directed to adopt the procedure laid down in the Code of Civil Procedure for the trial of suits, and it is provided that his decision in every such proceeding shall have the force of a decree. It appears to us that these words were intended to invest him for the trial of these disputes with the powers of a Civil Court, and to give **[726]** to his decision the binding force of a decree of a Civil Court. This view is borne out. as it seems to us, by the two following sections. Section 108 gives the right of appeal against such decision to a Special Judge to be appointed under that section, and of second appeal to the High Court. Section 109 distinguishes between disputed and undisputed entries in the record, and while laying down that undisputed entries shall be presumed to be correct until the contrary is proved, appears to treat the decision of disputed entries under sections 106—108 as final.

We must confess that it is with considerable hesitation that we arrive at this result. The language of the Act is unfortunately vague; but we cannot suppose that it was the intention of the Legislature after providing for the trial of disputes regarding entries in the record of rights by the Code of Civil Procedure and by a Special Appellate Court, that such disputes should be liable to be re-opened before the ordinary Civil Courts of the country.

We are of opinion, therefore, that the suit of the Roys was barred by section 13 of the Code of Civil Procedure.

Appeal No. 738 must be allowed, the decrees of the lower Courts are reversed and the suit dismissed with costs in all Courts.

In Appeal No. 691 we think that no ground for second appeal exists, and we accordingly dismiss it with costs.

Appeal No. 738 allowed.
Appeal No. 691 dismissed.

C. D. P.

NOTES.

[See also (1898) 2 C. W. N. 491 ; (1902) 30 Cal., 339 ; (1895) 23 Cal., 257 ; (1894) 22 Cal., 244 ; (1895) 21 Cal., 378 ; 491 ; (1893) 21 Cal., 38.]

[17 Cal. 726]

FULL BENCH.

The 2nd June, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, MR JUSTICE PIGOT, MR. JUSTICE O'KINEALY AND MR. JUSTICE GHOSE.

Radha Prosad Singh...... .Plaintiff

versus

Bal Kowar Koeri............Defendant.*

Cess—Illegal Cess —Asul and Abwab—Rent—Bengal Tenancy Act (VIII of 1885), ss. 3 (5), 74—Reg. VIII of 1793, ss. 54, 55, 57, 58, 61—Reg. V of 1812, ss. 2, 3—Second Appeal, grounds of—Code of Civil Procedure (Act XIV of 1882), s. 584.

[727] In a suit for rent at the rate of Rs. 22-2 per annum the defence was that the yearly rent was not Rs. 22-2, but Rs. 18-10-6, and that the difference was made up of certain illegal cesses such as *sarak*, *neg*, and *khuruch*, which had been paid for a long time with the rent and without specification in the rent receipts Both the lower Courts found that Rs. 18-10-6 was the defendant's *asul jama*.

Held by the Full Bench upon a review of the history of *abwabs* :—That the amounts sued for under the head of *sarak*, *neg*, and *khuruch* were *abwabs* and were therefore not recoverable, and that all additions to the actual rent under the denomination of *abwabs* are illegal, and any agreement to pay them is void.

Pudma Nund Singh v. *Baij Nath Singh* (I.L.R., 15 Cal., 828) dissented from.

Per PETHERAM, C. J. :—The law, whether under the Regulations, or the Bengal Tenancy Act, or as laid down by the Privy Council in *Tilukdhari Singh* v. *Chultan Mahton* (I. L. R., 17 Cal., 131 ; L. R., 16 I. A., 152) is the same, namely, that no imposition under any name whatever shall be recovered from the tenant for or on account of the occupation or tenure of the land, beyond the sum which has been fixed for rent, whether that sum has been paid by agreement or by judicial determination between the landlord and the tenant. Any contract, whether express or implied, to pay anything beyond that sum, under any name whatever for or in respect of the occupation of the land, cannot be enforced. The case of *Pudma Nund Singh* v. *Baii Nath Singh* (I.L.R., 15 Cal., 828) has been overruled by the Privy Council in *Tilukdhari Singh* v *Chultan Mahton* (I. L. R., 17 Cal., 131; L. R., 16 I. A., 152).

Per GHOSE, J.:—If in any given case the Court finds that any particular sum specified in the lease, or agreed to be paid, is a lawful consideration for the use and occupation of any land, that is to say, if it is really part of the rent although not described as such, the Court would be justified in holding that it is not an *abwab* and is recoverable by the landlord.

Pudma Nund Singh v. *Baij Nath Singh* (I. L. R., 15 Cal., 828) explained.

THIS was a Full Bench reference arising out of a second appeal in a suit for arrears of rent. The plaintiff alleged that the yearly rent of the defendant was Rs. 22-2, and claimed arrears of rent for the years 1290 to 1293 with damages. The defence was that the yearly rent was Rs. 18-10-6 ; that illegal cesses and double charge for Road and Public Works cesses were incorporated with

* Full Bench Reference on Special Appeal No. 2101 of 1887, against the decree of the District Judge of Shahabad, dated the 25th April 1887, affirming the decree of the Munsif, First Court, Buxar, dated 30th December 1886.

the rent; that no arrears were due, and that damages were not recoverable. The illegal cesses said to be included in the yearly rent mentioned in the plaint were *sarak* or cess for the maintenance of village roads, *batta* or the difference between the Sicca rupee [728] and the Company's rupee, *neg*, or fee for the *putwari*, and *khuruch* or expense (without any specification of its nature).

The plaintiff in the first Court examined his *tehsildar* and his *putwari*. The former ignored the realisation of the alleged illegal cesses, but the latter stated that in the zemindari accounts of certain years, *batta*, *sarak* and the other cesses were entered in the separate columns. It appeared from the *jamabundis* of 1279, an authenticated copy of which was filed by the defendant, that the items *sarak*, &c., were therein mentioned under separate heads, though the *jamabundis* of later years did not show any such specification. The plaintiff also put in his *sehas* or collection accounts and counterfoils of rent receipts to show that the amount stated in the plaint as the yearly rent was collected in former years, and that receipts had been granted without any specification of the *sarak*, *neg*, and other cesses, the whole amount paid being received as rent. The defendant, who was examined at the plaintiff's instance, stated that *batta*, *sarak*, *neg*, and *khuruch* were in the rental, but he knew not from what time these were collected. The defendant was cited to produce his rent receipts, but did not produce them. He admitted, however, that the entries in the *sehas* and counterfoils were correct.

Upon this evidence the first Court held that the yearly rent was not proved to be what was stated by the plaintiff, but it was as alleged by the defendant; that in the zemindari papers of later years the plaintiff had improperly omitted the specification of the items *sarak*, *batta*, &c.; and that the plaintiff was entitled to recover only at the rate of rent admitted by the defendant, and it accordingly gave the plaintiff a decree at that rate.

On appeal by the plaintiff, the Lower Appellate Court held that there had been no consolidation of the original *asul jama* and the items *neg*, *batta*, &c.; that the *jama* alleged by the defendant was the true *asul jama*; that the yearly rent stated in the plaint was made up of that *jama*, and the items *sarak*, *khuruch*, *neg*, and *batta* (specified in the *jamabundi* put in on behalf of the defendant(at certain established and known rates; that no detailed claim for these items having been made, the frame of the suit precluded the plaintiff from obtaining any adjudication as to the legality or otherwise of any of these items. The Lower Appellate [729] Court accordingly affirmed the decree of the first Court with one modification, allowing the *batta* in addition to the rate of rent allowed by the first Court.

From this decision the plaintiff appealed to the High Court. The Division Bench (PETHERAM, C.J., and BANERJEE, J.) referred the following question to the Full Bench :—

"Whether the portions of the claim that are objected to as coming under the denominations *sarak*, *neg*, and *khuruch* are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with rent and without any specification in the rent receipts?"

The material portion of the referring order was as follows :—

"In second appeal it is contended on behalf of the plaintiff that the defendant having for many years paid rent at the rate claimed, and taken receipts as for rent for the amounts paid without any specification of the items *sarak*, *neg*, and *khuruch* was bound to pay rent at that rate, and that the Court below ought to have held that there had been a consolidation of the rent and an implied

agreement by the defendant to pay the whole amount as rent, notwithstanding that in some of the *jamabundis* part of that amount might have been specified and entered under different heads, as mere matter of book-keeping. And in support of this contention the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828) which explains the Full Bench ruling in the case of *Chultan Mahton* v. *Tilukdhari Singh* (I. L. R., 11 Cal., 175; I. L. R., 17 Cal., 131; L. R., 16 I. A. 152) relating to *abwabs*, is cited. The defendant, respondent, on the other hand, relies upon the Full Bench ruling in *Chultan Mahton* v. *Tilukdhari Singh*, and contends that as the items *sarak*, *neg*, and *khuruch* were entered under separate heads and as distinct from the rent, the mere fact of those items having been paid and the receipts not showing any specification of them did not make them part of the rent and recoverable as such. We are unable to agree in the interpretation put upon the Full Bench ruling by the decision in *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828)."

[730] Mr. *J. T. Woodroffe* (with him Mr. *W. C. Bonnerjee*, Baboo *Hem Chunder Banerjee* and Baboo *Rughunundon Persad*) for the Appellant.

Mr. *C. Gregory* and Baboo *Taruk Nath Palit* for the Respondent.

Mr. *Woodroffe*.—The defendant alleges that illegal cesses are incorporated with the rent, and that no arrears are due. An account taken 15 years back (the *jamabundis* of 1279 B.S.) shows that in the zemindari accounts there was an appropriation for these items, but it was not in the time of the present tenant. No one was examined as to whether the *sarak*, *neg*, and *khuruch* were rent or not. The question is whether the fact of payment is legally inferable from the other facts of the case. [PETHERAM, C.J. The first question of law is whether the facts of the case as found do constitute an agreement to pay Rs. 22-2 as rent. The Judge found as a matter of law that he was upon the evidence bound to find that these items were illegal charges; and the second point is whether *sarak*, *neg*, and *khuruch* are *abwabs* or not.] The defendant made a statement which is recorded in the order sheet to the effect that he paid Rs. 22-2 as rental for the years 1286, 1287, 1288, and 1289, but alleged that the amount was made up by illegal cesses. He gave no evidence of this, and did not produce his rent receipts of which we gave secondary evidence. The Full Bench case of *Chultan Mahton* v. *Tilukdhari Singh* (I. L. R., 11 Cal., 175) only decides that if one sue to recover *abwabs* he may not recover unless they are proved to have been paid or payable before the Permanent Settlement. In the case of *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy* (22 W. R., 12) the ryot consented and contracted to pay an increased rent consisting of the original rent and a cess over and above it, and it was held that this demand and the old rent formed a new rent lawfully claimable under the contract. Here the defendant has paid Rs. 22-2 as rent and took receipts for it as rent. I rely upon the definition of rent in s. 3 (5) of the Bengal Tenancy Act. The counterfoils show that the amount is paid as rent only. Our contention is briefly stated in the order of reference. The Privy Council in *Chultan Mahton's* case (I. L. R., 17 Cal., 131; L. R., 16 I. A., 152) go upon the same ground as that taken up by the Full Bench (I. L. R. 11, Cal., 175). In Harington's Analysis, Vol. II, p. 19, *abwabs* [731] are defined as anything which has been indiscriminately collected at different periods over and above the *asul* or original ground rent. Section 74 of the Tenancy Act only provides that impositions in addition to the actual rent cannot be recovered under the name of *abwabs*. [PETHERAM, C. J. There is nothing to show that from the commencement of the tenancy or even at all the *asul jama* was paid without the other items.] No there is nothing.

[PIGOT, J. Can there be said to be an implied agreement under s. 3 of Regulation V of 1812 ?] I submit so. The Regulations speak of *abwabs* as being of an arbitrary and intricate character, but that section expressly reserves payment of such sums as may have been specifically agreed upon. [PETHERAM, C.J. Is there any point of law with which this Bench can deal ? Do the questions put to us arise on the findings ? PIGOT, J. There is no finding as to the antiquity of these *abwabs*, or whether the tenants agreed to pay consolidated rents.] There is nothing to prove that these are *abwabs* except the entry in the zemindar's book. I say that the points of law are *1st*—whether the Judge was right in deciding that the Full Bench in *Chultan Mahton's* case (I. L. R., 11 Cal., 175) had held that *sarak*, *neg*, and *khuruch* were *abwabs* ; *2nd*—whether he should have decided that if they were so, they could not be consolidated except by some express agreement prior to the Bengal year 1198 (see Regulation VIII of 1793, s. 54), and that subsequent payment of these sums as rent would not bring the matter within the concluding words of s. 3 of Regulation V of 1812, *viz.*, " payment of such sums as may have been specifically agreed upon between them." There is also the question whether the Judge was warranted on the facts found by him in coming to these conclusions. [PETHERAM, C. J. There is a question of evidence whether the item " *lagan* " or ground rent in the *jamabundi* of 1279 is any evidence that it was ever paid as rent alone without anything else.] I submit it is not. "*Lagan*" is not equivalent to *asul jama*, and the tenant has been paying Rs. 22-2. As to the language of the Regulations in Reg. VIII of 1793, ss. 54 and 55, the word used is "imposition." In Reg. V of 1812, s. 3, they are described as "arbitrary or indefinite cesses," and in s. 74 of the Tenancy Act all impositions in addition to the **[732]** actual rent are made illegal. If, therefore, the tenant pays any specific sum to the landlord, it must be presumed to be rent under s. 3 of Regulation V of 1812, unless it is shown to be otherwise. From the judgments of the Full Bench and Privy Council in *Chultan Mahton's* case (I. L. R., 11 Cal., 175 ; I. L. R., 17 Cal.131), it appears that the ground of those decisions was that the plaintiff was suing for rent plus *abwabs*. *Muhamed Fayez Chowdhry* v. *Jamoo Gazee* (I. L R., 8 Cal., 730) decides that an agreement to pay collection charges if definite and forming part of the consideration for the lease will be enforced. The case of *Juggodish Chunder Biswas* v. *Turrikoollah Sircar* (24 W. R., 90) is to the same effect. *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828) is not in conflict with the Full Bench in *Chultan Mahton's* case (I. L. R., 11 Cal., 175 : I. L. R., 17 Cal., 131). I gather from the rulings these propositions, *1st*—that it is in each particular case the question whether an item is an *abwab*, and this must be determined by the evidence, *2nd*—if there are items over and beyond rent, but which form part and parcel of the consideration for which the land is let, that is rent. In this case there is to be inferred an agreement to pay a new rent at a higher rate than the old rent, because such new rent has been so paid and received. As to whether these matters can be dealt with in second appeal—it has been held that a finding on no evidence is a good ground of appeal, *Futtehma Begum* v. *Mohamed Ausur* (I. L R., 9 Cal., 309). Here the Judge has misdirected himself in finding that there can be no amalgamation of separate items, and has assumed without evidence that Rs. 17-8 paid as rent before suit brought was merely rent payable upon land. The Court can interfere on special appeal upon an error of law such as to say that there is evidence where there is no evidence, or to say that certain evidence is a legitimate inference when it is not, or if the lower Court misconceives the nature of the case or does not give any reasons, *Futtehma Begum* v. *Mohamed Ausur* (I. L. R., 9 Cal., 309). *Dena Nath Banerjee* v. *Hari Dasi* (I L. R., 11 Cal., 499), *Bidhumukhi Dabea Chowdhrain*

v. *Kefyutullah* (I. L. R. 12 Cal. 93); *Goluck Nath* v. *Kirti Chunder Hàldar* (I. L. R. 16 Cal., 650).

[733] Mr. *Bonnerjee* followed on the same side.

Mr. *Gregory* for the respondent was not called upon.

The **opinions** of the Court (PETHERAM, C. J., PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.) were as follows :—

Petheram, C. J.—This was a second appeal which arose out of a suit brought by the plaintiff to recover a balance of rent at the rate of Rs. 22-2 per annum. The defendant by his pleader, on the settlement of issues, stated that he was tenant to the plaintiff of the land in question at a rental of Rs. 18-10-6 and the Munsif fixed as the first issue for trial—Is the defendant's rental Rs. 22-2 as alleged by the plaintiff, or Rs. 18-10-6 as alleged by the defendant? And the questions which arise in the second appeal and in this reference are upon that issue. Both the Munsif and the District Judge, before whom the case came on appeal in the first instance, have found upon this issue that the defendant's rental is Rs. 18-10-6. The case has been brought before the High Court on second appeal, and the plaintiff contends,—first, that there was no evidence on which the Munsif and the District Judge could come to such a finding; second, that even if there was some evidence, the Judge's judgment shows that he has so misunderstood the plaintiff's case, and has so misapplied the law, that his finding on the facts may be re-opened in this Court on second appeal; and, thirdly, that even if the rent is found to be Rs. 18-10-6 only, the plaintiff is still entitled to recover the larger sum of Rs. 22-2, the balance being made up of items which are neither uncertain nor arbitrary, and which the evidence shows the defendant agreed to pay as part of the consideration for his occupancy of the plaintiff's land.

To discover whether these contentions are well founded, it is necessary to see what was the evidence which was given in the case. The suit, both before the Munsif and the District Judge, was heard along with thirteen others relating to the same mouzah, and they are all governed by the same judgment.

The plaintiff, in order to prove that the defendant's rent was Rs. 22-2, called the defendant himself, and also required him to produce his receipts for rent for the years 1286 to 1292, inclusive. The defendant did not produce the receipts, and secondary evidence of their contents was given by the plaintiff, who [734] produced the corresponding counterfoils which were in the following form :—

"No. D. A. 1678.

Dumraon Raj.

No. 2 . . Re. 1 (one rupee).

Date 25th Kuar 1286.

Mohit Koeri Kushtkar, inhabitant of Ramu Baria, through self, on account of rent, as per details of Mouzah Ramu Baria, Pergunnah Bhojepore."

" Out of (the rent of) the year 1286 Re. 1 (one rupee)

Received one rupee.

(Sd.) Adinath Rai, Tehsildar.

By his own pen.

(Sd.) Deo Narain Lal, Putwari."

These counterfoils showed that in several of the years from 1286 to 1292 the defendant had paid the exact sum of Rs. 22-2, and that the yearly payments had always been within a few pice of that sum.

The plaintiff also put in his *jamabundis* for those years, which were in the following form:—

Annual Jamabundi of Mouzah Ramu Baria for the year 1286.

Serial number.	Name of tenant.	*Nukdi* land.	*Bhowli* land.	Total quantity of land.	*Nukdi* rent.	*Bhowli* rent.	Total rent.	*Saer.*	Total rupees.	Road Cess and Public Works Cess.	*Jama* (total) rent.	Arrears.	*Jama* (total rupees).	Paid.	Balance.	Deduct amount sued for.	Balance.
		B.C.D.		B. C. D.	Rs. A.		Rs. A.		Rs. A.	Rs. A.	Rs. A.	Rs. A.	Rs. A.	Rs. A.	Rs. A.		Rs. A.
...	...		...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
23	Mohit Koer	4 10 14	...	4 10 14	22 2	...	22 2	...	22 2	0 11	22 13	1 6	24 3	22 2	2 1	...	2 1

The defendant in his evidence said—

"I am defendant in Suit No. 56. I know that *sarak*, *khuruch*, *chanda*, *neg*, *batta* are in the rental, because I have been paying them. *Batta* is included in my rental of Rs. 18-10-6. I do not object to this *batta*. I do not recollect if I have paid all the *abwabs* separately from or with the rental proper. I do not know if receipts were called for. Receipts are not preserved. I do not remember from whence *sarak*, *neg*, *khuruch* and *chanda* have been collected."

[736] The plaintiff also put in the *sehas* for those years when it appeared that they were kept in the following form :—

DUMRAON RAJ.

Maharaja Radha Prosad Singh, Saheb Bahadur, proprietor, Pergunnah Bhojepore.—Seha (account) of individual tenants in the tehsil (collection) of Adinath Rai, the tehsildar of Mouzahs Ramu Baria, etc., for the week commencing from the (a) 25th of the month of Kuar 1286 and ending with the 25th of the month of Kuar 1286 Fasli.

Date of Seha.	No. of Seha.	English letter and number entered in the receipt form.	Name of cultivator with residence.	Name of mouzah wherein the holding for which rent is paid is situated.	Arrears for the current year.	FOR THE CURRENT YEAR.				ARREARS WITH SPECIFICATION OF YEARS.						GRAND TOTAL.
						Land rent with *batta* and *sarak* (road fund cess), etc.	*Mursam* (fee) Road cess and Public Works cess.	*Ikrar* money.	Interest.	Year.	Land rent with *batta* and *sarak* (road fund cess), etc.	*Mursam* (fee).	Road cess and Public Works cess.	*Ikrar* money.	Interest.	
						Re.										Re.
...	...	...	...	...	...	...	... .	...	...	...	...	...	...	...	...	...
...	2	1678	Mohit Koeri, inhabitant of do.	Do. (Ramu Baria).	..	1	... ...	...	...	...	... ...		... ...		...	1

(a) Sic. in original.

The plaintiff called his tehsildar and putwari, the latter of whom said that in the zemindari accounts of certain years *batta*, *sarak*, *etc.*, were entered in

separate columns. The defendant filed an authenticated copy of the plaintiff's *jamabundi* for 1279, which was in the following form :—

1279.

Mouzah Ramu Baria, Pergunnah Bhojepore, property of Maharaja Radha Prosad Singh Ji Bahadur—Annual jamabundi of individual tenants.

Name of tenant.	Quantity of land.	Land rent.	Road cess.	*Batta.*	Putwaris *neg* (fee).	Usual charges.	GRAND TOTAL.
...	...	...	...	...	...	...	...
Mohit Koori.							
Bgs. C. Dh. Rs.A.P. Rs.A.P.	Bgs.C.Dh	Rs. A.P.	Rs. A.P.	Rs. A.P.	Rs. A.P.	Rs. A.P. (a)	Rs. A.P.
Kodar 2 12 0 5 0 0 14 4 0	4 10 14	18 10 6	0 3 0	1 10 0	0 14 6	0 5 3	21 7 0
Baharsi 1 18 14 2 8 0 4 6 6							
4 10 14 18 10 6							

(*a*) Sic.

[736] Upon this evidence the Munsif found as a fact that the defendant's rent was Rs.18-10-6. He considered that the *jamabundis* filed by the plaintiff were fabricated ; that the receipts filed by him merely showed the amount paid, and did not prove conclusively that the whole of the money paid by the defendant was on account of rent only, and that the *jamabundi* for 1286, together with the *sehas*, showed that the difference between Rs. 18-10-6 and Rs. 22-2 was not rent at all, but was made up of various impositions and charges, and he accordingly found the first issue in favour of the defendant. When the matter came before the District Judge on appeal, he affirmed this finding of the Munsif. And the first question which has been argued before us has been whether there is any evidence on the record to support this finding. I think there is. The defendant himself stated that his rent was Rs. 18-10-6 ; the *jamabundi* of 1286 indicated that at that time the rental was Rs. 18-10-6, and the *sehas* for the subsequent years indicated that even if it be assumed that the form of the *jamabundi* had been changed since that time, the fact still remained the same ; that the sum of Rs. 22-2 claimed by the plaintiff was made up of the rent with other charges added to it, and whether they were evidence for the plaintiff or not the *sehas* were clearly evidence against him. The second question then arose, and the plaintiff contended that if there is some evidence on the record that the rent was the smaller sum, it is apparent from his judgment that the District Judge has so entirely misunderstood the case that his finding of fact may be reconsidered on second appeal. In the fifth paragraph of his judgment he says :—

"The plaintiff will not tell us the exact date of the 'consolidation ;' but at last gives us about 1286F. These modern consolidations cannot, as this Court has often ruled, be made by the malik alone. He must secure the acquiescence of the tenants concerned. There has, therefore, been no 'consolidation,' as alleged."

And Mr. *Woodroffe*, on behalf of the plaintiff, says that it is apparent that the Judge thought that the plaintiff, in order to succeed, must prove a consolidation of the rent and other items by some particular agreement come to

between the parties at some specified time; that with this in his mind he compelled the plaintiff's pleader to mention some time, and that when he mentioned [737] "about 1286," assumed that the plaintiff's contention was that the consolidation was effected by the change of the form of the *jamabundi*, and that as that was the act of the landlord alone, it would not bind the tenant; whereas the plaintiff's case was that the form of the *jamabandi* and receipts prove that the rent has always been the larger sum, and that the other figures merely show the mode of calculation by which the rental was originally arrived at.

If this was the view of the Judge as to what the plaintiff's real case was, I cannot say that he was wrong. The *jamabundi* of 1286 shows that the Rs. 22-2 was made up of that sum and various other items, and the *sehas* for the subsequent years, which, as I have before said, are certainly evidence against the plaintiff, show to my mind that the Rs. 22-2 always contained something other than rent, though they do not show what it was. These documents, in my opinion, rebut the inference of fact which may no doubt be drawn from the receipts, that the rent since 1286 has been enhanced to the sum of Rs. 22-2, of which fact the receipts for three years are made evidence by section 29 of the Bengal Tenancy Act, and prove conclusively to my mind that the change in the *jamabundis* was one of form only, representing no fresh agreement between the parties and made by the landlord with the intention of consolidating the other items with the rent, which he could not do except by agreement with the tenant.

I agree, then, with the Munsif and the District Judge that the rental was Rs. 18-10-6, and that the difference between that amount and Rs. 22-2 is made up of the items mentioned in the *jamabundi* of 1286, and upon this finding the third question arises, which is the question upon which the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I.L.R., 15 Cal., 828) appeared to the referring Bench to be in conflict with that of *Chultan Mahton* v. *Tilukdhari Singh* (I. L. R., 11 Cal, 175).

The case of *Chultan Mahton* v. *Tilukdhari Singh* was decided in January 1885 before the passing of the Bengal Tenancy Act. The suit was by ticcadars to recover from a ryot Rs. 1,105-1-2 as arrears of *nagdi* and *bhowli* rent for the years 1286 to 1288, together with certain customary *abwabs*. The nature of the *abwabs* appears in the report of the case to have been certain in this sense, that the amount depended on the amount of the rent or of the [738] produce of the land when the tenure was *bhowli*. It was found as a fact that according to the custom of the estate, of which the defendant's land formed a part, these items had been paid by the defendant and his ancestors for many years, so that it appeared that they were not uncertain or arbitrary, but were always paid, the amount of them each year being merely a matter of calculation. Mr. Justice MITTER, at page 183, says as to this—

"It has been next contended that although the disputed items in the plaintiff's claim are described in the plaint as old usual *abwabs*, and in the zemindari accounts also they are designated as *abwabs* separate and distinct from the specified rent, yet they are not *abwabs*, but part of the rent. This contention is mainly based upon the ground that anything which is certain and definite does not come under the class of *abwabs*, the imposition of which is prohibited by the Regulations. Although the Regulations did not clearly define what an *abwab* is, still I think it cannot be maintained that anything which is definite and certain is not an *abwab* under the Regulations, although the parties to the contract may call it so. It seems to me that the Regulations, without defining accurately what an *abwab* is, left this question for the determination by the Court in each case upon the evidence. I cannot find anywhere in the Regulations the precise definition of the word *abwab* which would justify

me to treat the disputed items of claim as part of the specified rent, although the plaintiff claims them in the plaint and enters them in the zemindari accounts as *abwabs*."

And the Full Bench held that nothing beyond the *nagdi* and *bhowli* rent could be recovered, any contract for the payment of the other items, whether express or implied, not being enforceable.

This case came before the Privy Council on appeal (I. L. R., 17 Cal., 131: L. R., 16 I. A., 152). The judgment of the High Court was affirmed. Lord MACNAGHTEN, in delivering judgment in speaking of the items in question, says—

"Unquestionably they have been paid for a long period; how long does not appear. They are said to have been paid according to long-standing custom. Whether that means that they were payable at the time of the Permanent Settlement or not is not plain. If they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under section 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered under section 61 of that Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in section 55, and they would be in that case illegal."

[739] By this judgment I understand the Privy Council, while affirming that of the High Court, to go beyond it and to hold that under the Regulations nothing could be recovered for the occupation of land, except one sum which must include everything which was payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract, whether express or implied, to pay anything beyond that sum, under any name whatever, for or in respect of the occupation of the land, could not be enforced.

After the decision by the High Court of the case which I have now considered, but before the decision by the Privy Council, the present Bengal Tenancy Act (VIII of 1885) came into force. The sections of that Act which are material to consider are section 3, sub-section 5, by which rent is defined to be "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant," and section 74 which enacts that "all impositions upon tenants under the denomination of *abwab*, *mahtut* or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void." After this Act had been passed, but before the decision of the Privy Council, the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828) was decided by a Division Bench of the Court. In that case the plaintiffs sued to recover Rs. 2,830-13-3 for arrears of rent and for *tehwari* and *salami* due to them for the years 1290 to Baisakh 1293 in respect of a *mokurari* tenure held under them by the defendant. The basis of the suit was a *kabuliyat*, dated 25th December 1869, by which the defendant agreed to pay a certain fixed rent, *plus* a small annual addition for items designated therein as *tehwari dusara* and *salami towzi*, in respect of which items the amounts declared to be payable were Rs. 9 and Rs. 2, respectively. The only question was whether the *tehwari* and *salami* could be recovered. The learned Judges held that as the items in dispute were not arbitrary and uncertain in their character, but were specific sums which the tenants had agreed to pay to their landlords, they were in fact part of the rent agreed to be paid and were [740] not *abwabs* at all. They considered that what is or is not an *abwab* must depend on the circumstances of each particular case in which the question arises, and they allowed the plaintiff's claim. It is clear that this case may be reconciled by the judgment of the High Court in the other case, as Mr. Justice MITTER expressly says that the question whether the disputed item is an *abwab*

must be decided by the Court in each case; but if I have correctly understood the judgment of the Privy Council in the same case, it is equally clear that it cannot be reconciled with that, as that decided that nothing can be recovered from the tenant except the one sum fixed as the rent of the land, and in this view, I think, we must hold the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828) to be overruled by the decision of the Privy Council in that of *Chultan Mahton* v. *Tilukdhari Singh* (I. L. R., 17 Cal., 131; L. R., 16 I. A., 152), and that unless the law has been changed by the Bengal Tenancy Act in favour of the landlord, the items in dispute in this action cannot be recovered, as they have been proved to be something beyond the sum which had been agreed upon as rent. The definition of rent in s. 3 of the Act does not, in my opinion, affect the question, as that would have been the correct definition of rent without the assistance of the Act, and consequently was so at the time of the decision of the Privy Council, and the only question is as to the meaning of s. 74. I think that the effect of that section is to declare the law to be as it is laid down by the Privy Council in the judgment which I have cited, and to be that no imposition under any name whatever shall be recovered from the tenant for or in respect of the occupation or tenure of the land beyond the sum which has been fixed for rent, whether that sum has been fixed by agreement or by judicial determination between the landlord and the tenant.

In my opinion the portions of the claim which are objected to are illegal, and cannot be recovered as rent, and the second appeal should be dismissed with costs.

O'Kinealy, J.—In this case the plaintiff, a zemindar, sued the defendant, his ryot, for arrears of rent due on account of the years 1290 to 1293. The plaintiff alleged that the rent was **[741]** Rs. 22-2 per annum. The defendant, on the other hand, contended that it was only Rs. 18-10-6, and that he had paid that sum. He also added that the difference between Rs. 18-10-6 and Rs. 22-2, claimed by the plaintiff, consisted of illegal cesses which had been incorporated with the original rent.

In the first Court the plaintiff examined his *putwari*, his *tehsildar*, and the defendant, in support of his case. The *jamabundis*, or collection papers from 1286 to 1292, were also produced as corroborative evidence.

The Munsif held that the *jamabundis* from 1286 to 1292 had been fabricated in order to support a false case. He has also held that the amount claimed as rent included *abwabs*, such as *sarak*, *khuruch*, *neg*, and *batta*; he found that the proper rent was what the defendant alleged it to be, and on that basis he decreed the arrears found to be due.

The plaintiff appealed to the Lower Appellate Court. He argued that the Munsif should have found whether the amounts claimed to be included in the *jama*, and disallowed by the lower Court, were legal cesses or not, and he urged that the onus of proving that illegal taxes were included in the rent claimed lay on the defendant. He further asserted that the Munsif was wrong in saying that the *jamabundis* produced on the part of the plaintiff were not genuine, and asserted that the plaintiff's claim was proved by the statements of the defendant and the papers admitted by him. These contentions seem to have failed before the Judge in the lower Court. He came to the same conclusion in regard to the *jamabundis* as the Munsif, and he agreed with that judge in thinking that the sum stated by the defendant was the *asul jama*, while the amount claimed by the plaintiff as the yearly rent was made up of the *jama* with other items, such as *sarak*, *khuruch*, *neg*, and *batta*.

This being the case, and the suit being a suit for rent, he refused to grant the items in excess of the annual rent, because, in his opinion, it was not rent, and the plaintiff ought not to succeed on a different title. He therefore dismissed the appeal.

From that decision a second appeal was preferred to this Court, and before the Division Bench it was contended on behalf of the plaintiff that the defendant having for many years paid the sums [742] claimed and taken receipts as if the amounts paid had been rent without any specification of the items *sarak*, *khuruch*, *neg*, and *batta*, he was bound to pay rent at that rate, and the Court below ought to have held that there had been not only a consolidation of these sums with the rent, but an implied agreement by the defendant to pay the whole amount as rent.

So far as I can see that is not a valid ground of second appeal. In the case of *Meer Mahomed Hossein* v. *Forbes*, their Lordships of the Privy Council say (L. R , 2 I. A., at p. 6)—

"The case was before the High Court upon special appeal, and, therefore, in strictness, they had nothing to do with the evidence in the cause."

In the more recent case of *Pertap Chunder Ghose* v. *Mohendro Purkait* (L. R., 16 I. A., 233 at p. 238: I. L. R., 17 Cal. 291, at p. 298), decided by their Lordships on the 29th June 1889, there is the following passage:—

" Their Lordships have doubted whether the Judges of the High Court in hearing the appeals, had regard to the provision in the Code of Civil Procedure (Act XIV of 1882), s. 584, as to appeals from appellate decrees, and thought they were at liberty to consider the propriety of the findings of the District Judge upon questions of fact. Certainly there are some passages in their judgment, particularly in the latter part, if not in the former, which suggest this. Their Lordships must observe that the limitation to the power of the Court by ss. 584 and 585 and in a second appeal ought to be attended to, and the Appellate Court ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact."

In this case two Courts have come to the same conclusion on a matter of fact, which goes to the foundation of the case, namely, what was the rental of the defendant; and they have decided adversely to the appellant. This seems to me to conclude the case, and to render it impossible for us to decree the second appeal in favour of the appellant.

In this view of the case it would seem unnecessary that I should answer the question referred to this Court, namely, " whether the portions of the claim that are objected to as coming under the denomination *sarak*, *neg* and *khuruch*, are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with rent and without any specification in [743] the rent receipts," but as the Judge in the Court below has forwarded as part of his judgment a decision on the nature of *abwabs*, and a majority of the Judges composing the Full Bench think that it should be answered, I think it is better to give my opinion.

In order to determine what was the meaning of rent under the old Regulations, and what were the cesses and assessments that they were intended to prohibit, it is necessary to see what the law was before the time of the Permanent Settlement; what the evils were that the Legislature then intended to get rid of, and how they attempted to do it.

Before the acquisition of Behar by the East India Company, the distinction between rent and revenue can hardly be said to have existed. Both were looked upon as the dues of Government, rather in the form of a tax on land than as rent. Thus in Regulation XLIV of 1793 (Preamble), we find it declared

that, according to the established usages of the country—and these, according to 24 Geo. III, (1784), Chapter 25, s. 39, were to guide the Directors in fixing the income of Government from land—these dues, consisted of a certain proportion of the annual produce of every bigha of land demandable, according to the local custom, either in money or kind. This right was a right peculiar to the State alone. So that as long as the Moghul Government was strong enough to govern the provincial rulers, taxation, so far as it fell upon land, may be said to have been substantially of a fixed nature. In Behar the zemindar divided the produce of the lands with the cultivators in stated proportions; and in Bengal a settlement was made with the ryot upon a standard called the *asul*, or original rate, with the accumulation of taxes successively imposed upon it. These taxes were divided into *abwab* and *mahtut*, and in calculating the zemindari demand, now called rent, the zemindar levied the *asul* or ground rent according to the *jamabundi*, or assessment, of each village, and the excess imposed, if *abwab*, according to the rate of the pergunnah, and if *mahtut*, according to the rate of each *chukla*.

These two, namely, the *asul* and *abwab* constituted the whole land revenue demand imposed on the *ryot* prior to and after the British rule. To illustrate this, I print from Mr. Shore's Minute the **[744]** following abstract (Fifth Report, Vol. I, p. 163) of a *ryot's* account taken about the year 1781:—

	Rs.	A.	G.	Rs.	A.	G.	K.
Rent of 7 bighas 12 cottahs 7 chittacks of land of various produce, calculated at a certain rate per bigha according to its produce				14	0	8	0
Abwab cesses.							
Chout at 3-16 per rupee .	2	10	0				
Pulbundi, a half mo. demand or ½-4 of the *jama*	9	7	2				
Nuzzerana, 1 mo. or ½ ...	1	2	15				
Mangan, 1 mo. or ½	1	2	15				
Fouzdari 3-4 of 1 mo. amount or 1-16	14	15	0				
Company's *nuzzerana*, 1¼ mo. ...	0	1	7				
Batta 1 anna per rupee ...	0	0	14				
				8	12	2	0
Total ...				22	12	10	2
Khelat 1½ anna per rupee ...				2	2	1	2
Total *jama* ...				24	14	12	0

As I have stated above, the assessment of land revenue was the right of the Government alone, and as a fact the Government, when in full vigour, supervised the assessment year by year. *Abwabs* were in their nature unconstitutional; but from the beginning of the 18th century, when the Subahdars were becoming more independent, they began to levy new perpetual imposts now called subahdari *abwabs*. These viceregal imposts were levied by the Subahdars in a certain proportion to the *asul*, or standard, assessment, and the zemindars who paid were authorized to collect them from the ryots in the proportion of their *asul*, or standard, assessment; and sometimes these cesses were incorporated with the original *asul*, so that the aggregate became a new

asul, or standard of assessment, according to which the assessments on land were subsequently levied.

[745] Besides being unconstitutional, there was another objection to these assessments, namely, that they confirmed the zemindars within the *subah* in the exaction of their *abwabs* and in increasing their amount in an arbitrary manner not authorized by the Subahdar. The result was that the incorporated subahdari *abwabs* in some instances amounted to 33 per cent. of the *asul*, while the zemindari *abwabs* amounted to somewhere about 50 per cent.

Moreover, in some cases, the *abwabs* were increased in one estate to meet a deficiency in another, so that the incidence of the taxation varied in different estates, and often according to the caste and place of residence of the ryot.

They were also made a means of enhancing the rent, while it was one of the objects of Government to stop enhancements made in an arbitrary and indefinite manner.

The mode in which these *abwabs* grew up is well described by Mr. Shore in reference to the *ryot's* account printed above. He says, in 1789 :—

"If the accounts of the same land were now examined some additional impositions might appear. The zemindars introduce them by degrees, at intervals of two, three, four or five years, and rarely attempt them for two or three years successively. Solicitation and influence are equally employed to effect the establishment of them, and a ryot, when the burden is not too heavy, will rather submit than resist or complain. Temporary extortion may be practised at any time, but a permanent exaction of this nature can rarely be established by force alone upon the ryots. (Fifth Report, Vol. I, p. 163.)

It is, I think, in this sense that these cesses are said in the correspondence of that period to be arbitrary or indefinite. Thus we find them described by the officials of that period "as arbitrary impositions, vicious in mode and principle, yet extremely moderate in amount," as "claimed by no measured rule, but arbitrary indefinite expediency," as "an oppressive exaction wholly unauthorized," and a "daring encroachment on the exclusive prerogative of the Sovereignty, in levying from the subject what can only be legitimate in the form of a public supply of a necessary exigency of the State."

This too is, I think, the sense in which *abwabs* were considered as arbitrary or indefinite in the old Regulations—arbitrary, in the sense that they were unauthorized by law—indefinite, in the sense [746] that, though levied in a certain proportion to and upon the original assessment or *asul* land tax, there was no definite rule guiding the zemindar in fixing the proportion they bore to the produce of the land, nor any rule prescribed for limiting their amount.

They were not arbitrary in the sense that the parties had not contracted in regard to them, for at that time rent was paid, not under contract, but as a land tax, as the Government share, and according to the pergunnah rate, nor indefinite in amount, since every *abwab* was, as in the present suit, a determined sum, generally a certain defined share of the real land tax.

In 1772, the Hon'ble Court of Directors deprived Nawab Mahomed Reza Khan of his appointment of Naib Dewan, and determined to stand forth publicly themselves in the character of Dewan, and in the proclamation of the 14th of May of that year *, they laid down rules for the settlement and collection of the revenue.

Rule 10 states :—

"That the farmer shall not receive larger rents from the ryots than the stipulated amount of the pottahs on any pretence whatsoever ; and that for every instance of such

* Colebrooke's Supplement, p. 190. Fifth Report, Vol. I, 4. Harington's Analysis, Vol. II., 12.

extortion, the farmer, on conviction, shall be compelled to pay back the sum which he shall have so taken from the ryot, besides a penalty equal to the same amount to the Sircar; and for a repetition, or a notorious instance of this oppression on his ryots, the farmer's lease shall be annulled."

Rule 12 states:—

"That no *mahtuts*, or assessments under the name of *mangan*, *bauris gundee*, *sood*, or any other *abwab* or tax, shall be imposed upon the ryots; and that those articles of *abwab* which are of late establishment, shall be carefully scrutinized, and at the discretion of the Committee abolished, if they are found in their nature to be oppressive and pernicious."

The rules were issued three days after the assumption of the Dewani, and thus the prohibition of illegal assessments was almost the first act of the British Government when it assumed the revenue administration of Bengal.

The nature of them can be best understood from the terms in which they are described. Thus *mangan* in Behar, in which the land in connection with the present suit is situate, was a share of [747] the crop given as a fee or perquisite to the headman of the village; and *sood* was an impost in order to meet the interest which the zemindars were compelled to pay on arrears of revenue; but what the rules plainly point out is that whether it be treated as an assessment or a tax, nothing beyond the ordinary rent was to be allowed.

In 1787, the Regulation regarding the assessment of revenue in Bengal was revised by Regulation VIII passed on the 8th of June of that year*. Section 50 runs as follows:—

"That whereas notwithstanding the orders of Government in the year 1772, prohibiting the imposition of *mahtut* or assessment, under the names of *mangan*, *hauldauri*, *moracha*, *bazee jama*, or *sood*, or any other new articles of taxation, various taxes have been since imposed, the Collector is strictly enjoined to enforce this article and prevent the imposition of any new taxes upon the ryots, and if hereafter any new tax should be imposed, the Collector, on proof of such extortion, is to decree double the amount thereof as costs of suit."

In this section it will be seen that the Legislature describes these impositions as assessments or taxes, and it gives a few examples of those impositions which were not mentioned in the Regulation of 1772.

This brings us down to the Regulation relative to the Decennial Settlement which was subsequently re-enacted in 1793 when the Permanent Settlement was sanctioned. By section 57 of Regulation VIII of 1793 it was enacted that—

"The rents to be paid by the ryots, by whatever rule or custom they may be regulated, shall be *specifically stated* in the pottah, which, in every possible case, shall contain the *exact sum* to be paid by them."

By section 6 of Regulation IV of 1794, it was declared—

"If a dispute shall arise between the ryots and the persons from whom they may be entitled to demand pottahs, regarding the rates of the pottahs (whether the rent be payable in money or kind), it shall be determined in the Dewani Adawlut of the zillah in which the lands may be situated, according to the rates established in the pergunnah for lands of the same description and quality as those respecting which the dispute may arise."

So that what the Permanent Settlement and the Regulation of 1794 describe as rent, is the original ground rent assessed according to the pergunnah or customary rate per bigha; and it is at once distinguishable from the other assessments or taxes which have no relation to the customary rate or to the extent or produce of the [748] lands by the fact that the imposition of them was not caused, nor was it pretended to be attributed to, or claimable by

* Colebrooke's Supplement, pp. 253-266. Fifth Report, Vol. I, 15. Harington's Analysis, Vol. II, 53.

reason of, any change in the customary rate, or in the extent or the amount of produce of the lands. Bearing this in mind, we can now understand the meaning of sections 54, 55 and 56 of the Permanent Settlement.

Section 54 of Regulation VIII of 1793 declares—

"The imposition upon the ryots under the denomination of *abwab*, *mahtut*, and other appellations, from their number and uncertainty, having become intricate to adjust, and a source of oppression to the ryots, all proprietors of land and dependent talukdars shall revise the same in concert with the ryots, and consolidate the whole with the *asul* into *one specific sum*."

Section 55 of the same Regulation enacts—

"No actual proprietor of land or dependent talukdar or farmer of land, of whatever description, shall impose any new *abwab* or *mahtut* upon the ryots, under any pretence whatever."

Now the effect of this enactment seems to be that, at the time of the Permanent Settlement, there was, or there was believed to be, a customary assessment per bigha for the land, which was described in the Regulations themselves as the *asul*, and that in addition to that there were added certain assessments or taxes or cesses of various kinds which the Legislature wanted to prohibit for the future, and that they proposed to bring about this result by compelling each zemindar to revise the assessments or taxes then existing in concert with his *ryots*, and consolidate them into one specific sum which would form a new *asul*, and to absolutely prohibit any new assessment, imposition or tax in addition to the *asul* for the future—*Ram Kant Dutt* v. *Gholam Nubby Chowdhry* (2 Sel. Rep. 58). A certain time was given for this consolidation, and if not carried out, it was declared that any action for the realization of the *abwabs* beyond the *asul* or ground rent should be non-suited.

We can now easily understand the meaning of the *jamabundi* of 1279 which was relied upon by the defendant in the present case:

Names of tenants.	Land.	*Lagan.*	*Sarak.*	*Batta.*	Putwari's *neg.*	Ordinary expenses.	TOTAL.

[749] After the name of the tenant, comes "land." Then the ground rent called "*lagan*." Then comes "*sarak*," a cess in connection with roads. Then "*batta*," a tax imposed to make up any deficiency in the currency, which has always been considered an *abwab*—*Chukan Sahoo* v. *Roop Chand* (S. D. A., 1848, p. 680); Regulation LI of 1795, section 3, clause 6. No question as to *batta* arises in this case. Then "putwari's *neg*," a cess imposed for the payment of the putwari and declared to be an *abwab* by the decision of the Full Bench in the case of *Chultan Mahton* v. *Tilukdhari Singh* (I. L. R., 11 Cal., 175). Lastly, the column "Ordinary expenses," a cess to cover ordinary zemindari expenditure.

In accordance with the common law, and in pursuance of section 83, Regulation VIII of 1793, the *lagan* was determined by the average produce of the lands in common years. But there is no law justifying the imposition of any of the other items at all; they are in name cesses, and have no connection with the produce of the land beyond that they are calculated upon the ground rent. There is no means known to the law for determining the proportion they must bear to the rent.

According to the view which I take of the Regulations, every item in this account, except that of "*lagan*," or ground rent, is a *mahtut* or *abwab* within the meaning of the Permanent Settlement Regulation, and the realization of any of it was punishable thereunder with a penalty of three times the amount.

The form of *pottah* issued to the *ryots* at the time of the Permanent Settlement was subject to control. By section 58 of Regulation VIII of 1293, no *pottah* was valid unless it had been approved of by the Collector and registered in the Civil Court of the district. These restrictions as to form were partially removed by Regulation IV of 1794.

Towards 1812 the futility of this legislation was pressed on the Government; and as the objections to the then existing legislation cannot be better put than they are by Mr. Colebrooke, I put them in his own words. He said—

"Another part of the subsisting revenue regulations, which appears to me to need emendation, is that which relates to the form of leases; and which annuls such engagements as may not be drawn in prescribed form. [750] Before the enactment of the regulations connected with the Permanent Settlement of the land revenues of Bengal, a practice prevailed among landholders in this province of imposing on their *ryots* arbitrary cesses termed *abwabs*; being either authorized so to do by reservations in the *pottahs*, to subject the *ryots* to such *abwabs* as might be imposed on the pergunnah generally, or else assuming that authority without the sanction of any such reservation in the leases of their tenants. To protect the peasantry from such arbitrary exactions, which had been the source of grievous oppression and of gross abuses, the regulations of the Permanent Settlement provided that no new *abwab* should be imposed on any pretence, under penalty of three times the amount; that the landholders, in concert with their tenants, should revise the *abwabs* and consolidate them with the land rents; that they should give or tender to their *ryots pottahs* prepared according to a form previously approved by the Collector and registered in the Adawlut. These rules are enforced by a provision that *pottahs* of any other form are to be held invalid. Notwithstanding this penalty, which was expected to enforce universal compliance, by rendering the written engagements of landlord and tenant void and of no effect, if there be a deviation from the prescribed form, there is reason to believe that little progress has been really made towards the general introduction of the simple and definite leases which it was thus intended to enforce. But whether generally or partially successful, or wholly ineffectual, that penalty ought, I think, to be now rescinded. There is no longer any sufficient motive for holding the landholders and tenantry of the country in this sort of pupilage, prescribing to them the manner and form of their reciprocal engagements. They may be safely left to consult their mutual interests, by entering into such engagements as they may consider to be for their benefit respectively, and to reduce their agreements to writing in any form most intelligible and satisfactory to themselves or in their conviction most binding and secure. All that need be required, is that the engagements shall be definite; and it may be accordingly declared that any clause of a lease, or other engagement, reserving the power of imposing cesses or taxes, termed *abwab* or *mahtut*, or under any other denomination whatsoever, or binding the *pottah* holder to pay any impost or addition whatsoever beyond the rent, however regulated, in money or in kind, which the *pottah* or engagement specifies, shall be void and of no effect, and the Courts shall maintain the remaining definite clauses, and enforce payment of such rent, and such only, as is specifically stipulated and agreed for by the *pottah* or other engagement. Under this alteration of the existing rules the Courts of Justice will give effect to the agreements of the parties according to their ascertained intentions, with exception only to stipulations subjecting one of the parties to arbitrary demands at the will of the other. This exception, together with the prohibition actually in force against the imposition of any arbitrary cesses or *abwabs*, under whatever [751] pretence, will entirely preclude the renewal of those oppressions and abuses which the Regulations I have proposed to modify were designed to prevent."

For these reasons Regulation V of 1812 was enacted, and of it sections 2 and 3 ran as follows:—

"SECTION 2.—Section 2, Regulation XLIV, 1793, section 2, Regulation L, 1795, and clause second, section 2, Regulation XLVII, 1803, by which the proprietors of land paying revenue to Government are precluded from granting leases for a period exceeding ten years are hereby rescinded, and proprietors of lands are declared competent to grant leases for any period which they may deem most convenient to themselves and tenants and most conducive to the improvement of their estates.

"SECTION 3.—Such parts of Regulation VIII of 1793 and of Regulation IV of 1794 as require that the proprietors of land shall prepare *forms* of pottahs, and that such *forms* shall be revised by the Collectors, and which declare that *engagements for rent* contracted in any other than that prescribed by the Regulations in question shall be deemed invalid, are hereby rescinded; and the proprietors of land shall henceforward be considered competent to grant leases to their dependent taluqdars, under-farmers and ryots, and to receive corresponding *engagements for the payment of rent* from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests; provided, however, that nothing herein contained shall be construed to sanction or legalise the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mahtut*, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Courts shall notwithstanding maintain and give effect to the definite clauses of the *engagements contracted* between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them."

Apparently some doubt arose as to the meaning of section 2, and this was explained in Regulation XVIII of the same year. Section 2 of this enactment declared the true meaning was that proprietors of land were "competent to grant leases for any period even to perpetuity *and at any rent* which they might deem conducive to their interest," provided that a person holding a restricted interest could not grant a lease extending beyond the term of his own interest.

This was the law in regard to rent and *abwabs* which remained in force until the passing of Act X of 1859. The avowed object [762] in passing Regulation V of 1812 was to get rid of the necessity of having the forms of leases supervised by the Collector, but at the same time to re-state the prohibition already existing in Regulation VIII of 1793 against the landholders imposing or realizing any new *abwabs*, not to repeal them. The time for consolidating the *abwabs* existing at the time of the permanent settlement had passed, and they could not be re-assessed as *abwabs*, but only as rent, and in those cases in which they had been consolidated with the *asul*. This it was considered would leave the ryot in the same position as he was after the passing of Regulation VIII of 1793. By section 2 of Regulation XVIII of 1812, the proprietors were empowered to grant leases of any form for *rent*, and by section 3 of Regulation V of 1812 they were empowered to receive from the tenants "corresponding engagements for the payment of rent," and it only. No further power was given. And as if to mark the distinction between cesses and rent, the former are referred to as paid under stipulations or reservations, the latter under engagements, and it was the engagements for the payment of rent, and not the stipulations for cesses, that were to be enforced. It was not the intention of the framers of this Regulation to allow the parties to contract for anything in money or in kind not then known as rent, and when they describe *abwabs* and *mahtuts* as arbitrary or indefinite they were only using words applied to these assessments from 1772. Bearing this in mind, a comparison of the latter portion of this section with sections 54 and 57 of Regulation VIII of 1793 shows that the words "specifically agreed" in

Regulation V of 1812 are the same as "specifically stated" in ss. 57, and refer to the *one* specific sum of s. 54 in the permanent settlement. They have no reference to cesses. This is the view taken by the Full Bench, in *Chultan Mahton's* case (I. L. R., 11 Cal., 175), where it is said that the last four lines of s. 3 of Regulation V of 1812 refer to the ground-rent in the permanent settlement. That being so, I take it that every assessment of any kind beyond that entered in the second column of the *jamabundi*, which I have given above, was an arbitrary or indefinite cess within the Regulation, and prohibited by it.

[733] These sections are partially repealed by Act X of 1859 and Act VIII of 1869, and are now wholly repealed by the Bengal Tenancy Act of 1885, but partly re-enacted by s. 74 of that Act, which declares:—

"All impositions upon tenants under the denomination of *abwab*, *mahtut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

It seems, therefore, that all additions to the actual rent, under the denomination of *abwabs*, are now, as they were in 1793, illegal, and any agreement to pay them is void. This seems to me the conclusion arrived at by the Full Bench in the above case, which was subsequently affirmed by their Lordships of the Privy Council.

It has been argued that a different interpretation has been put upon that decision by a Division Bench of this Court in the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828). In that case the plaintiff sued for rent, and two items denominated *tehwari* and *salami*, and in the plaint the claims for the different items were set out as follows:—

1. That your petitioners, the plaintiffs, are the proprietors and zemindars of pur-gannahs Sahrai, etc., mehal Kharagpur. The defendant is the mokuraridar of mouzah Gora, etc., purgannah Parbutpatra, the zemindari of your petitioners, the plaintiffs, and pays an annual *jama* of Rs. 1,999-8 annas, besides road cess, public works cess, *tehwari*, etc.

2. That the sum of Rs. 2,830, 13 annas 3 pies on account of rent, road cess, public works cess, *tehwari*, interest, *salami*, etc., from the year 1290 to Bysak instalment of the year 1293 Fusli * * * is due from the defendant.

For the Year 1290.

	Rs.	A.	P.
Rent ...	1,999	8	0
Road and public works cesses	345	0	0
Tehwari ...	7	3	0
Dakbehri ...	40	0	0
Salami ...	1	9	9
Interest ...	82	2	0
	2,475	6	9

The Judge in the Lower Appellate Court dismissed the claim. He found that *salami* was a tax levied on the occasion of a *punna*, [734] or religious festival, and *tehwari*, another tax imposed on the occurrence of the Doorga Pooja, when it is customary for zemindars to expend money in certain ceremonies. So that he held in so many words, that both in denomination and essence, these items were cesses. He further found that the *kabuliat* divided the amount payable into *mal*, *tehwari* and *salami*, and we know that in several parts of the Regulations the word *mal* is used in the sense of rent, as opposed to any excess which was styled an *abwab*. Thus in Regulation LI of 1795, s. 2, cl. 1, we find the words *mal* and *abwab* used in this sense. In short, the Judge found they were cesses, independent of the *mal* or rent, and only usually payable when certain ceremonies were performed. In appeal to this Court, the Division Bench decided that the items called

tehwari and *salami* did form part of the rent and were recoverable because they were entered in the *kabuliat* under which the defendant held, were not arbitrary and uncertain, but specific sums which the tenant agreed to pay; and they decided that the Full Bench decision above referred to did not lay down as law that anything recoverable in 1812 could not be recovered at the present day. I agree in thinking that the Full Bench did not lay down any such doctrine, but I think that the Full Bench did lay down that these amounts were not recoverable under Regulation V of 1812. In that case the Full Bench held that in the last four lines of s. 3 of Regulation V of 1812, the words "sum specified" refer to the amount of the rent specified. And it follows from the Regulation itself that all stipulations or reservations for *abwabs* or *mahtut* above the rent are *asul jama* were, after the time of the permanent settlement, null and void. In the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828), the sums named *tehwari* and *salami* were in name cesses, and were found to be such by the lower Court, and this finding, so far as it depended on evidence, could not be interfered with in special appeal. Moreover, when we consider that so far back as 1772, long before the permanent settlement, *salami* was looked upon as an *abwab*, there can be little doubt of their nature. They were by name and nature distinct from the rent, were apparently so stated in the lease, and they were received by the landlord, not as rent, but as [755] cesses. This distinction was marked in the plaint where they were set out by name after the rent and in sharp contrast with it. And yet the sums were decreed as rent.

The Judges said:

"In the case before the Full Bench that Regulation did not support the plaintiffs. On the contrary, it was directly opposed to their claim. In the present case the Regulation does support the plaintiff's case because the items in dispute are not arbitrary and uncertain in their character, but they are specific sums which the tenant agreed to pay to the landlords; and from the terms of their *kabuliat* it seems to us that the payments of these items no less than the payment of the *jama* itself, formed part of the consideration upon which the tenancy was created. Therefore the plaintiffs were entitled, by virtue of Regulation V of 1812, to demand and recover these items, they being in fact part of the rent agreed to be paid, although not so described. In the definition contained in the new Tenancy Act, "rent means whatever is lawfully payable or deliverable in money or kind by a tenant or his landlord on account, of the use or occupation of the land by the tenant." There is nothing new in this, but it expresses concisely what has always been understood by the word 'rent." What is or is not an *abwab*, must depend upon the circumstances of each particular case in which the question arises. The Full Bench case, upon which the District Judge relies, does not, as we have said, bar the plaintiff's claim."

I must respectfully dissent from this judgment, and since I do so, I think it is only due to the Judges that I should give my reasons for my dissent. In the Full Bench, as in this case, the sums were definite: in that case the sums were admitted and held to be *abwabs*: in this case the sums were entered among the cesses and declared to be cesses. I do not see clearly how the Regulation is opposed to the one claim more than the other. Nor does the Regulation require that the sums in dispute should be arbitrary *and* uncertain. The words are "arbitrary *or* indefinite;" and to find that the sums are specific is not sufficient to satisfy the requirements of the law: indeed, it is opposed to two propositions laid down in the Full Bench case,—that it cannot be maintained that anything which is definite and certain is not an *abwab*, and that the last four lines of the Regulation invoked in support of this decision only refer to rent, and do not refer to *abwabs*. Nor can I bring myself to acquiesce in the proposition which, I think, is involved in the decision, that rent as

defined in the [756] Rent Act, means the consideration upon which a tenancy is created—a mere contract rent and that only. The obligation to pay rent arising out of contract is not found more often than the obligation to pay arising from law. All the tenants, whether ryots or tenure-holders, whose rents have been enhanced, and all tenants in the estates settled under Chapter X of the Rent Act, are bound, not by contract, but by law, to pay. In India the rights of landlord and tenant, as this very Act shows, are not wholly based on contract. They depend partly on contract, partly on law, partly on custom and usage. Moreover, assuming that the rent in the case I am now discussing depended on contract, I cannot agree with the view taken in the decision. In regard to the sums sued for in addition to that called rent, the plaintiff sued for rent *by name*, and additional sums which the lower Court found were in denomination and essence *abwabs*. This Court gave them as rent. It is declared by s. 74 that all impositions upon tenants under the denomination of *abwab* or *mahtut* or other like appellations in addition to the actual rent, are illegal, and the stipulation and reservations for their payments are void. So that these sums do not fall within the words, "what is lawfully payable," in the definition of rent. Lastly, I am unable to assent to the proposition that the definition of rent in the Rent Act includes every specific sum which the ryot has agreed to pay. That proposition seems in conflict with the decision of the Full Bench. That certainly was not the meaning of the word rent in the old law. It certainly was not the opinion of Mr. Shore, who says—

"With respect to land and land revenue there are two material distinctions; first, the lands of the country were anciently distinguished by the denominations of Khalsa and Jabiri; the former may be translated exchequer lands ; the latter, which are appropriated for the maintenance of Munsubdars, or the officers of the State, may be denoted assigned lands. The aggregate of the two constitutes the whole of the lands paying revenue to the State. Secondly, the distinction with respect to land revenue is that of *asul* or original, understood to be the standard assessment, in contradiction to *abwab* or taxes subsequently imposed upon it."

In other words, before the permanent settlement, the *asul*, or ground rent, was only one portion of the amount payable by, and agreed to be paid by, a ryot ; the other portion was *abwab*.

[757] This distinction, as I have pointed out above, runs not only through Regulation VIII of 1793, but also through other Regulations.

Regulation II of 1795, s. 3, cl. 2, runs as follows :—

"*Second.*—In the *pottahs* for *nukdi* land (land paying a specific money rent per bigha), the name and length of the measuring rod was directed to be mentioned, and as, since the year 1781, sundry new articles of *abwab* and charges had been introduced, the *pottah* provided that all new *abwabs* and charges introduced since the Fusli year 1187 should, from the year 1196 of the same era, be considered as prohibited and relinquished, and the *mal* or original rent and *abwab* or cesses which existed in that year, viz., 1187 Fusli, being incorporated with the *mal* so as to form only *one* aggregate sum, this sum or specific rate should constitute what the *ryots* or cultivators of the *nukdi* lands were to pay per bigha."

Again, take the preamble of Regulation XXX of 1803 regarding the settlement of the ceded provinces, where it is said that in the proclamation regarding the settlement of these provinces, and in Regulation XXVII of 1803 [s. 53 (11) (12)], it was declared that "all persons who may enter into engagements with Government for the public revenue, shall bind themselves to grant *pottahs* to their under-renters and *ryots*," *in which* "*all authorized abwabs* shall be consolidated with *the land rent (or asul jama) in a gross sum* :" that counter-engagements shall be executed by the *ryots* and under-renters of a similar tenor ; and nothing but what is therein expressed shall be collected from the *ryots* or under-renters of whatever description.

The same view is set forth in Regulation VII of 1822, s. 9, and it comes to this, that up to the time of making a settlement, the whole amount paid by the *ryots* consisted of two portions, ground rent plus *abwabs*; and that such of the *abwabs* as were allowed by the settlement were consolidated with the *asul* and called land rent, representing a share of the produce in contradistinction to *abwabs* or cesses. In illustration of this proposition, I set forth the lease granted under the Regulation to the ryots of Benares, the province next to Behar. It is the only form mentioned in the Regulations:—

A *pottah* or engagement and stipulation in the name of———according to the *zeyl* without *abwab* or *serf*. The *fota* or rent for the entire year of [758] the cultivation shall be *bilmokta* or according to one rate; and exclusive of that neither a *daam* or *dhirm* will be taken.

"*Zeyl* or annexed specification of rent."

Nukdi or money rent.

1st. *Mootry*, 12 bighas (either of 3 dera ilahi or purgana bighas, or dherawat or estimated bighas) at 8 [3 ?] rupees 2 annas per bigha—Rs. 37-8-0.

2nd. *Kuyraur*, &c. (being for the more valuable articles of cultivation), 13 bighas (whether of 3 dera ilahi or purgana measurement or dherawat), *viz*.,—

	Rs.	A.	P.
Sugarcane, 10 bighas, at 5 rupees 1 anna per bigha . .	50	10	0
Tobacco, 2 bighas, at 6 rupees per bigha	12	0	0
Moolee or vegetables, 1 bigha, at 2 rupees 1 anna per bigha	2	1	0
	64	11	0

F

In this lease rent is used in the sense of ground rent only, and it is on this supposition that all the elaborate rules for enhancement of rent in Act VIII of 1885 are based.

Nor do I think the express words of the Regulations, as to the consolidation of *asul* and *abwabs* into one sum, weakened by the argument that because the last four lines of Regulation V of 1812, s. 3, use the words in the plural, namely, "clauses" and "engagements," the rent must consist of more than one lump sum. It is a general clause and describes every person and every thing in the plural, except rent. It must be borne in mind that the leases contain a specification of rates, and that the land could be let for a term, and there might be clauses in regard to these matters as in the lease set out above. Moreover, we know that in some Regulations, before Regulation V of 1812, when rent was consolidated into one lump sum, the engagements between *ryots* and landholders are referred to in similar terms. Examples of this are found in Regulation XIV of 1793, s. 6, and in Regulation VII of 1799, s. 15, clause 8, where the words bear a strong resemblance to those in Regulation V of 1812, although they refer to Regulation VIII of 1793.

The Judges held in the case decided by the Full Bench that there was no definition of *abwabs* in the Regulations, and hence [759] that it must be decided in each case whether any sum is or is not an *abwab*. It is true that there is no express definition of *abwab* in the Regulation. Yet, as the whole demand on a tenant is frequently declared to be the ground rent and *abwab*, the latter must be that portion of the demand not included in the ground rent. This too was the meaning attached to it in 1813, one year after the passing of Regulation V of 1812. In this year a glossary of legal terms was compiled in

the East India House in London for the assistance of English readers of the Fifth Report, and in it *abwab* is defined as follows:—

"This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *asul*, or original standard rent, in the nature of addition thereto. In many places they had been consolidated with the *asul*, and a new standard assumed as the basis of succeeding impositions."

This is, I think, an accurate definition of the term *abwab* as found in the Regulations, and it should serve as a guide to us in deciding cases; and certainly, if it be correct as I think it is, the cesses in this case and in the case under discussion were *abwabs*.

It is for these reasons I respectfully dissent from the decision in *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828). It seems to me to be in direct conflict with the decision of the Full Bench, and that both judgments cannot co-exist as an exposition of the same law. I think the sums of *tehwari* and *salami* stipulated to be paid were *abwabs*, and the stipulation to pay them was void.

I may add in support of the view of the Full Bench decision the case referred to by the Judges of the Full Bench, viz., the case of *Radha Mohun Surma Chowdhry* v. *Gunga Pershad Chuckerbutty* (7 Sel. Rep. N.S., 166). There the zemindar sued the farmers for Rs. 7,542-13-4 under the head of *Zabitta batta*, *i.e.*, an excess of a half-anna in each rupee on the amount of the farming *jama* under their *kabuliat*, dated 22nd Bysack 1231. That suit was dismissed. Three Judges of the Sudder Dewani Adalut in giving judgment held as follows:—

"The *kabuliat* provides that the farmers should pay such sums, over and above the stipulated *jama*, as are realized in the mofussil under the head of *Zabitta batta*. Section 3, Regulation V, 1812, provides that the imposition of arbitrary or indefinite cesses, whether under the denomination [760] of *abwab*, *mahtut*, or other denomination, is illegal, and that all stipulations of that nature should be judged by the Courts to be null and void."

This case, in my opinion, bears a strong analogy to the case of *Pudma Nund Singh* v. *Baij Nath Singh* (I. L. R., 15 Cal., 828), and it affirms the principle that all agreements of the nature referred to in that case are null and void. The answer to the question referred to the Full Bench must, I conceive, be that the amounts sued for under the head of *sarak*, *neg* and *khuruch* are *abwabs*, and are not, therefore, recoverable, and the appeals should be dismissed.

Prinsep, J.—I am of the same opinion.

Pigot, J.—I entirely agree.

Ghose, J.—This was a suit for rent for the years 1290 to 1293, at the rate of Rs. 22-2 annas per year. The defence was that the yearly rent was not Rs. 22-2 annas, but Rs. 18-10-6; and that the difference between Rs. 22-2 annas and Rs. 18-10-6 was made up of certain illegal cesses such as *sarak*, *batta*, *neg* and *khuruch*, which could not be legally recovered.

The suit was instituted after the Bengal Tenancy Act came into operation.

The main question* upon which the parties went to trial in the Courts below was whether the rent was Rs. 22-2 annas or Rs. 18-10-6; and upon this question both the Courts below found in favour of the defendant. They were of opinion that the "actual rent" was Rs. 18-10-6 and that although the defendant had for many years paid very nearly at the rate of Rs. 22-2 annas, still that sum was made up of the rent and illegal cesses; that these cesses had not been consolidated with the rent in accordance with the provision of Regulation VIII of 1793, and that therefore they could not be recovered as rent. The learned Judge has, however, held that *batta* is not an illegal cess, and it can

therefore be recovered ; and he has reserved to the plaintiff the liberty of bringing a separate suit for *neg*.

The plaintiff appealed to this Court and the Division Bench, before whom the case came on for hearing, has referred the following question to a Full Bench, viz. :—

"Whether the portions of the claim that are objected to as coming under the denominations *sarak*, *neg* and *khuruch* are illegal cesses, or [761] whether they are recoverable as rent by reason of their having been paid for a long time along with rent without any specification in the rent receipts."

It appears to me that upon the finding of fact arrived at by both the Courts below, the appeal ought to fail ; and the question as to the legality or otherwise of the items of *sarak*, *neg* and *khuruch* hardly arises in this second appeal. The question between the parties was, what was the *rent* of the tenure held by the defendant ; and it has been found that it was Rs. 18-10-6, and not Rs. 22-2 annas, and that the difference between these two figures was no part of the *rent* of the tenure, though paid *along* with it, and could not therefore be recovered as such.

But as the majority of the Judges who compose the Full Bench think that the question should be answered, I briefly state my views.

Section 74 of the Bengal Tenancy Act provides as follows :—

"All impositions upon tenants under the denomination of *abwab*, *mahtut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

And "rent" is defined in section 3 (5) to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land." This definition, as I understand it, expresses in different words what has always been understood by the word "rent" viz., the consideration to be paid for the occupation of land by a tenant.

In this case the actual rent is found to be Rs. 18-10-6 only ; and the other items claimed are what had been levied in previous years, under the denomination of *sarak*, *khuruch*, *etc.*, *in addition* to the *rent*.

There is nothing to show that those items ever formed any part of the consideration for which the land was leased to the defendant ; for if they did, they would, I think, be really *rent*, though described in the zemindari papers under other denominations. They were apparently *abwabs* imposed subsequent to the rent being fixed at Rs. 18-10-6 ; and it is not proved that the *ryot* at any time agreed to pay an enhanced rent including the said items as part of the rent.

[762] The word *abwab* is not defined either in the Bengal Tenancy Act, or in the Regulations which have been repealed by that Act. When the East India Company obtained the Dewany of Bengal, they found that a variety of taxes, called *abwab*, *mahtuts*, *etc.*, had been indiscriminately levied in addition to the *asul* or original ground rent by the Government from the zemindars, as also by the "zemindars" from the ryots. And from the Reports that were submitted by the officers of the Company, after investigation into the Revenue System, it would appear that in the time of the Emperor Akbar, a *tumar jama* or standard assessment was fixed upon the principle of division of the gross proceeds between the sovereign and the ryots in certain proportions. This standard assessment was from time to time augmented. But notwithstanding this standard assessment, various taxes were subsequently imposed upon the *ryots* by the farmers of the land revenue (zemindars), as also by the subahdars (Viceroys) upon these farmers. And these taxes were called *abwab jama* in contradistinction to the *asul jama*, or original rent, at which the land was supposed

to have been rated in the time of Akbar or an ancient rent fixed at some later period. The Subahdary *abwabs* were, it is said, generally levied upon the standard assessment in certain proportions from the zemindars, and the latter were authorized to collect them from the *ryots* in the same proportions; but, as a matter of fact, the zemindars were left to their own discretion and arbitrary will to make any new demands as they pleased, and there was no fixed rule or principle in levying these impositions. (See Harington's Analysis, Vol. II, pages 19, 69, and 5th Report to the House of Commons, Vol. I, pages 103, 105 to 108, 275, 292, 300 and 391).

In the year 1772 (14th May) a Regulation * was passed, whereby it was declared that a settlement should be made for five years; that the farmers should not receive larger rents from the ryots than the stipulated amount of the *pottahs;* that the payments made by the farmers to Government should, in like manner, be ascertained and established; and that no *mahtuts* or assessments under the denomination of *mangan, sood,* etc., or any other *abwab* should be [763] imposed upon the ryots, and those articles of *abwab* which were of recent establishment should be scrutinized, and such as might be found to be oppressive and pernicious should be abolished, and that all *nuzzurs* and *salamis* be totally discontinued (Articles 10 to 13).

In the same year, the Committee of Circuit, while making a settlement for five years in some parts of Bengal, found it necessary "to form an entire new *hustabud* or explanation of the diverse and complex articles which were to compose the collections," these consisting of the *asul* or original ground rent and the *abwabs*. Such *abwabs* which appeared to be most oppressive were abolished, and the rest were retained, they being considered part of the "neat rents." And in order to prevent the farmer from eluding the restriction imposed, the Committee prepared forms of *pottahs* which the farmers were to give to the *ryots*, specifying the conditions of the lease and the "separate heads or articles of the rent." (See Harington's Analysis, Vol. II, pages 19 and 20).

Subsequently in the year 1787 (8th June), another Regulation † was passed, by the 50th article of which it was declared that, whereas, notwithstanding the orders of Government in 1772 prohibiting the imposition of *mahtut* or assessment, various taxes had since been imposed, the Collector should be enjoined to enforce that article, and that if any new taxes be imposed, he was to decree to the party injured double the amount extorted.

We then find that Lord Cornwallis, while recommending a Permanent Settlement of Revenue in Bengal, stated in his Minute, referring to Mr. Shore's Minutes on the subject, that—

"The rents of the ryots, by whatever rule or custom they may be demanded, shall be specific as to their amount; that the landlords shall be obliged to grant *pottahs*, in which this amount shall be inserted, and that no *ryot* shall be liable to pay more than the sum actually specified in the *pottah*." ‡

And—

"every *abwab* or tax imposed over and above that sum is not only a breach of that agreement but a direct violation of the established laws of the country." §

[764] Further on he says—

"The zemindar may sell the land, and the cultivator must pay to the purchaser. Neither is prohibiting the landholder to impose new *abwabs* or taxes on the lands in

* Colebrooke's Supplement, 190, Fifth Report, Vol. I, 4. Harington's Analysis, Vol. II. 13.

† Colebrooke's Supplement, 253-266. Fifth Report, Vol. I, 15. Harington's Analysis, Vol. II. 53.

‡ Harington's Analysis, Vol. II. 183. Fifth report, Vol. I. 614.

§ Harington's Analysis, Vol. II. 184, Fifth Report, Vol. I. 615.

cultivation tantamount to saying to him that he shall not raise the rents of his estate. The rents of an estate are not to be raised by the imposition of new *abwabs* * * ." Harington's Analysis, Vol. II, 184. Fifth Report, Vol. I, 615).

The policy of the Government then was, as I gather from what has been already noticed, that whatever may be payable as rent should be specified in the *pottah* to be granted by the landlord, and that no *new abwabs* should be imposed.

We then find that in s. 54 of Regulation VIII of 1793, it was laid down that—

"the impositions upon the ryots under the denomination of *abwab*, *mahtut* and other appellations, from their number and uncertainty, have become intricate to adjust, and a source of oppression to the ryots ; all proprietors of land and dependent talukdars shall revise the same in concert with the ryots and consolidate the whole with the *asul* into one specific sum."

The next s. 55 provides that—

"no actual proprietor, or dependent talukdar, or farmer of land, shall impose any new *abwab* or *mahtut* upon the ryots * * ."

Section 57 lays down that—

"the rents to be paid by the ryots, by whatever rule or custom they may be regulated, shall be specifically stated in the *pottah*, which in every possible case shall contain the exact sum to be paid."

Section 58 provides that the proprietor of the land or dependent talukdar shall prepare the form of *pottahs* to be given to the ryots, and obtain the approbation of the Collector. Section 61 says that in the event of any claims being preferred by any proprietor or talukdar on engagements wherein the consolidation of the *asul*, *abwab*, etc., shall appear not to have been made within the time limited by s. 54, they are to be non-suited.

This was the law until the year 1812. The object that the Legislature had in view in 1793 was to put down the imposition of *new abwabs* and to make it compulsory upon the landlords to consolidate the then existing *abwabs* with the rent. And probably, they intended also that there should be but one sum [763] including all the items of payment, fixed and specified in the *pottah* as the rent. But then s. 3, Regulation V of 1812, in the first place rescinds so much of the Regulations of 1793, which provided that the proprietors and talukdars should prepare forms of *pottahs*, and obtain the sanction of the Collector thereto, and authorizes them to grant *pottahs* in such forms as the contracting parties might agree to, and it then lays down as follows:—

"Provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mahtut*, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void ; but the Courts shall notwithstanding maintain and give effect to the definite classes of the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them."

It will be observed that the section prohibits the *imposition* of *arbitrary* and *indefinite* cesses, and says that any reservation or stipulation of *that* nature shall be null and void. And the words which follow are to my mind very significant as showing what they really intended to lay down. I think their intention was to provide that if the parties agree to any specific and definite sum or sums as consideration for the lease, such agreement shall be enforced. The expression "such sums as may have been specifically agreed upon" should be read as it were in contradistinction to the words "imposition of arbitrary or indefinite cesses." As I have already stated, when the East India Company assumed the Dewany, they found after enquiry that a variety of taxes under

the denomination of *abwab, mahtut*, etc., were being indiscriminately levied by the zemindars according to their own will and discretion, without any fixed rule or principle. And it was the policy of the Government to put a stop to such arbitrary and indefinite impositions, and to prohibit the levying of *new abwabs*. If the construction I have put be not correct, I fail to see with what object the last portion of the section beginning with the words "but the Courts shall notwithstanding, etc." was put in, for accepting the opposite view to be correct, these words would, I think, be superfluous.

[766] In the case of *Chultan Mahton* (I. L. R., 11 Cal., 175), decided by the Full Bench of this Court, Mr. Justice MITTER (and his judgment was concurred in by TOTTENHAM and PIGOT, JJ.) observed as follows:—

"Although the Regulations did not clearly define what an *abwab* is, still I think that it cannot be maintained that anything which is definite and certain is not an *abwab* under the Regulations, although the parties to the contract call it so. It seems to me that the Regulations, without defining clearly what an *abwab* is, left this question to the determination by the Court in each case upon the evidence. I cannot find anywhere in the Regulation the precise definition of the word *abwab*, which would justify me to treat the disputed items of claim as part of the specified rent, although the plaintiffs claim them in the plaint and entered them in the zemindary accounts as *abwabs*."

In that case the plaintiff claimed to recover a certain amount as rent, as also certain other items as "customary *abwabs*" as having been prevalent in the village from time immemorial. It was contended that these *abwabs* had existed from before the Permanent Settlement, and were therefore recoverable, notwithstanding the provisions of s. 54, Regulation VIII of 1793, and further that they were not *abwabs*, although claimed as such in the plaint, but part of the rent. The Full Bench negatived both these contentions, and Mr. Justice MITTER held, as already mentioned, that what was an *abwab* must be left to the determination by the Court in each case upon the evidence; but that in the case before them he could not hold that the disputed items were part of the rent. No doubt that learned Judge in a subsequent passage, while referring to the last four lines of s. 3, Regulation V of 1812, viz., "but the Courts shall notwithstanding maintain and give effect to the definite clauses in the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them," says that "the words 'sum specified' refer to the amount of the rent specified." But this passage must be read with what had preceded, and which I have already referred to.

The Judicial Committee in affirming that decision observed as follows:—

"The first question seems to be this: are these payments over and above rent, properly so called, *abwabs* within the meaning of the word as used in the Regulation VIII of 1793?

[767] They are described in the plaint as 'old usual *abwabs*,' and they are described as *abwabs* in the zemindary accounts. It appears to their Lordships that the High Court were perfectly right in treating them as *abwabs* and not as part of the rent. Unquestionably they have been paid for a long time—how long does not appear. They are said to have been paid according to long-standing custom; whether that means that they were payable at the time of the Permanent Settlement or not is not plain. If they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under s. 54, Regulation VIII of 1793. Not being so consolidated they cannot now be recovered under s. 61 of that Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in s. 55; and they would be in that case illegal. * * *"

What the Judicial Committee say is simply this: plaintiff expressly claims these items as *abwabs*; if they existed at the time of the Permanent Settlement,

they should have been consolidated with the rent under s. 51, Regulation VIII of 1793; if they were not payable at that time, they are *new abwabs* and therefore illegal under s. 55. And they further say that the High Court were right in treating them as *abwabs* and not as part of the *rent*.

I do not understand that they intended to go any way beyond what Mr. Justice MITTER said in his judgment, and to lay down, as it is said they did lay down, that nothing, save and except *one* sum, including every item of payment, could be recovered as payable for the occupation of land; and that an agreement to pay anything beyond *that* sum, although it might be a lawful consideration for the lease, could not be enforced.

It appears to me that if in any given case the Court finds that any particular sum specified in the lease or agreed to be paid, is a lawful consideration for the use and occupation of any land, that is to say, if it is really part of the rent, although not described as such, it would be justified in holding that it is not *abwab*, and is recoverable by the landlord.

And it is somewhat from this point of view that the case of *Pudma Nund Singh* (I. L. R., 15 Cal., 828) was decided. That was a case of a permanent *mokurari* lease executed before the Bengal Tenancy Act, and under which the defendant agreed to pay a certain [768] amount as rent, and two other items of Rs. 9 and 2 respectively, designated as *tehwari* and *salami towzi*. The Division Bench (TOTTENHAM and GHOSE, JJ.), before which the case came on for hearing, proceeding upon the provisions of s. 3, Regulation V of 1812, held that the items objected to, viz., *tehwari* and *salami*, were recoverable, because they were not arbitrary and uncertain in their character, but specific sums which the tenant had agreed to pay; and because these sums formed part of the consideration for the lease, and were in fact part of the rent agreed to be paid, though not described as such. The case was decided upon the terms of s. 3, Regulation V of 1812, and not with reference to s. 74 of the Bengal Tenancy Act, the lease having been executed before that Act was passed. The judgment in the case was delivered by TOTTENHAM, J., who was one of the Judges who formed the Full Bench in the case of *Chultan Mahton*. And I may here observe that it was not intended thereby to hold that anything that is not arbitrary and indefinite is recoverable, although it may not be part of the *rent*. In that case, both the elements were supposed to be present, viz., that the items in question were not of an arbitrary or indefinite character; and secondly, they formed part of the rent agreed to be paid. I am, however, bound to say that having since more carefully considered the subject, I have come to the opinion that we were not right in holding that the items of *tehwari* and *salami* were part of the *rent* stipulated to be paid under the lease. They were, I now think, *abwabs*.

As regards the items of *sarak* and *khuruch* claimed in the case now before us, it seems to me that, although they had been realized in previous years at certain rates, still the amounts are not definite, and they may vary according to circumstances; and if the rent is not permanent, they would be augmented with the increase of rent—*Radha Mohun Surma Chowdhry* v. *Gunga Pershad Chuckerbutty* (7 Sel. Rep. N. S., 166). But however that may be, the question is whether under the Bengal Tenancy Act (s. 74) they may be recovered. The Judge of the Court below has found, as a matter of fact, that they are no part of the "actual rent," and it follows therefore that they are not recoverable.

[769] As regards *neg*, I should also think that it cannot be recovered in this case, because it is no part of the rent.

A. A. C. *Appeal dismissed.*

NOTES.

[*See* also (1906) 11 C. W. N., 20; (1900) 28 Cal., 17; (1906) 4 C. L. J., 527; (1907) 7 C. L. J., 251; (1895) 22 Cal. 680. In (1904) 31 Cal., 834, upon the construction of the lease the collections there were held to be part of the rent and not *abwabs*.]

[17 Cal. 769]

FULL BENCH.

The 1st April 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
MR. JUSTICE PRINSEP, MR. JUSTICE TOTTENHAM,
MR. JUSTICE PIGOT AND MR. JUSTICE GHOSE.

Mohendro Narain Chaturaj and others............Defendants
versus
Gopal Mondul and others............Plaintiffs.*

Sale in execution of decree—Fraud—Suit to set aside a sale on the ground of fraud—Decree—Questions arising between the parties or their representatives under s. 244 (c) of Act XIV of 1882,—Code of Civil Procedure (Act XIV of 1882), ss. 2, 244 (c), 274, 287, 289, 311, 312, 314—316—Limitation Act (XV of 1877) s. 18, Art. 166.

Held by the Full Bench (PETHERAM, C.J., PRINSEP, TOTTENHAM, and PIGOT, JJ., GHOSE. J., dissenting), that when circumstances affecting the validity of a sale in execution have been brought about by the fraud of one of the parties to the suit, and give rise to a question between those parties such as, apart from fraud, would be within the provisions of s. 244, a suit will not lie to impeach the validity of the sale on the ground of such fraud.—*Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376), *Viraraghava Ayyangar* v. *Venkatacharyar* (I. L. R., 5 Mad., 217), *Paranjape* v. *Kanade* (I. L. R., 6 Bom., 148), and *Sakharam Gobind Kale* v. *Damodar Akharam Gujar* (I. L. R., 9 Bom., 468), approved; *Gobind Chundra Majumdar* v. *Uma Charan Sen* (I. L. R., 14 Cal., 679, 681) dissented from in part.

Held that in such a case the judgment-debtor is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application (if any) under s. 311† as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him.

Held, further, that in cases in which the decree or the purchase is made *benami*, s. 244 does not apply, and a suit may be held to lie to set aside the sale.

Per GHOSE, J.—An objection under s. 311, or upon the ground of fraud, raised by the judgment-debtor after the sale has been confirmed under s. 312, cannot be dealt with under s. 244. In such a case the judgment-debtor is entitled upon the ground of fraud to bring a

---

* Full Bench on special appeal, No. 1347 of 1888, from the decree of Babu Rajendro Kumar Bose, Subordinate Judge of Zilla Bankura, dated the 30th April 1888, affirming the decree of Babu Kartick Chunder Pal, Munsif of Gungajulghati, dated the 4th June 1887.

† Sec. 311:—The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

Application to set aside sale of land on ground of irregularity.

suit to set aside the sale, or at all events to have it declared that the sale passed no title to the [770] purchaser, or that the purchaser is a trustee for him. There is no special provision in the Code for setting aside a sale on the ground of fraud when it has once been confirmed.

THE facts out of which this reference arose were briefly as follows:—Two persons, named Nilachul and Haradhun, who owned as landlords a certain property, obtained a decree for arrears of rent against the plaintiffs in respect of a tenure held by them in that property. Execution of this decree was taken out in the Court of the Munsif of Gungajulghati, and while the proceedings were going on the decree-holders assigned their interest to Gopal Mondul, the defendant No. 1. The tenure of the plaintiffs was then sold in execution of the decree, and was ostensibly purchased by the defendant No. 2 on the 21st April 1883. No application was made by the judgment-debtors within 30 days, as provided by article 166 of the second schedule of the Limitation Act, for setting aside the sale under s. 311 of the Civil Procedure Code, and it was confirmed on the 26th May following. No step was, however, taken by the purchaser to obtain possession of the property for upwards of a year, and it was not until the 6th June 1886 that the plaintiffs were served with a notice by the Court which had held the sale to vacate possession. Thereupon the plaintiffs instituted the present suit on the 12th June 1886 for the purpose of setting aside the sale, and for such other relief as they might be entitled to obtain; the ground of action being that the sale was a fraudulent one, and that the defendant No. 3, who was the beneficial holder of the decree in the name of the defendant No. 1, secretly brought about the sale without any publication of the sale notification, and purchased the property in the *benami* name of defendant No. 2.

Both the lower Courts decreed the suit of the plaintiffs, and the lower Appellate Court found that there was no publication whatever of the sale notification; that the whole of the proceedings in execution of the decree were colourable transactions, the object of the defendant No. 3, who was the beneficial assignee of the decree, being to secure the property for herself; that she purchased in the name of the defendant No. 2; and that, prior to the service of notice upon the plaintiffs to vacate the land, they had no knowledge of the fraud that had been practised upon them.

[771] The case was referred to a Full Bench by the Division Bench (PIGOT and BEVERLEY, JJ.) on the 28th August 1889, with the following opinion:—

"This is a suit to set aside an execution sale on the ground of fraud. The purchaser at the sale was the decree-holder. The fraud consisted in the decree-holder having brought about the sale without causing a notification of the sale.

"It has been held in this Court in the case of *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376) in Madras in the case of *Viraraghava Ayyangar* v. *Venkatacharyar* (I. L. R., 5 Mad., 217), and in two cases decided in the High Court of Bombay, *Paranjape* v. *Kanade* (I. L. R., 6 Bom., 148) and *Sakharam Gobind Kale* v. *Damodar Akhavam Gujar* (I. L. R., 9 Bom., 468) that fraud will not entitle a party to bring a suit which would, in the absence of fraud, be barred by the provisions of s. 244 of the Civil Procedure Code.

"Two cases later in date than that of *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376), have been relied on by the Subordinate Judge as overruling or inconsistent with that decision. They are *Brojo Gopal Sarkar* v. *Busirunnissa Bibi* (I. L. R., 15 Cal., 179) and *Gobind Chundra Majumdar* v. *Uma Charan Sen* (I. L. R., 14 Cal., 679).

"Although, perhaps, in form not expressed to be inconsistent with it, they are in some measure capable of being so treated, and we think it necessary to refer the question to a Full Bench.

"The questions we refer are :—

"*First*—Whether, when circumstances affecting the validity of a sale have been brought about by fraud of one of the parties to a suit, and give rise to a question between those parties, such as, apart from fraud, would be within the provisions of section 244, a suit will lie on the ground of fraud, notwithstanding the provisions of that section ?

"*Second*—Whether the case of *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376) was rightly decided ?"

Dr. *Rash Behari Ghose* and Baboo *Dwarka Nath Chuckerbutty* for the Appellants.

Dr. *Troylukhya Nath Mitter* for the Respondents.

[772] The authorities cited appear sufficiently from the judgments.

The **opinions** of the Full Bench (PETHERAM, C.J., PRINSEP, TOTTENHAM, PIGOT, and GHOSE, JJ.) were as follows :—

Pigot, J.—The cases of *Brojo Gopal Sarkar* v. *Basirunnissa Bibi* (I. L. R., 15 Cal., 179), and *Gobind Chundra Majumdar* v. *Uma Charan Sen* (I. L. R, 14 Cal., 679) are relied on by the Subordinate Judge as inconsistent with the previous decision of this Court mentioned in the reference. They are, in effect, liable to the interpretation put upon them by the Subordinate Judge, although not professing to overrule it ; and for that reason, although the case may be disposed of without deciding upon that inconsistency, it is proper to deal with the questions put to us.

Relying upon them, and upon previous decisions mentioned by him, the Subordinate Judge has set aside the sale, holding that the balance of authority is in favour of the suit being maintainable, though the execution-creditor may be the purchaser.

The question is of great importance, and ought, I think, to be determined in this reference. As to the first question, my opinion is as follows :—When circumstances affecting the validity of a sale have been brought about by the fraud of one of the parties to the suit, and give rise to a question between those parties such as, apart from fraud, would be within the provisions of section 244, a suit will not lie to impeach the validity of the sale on the ground of such fraud. I treat the "first question referred" as including the words "to impeach the validity of the sale" in the 5th line of it, and limit the answer to this.

The words of section 244 are express :—"The following questions shall be determined by order of the Court executing a decree, and not by separate suit (namely)—

"(*a*) Questions regarding the amount of any mesne profits as to which the decree has directed inquiry.

"(*b*) Questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit between the date of its institution and the execution of decree, or the expiration of three years from the date of the decree.

"(c) Any other questions arising between the parties to the suit in which the decree was passed or their representatives, and [773] relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof.

"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.

"If a question arises as to who is the representative of a party for the purposes of this section, the Court may either stay execution of the decree until the question has been determined by a separate suit or itself determine the question by an order under this section."

No doubt the expression "relating to the execution," etc., is wide and somewhat vague, and has caused some difficulty in more cases than one; but once a case is held to come within those words, the law seems plain enough. The words of the sub-section (c) are as clear as could well be used, and apply to all questions other than those concerning mesne profits and interest mentioned in (a) and (b) between the parties and of the kind therein described.

The object aimed at is equally clear: it is that the Court having the parties already before it, should decide all questions relating to execution, etc., arising between them, in place of allowing one or the other of them to put his adversary to the delay and cost of a separate suit in cases in which but for this sub-section it might be possible for him to do so. In order to effect this object completely without injustice to the parties, an order under this section has been included within the definition of decree in section 2 of the Code, so as to allow an appeal.

It is, however, contended that although the words of the sub-section include *all* questions relating to the matters specified, still, where questions arise of the nature referred to, in which fraud is involved, these may or must still be the subject-matter of a regular suit; and it is contended that the cases decided in this Court support this conclusion.

I shall refer to several of the cases which have been cited.

In *Nilmoni Bonik* v. *Puddo Lochun Chuckerbutty* (B. L. R., Sup., Vol. 379; 5 W. R., Act X, 20) a sale in execution of the decree under Act X of 1859 of a Revenue Court [774] (which decree itself had been set aside) was set aside as fraudulently obtained. The purchaser (if that be material) was not a party to the original suit, but was a party to the fraud. No question arose in the case under section 11 of Act XXIII of 1861, the section then corresponding to section 244.

Umbica Churn Chuckerbutty v. *Dwarka Nath Ghose* (8 W. R., 506) is one of those cases in which the head notes mis-state the decisions. The case was decided when Act XXIII of 1861 was in force. The Court says:—"The question to be tried does not arise between the parties to the suit in which the decree was passed, and relating to the execution of that decree;" and lower down, "Section 11 therefore cannot apply." This case, therefore, assuredly does not decide that *notwithstanding* section 11 of Act XXIII of 1861 a suit on the ground of fraud would lie though between the parties to the suit in which the decree was passed and relating to the execution of that decree.

Nund Lall Doss v. *Delawar Ali* (11 W. R., 244). In this case no question under section 11 of XXIII of 1861 seems to have arisen. The

co-sharer of the plaintiff, one Jamul Ali, induced the decree-holder to make false returns and to commit other irregularities, by which Jamul was enabled to purchase the plaintiff's property below its value in the name of Delawar Ali (defendant No. 1). It is difficult to see how this case can be treated as an authority for the proposition contended for. It does not appear from the report whether the decree-holder was a party to the suit or not: even if he was, it is plain he was not the only, or the real and principal defendant, and the relief claimed was against persons not parties to the original suit.

Ujolla Dasi v. *Dhiraj Mahtab Chand* (I. L. R., 8 Cal., 215) was a suit to set aside a sale for arrears of rent under Bengal Act VIII of 1869. The procedure under Act VIII of 1859, if any, applied, and s. 283 of that Act does not contain the provision introduced into Act XXIII of 1861 and now contained in s. 244. The case does not apply.

In *Guna Moni Dasi* v. *Pran Kishori Dasi* [5 B.L.R., 223; 13 W.R.(F.B.), 69] the plaintiff compromised a decree which the defendant had against her, paying [775] about Rs. 930 in respect of the decree. The compromise, however, was not certified, and the defendant sued out execution: thus the plaintiff was compelled to pay the amount of the decree. The plaintiff brought the suit to recover the money paid under the compromise. It was held that s. 11 of Act XXIII of 1861 did not apply to payments made out of Court not certified to the Court, and of which it could not take notice, and did not therefore apply in the case. This case was followed in the case of *Ishan Chunder Bundopadhya* v. *Indra Narain Gossami* (I. L. R, 9 Cal., 788), where it was held that s. 244 did not, any more than 11 of Act XXIII of 1861, apply to a case where a payment of money in satisfaction of a judgment-debtor's liability under the decree was made out of Court and was not certified. In that case the decree having been executed, and the judgment-debtor's property purchased by the decree-holder, the Court set aside the sale.

These are cases in which it was held that the questions which arose were *not* "questions relating to the execution of the decree" within the meaning of the section. They do not decide that questions which *do* come within the purview of the section may nevertheless be determined by separate suit if a question of fraud is involved.

In the case of *Gunga Pershad Sahu* v. *Gopal Singh* (I. L. R., 11 Cal., 136) an agreement to postpone an execution sale was come to by the parties and was filed in Court, but in the wrong Court. The sale took place in consequence of this mistake; the judgment-debtor was absent; and the decree-holder took advantage of the sale so held and bought the property. It was held that a suit would lie to set aside the sale, as it is said in the report (more accurately, as stated in the order, *for a re-conveyance)*, upon payment of the amount due under the decree. In fact the sale was not invalidated, but was affirmed by the order, for a re-conveyance was ordered *on terms* to be fulfilled by the plaintiff. On reference to the paper-book it appears that those terms were contained in an agreement between the parties made after the sale, and that one of these terms was the payment by the plaintiff to the defendant and his father of money due under a former decree, which had no connection whatever with the sale, or with the suit in which the sale had [776] taken place. No question was raised in the case as to s. 244: the questions in the case appear to have been treated as wholly unaffected by that section.

I think that it cannot be affirmed that either in this Court or elsewhere any course of decisions is to be found according to which questions coming

under the sections may be determined by separate suit, because of being affected by considerations of fraud—or if the circumstances giving rise to them have been brought about by the fraud of one of the parties to the suit in execution: and I see no reason why the section should not be held to apply to such cases as well as any others.

I must therefore dissent from the expression of opinion in the case of *Gobind Chandra Majumdar* v. *Uma Charan Sen* [I. L. R., 14 Cal., 679 (681)] at page 681, to the effect that: "If the sale was really a fraudulent sale, it is open to the judgment-debtor to bring a suit to set it aside on the ground of fraud." This, I think, would not be so if the question arising was one properly coming within s. 244.

The decision in the case just mentioned is so connected with the question with which we are here concerned, that I think myself bound to express my opinion upon it. In that case a sale in execution took place, of which the judgment-debtor was, by the fraud of the judgment-creditor and the purchaser, kept in ignorance until after the sale had been confirmed. It was contended that the judgment-debtor was entitled under s. 18 of the Limitation Act to apply to have the sale set aside within 30 days from the discovery of the fraud. But it was held that the sale having been confirmed, no application could be entertained under s. 311.

I think that under s. 18 of the Limitation Act, where irregularities affecting the validity of the sale have been, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application, if any, under s. 311 as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him. The confirmation of the sale ought not to be used as a shield for the fraud by which the Court has been induced to make the sale itself.

[777] In the present case the steps to take possession were a year after the confirmation of sale, and the judgment-debtor at once was put in motion.

I agree in principle with the cases decided in the High Courts of Madras and Bombay, and that of *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376), referred to in the reference, and answer the second question in the affirmative

In this particular case defendant No. 2, the purchaser, was not a party to the original suit: he has been held to have purchased *benami* for defendant No. 3. So also defendant No. 1, who was the decree-holder, has been held to have become purchaser of the decree for defendant No. 3, and to have carried out the decree under his orders.

I think that if we were to hold sub-section (*c*) of s. 244 as governing cases in which the decree or the purchase was made *benami*, and to apply it on the footing that the persons really interested were, within the meaning of the sub-section, parties to the proceedings, we should run the risk of applying the section, so as perhaps in some cases to work hardship. I do not think we are bound to go further than the express words of the section, and therefore think that in the present case the suit may be held to lie. We already intimated this at the close of the argument. There is no doubt, of course, that the fraud found was of the grossest character; and the suit, not being barred

by s. 244 as the questions in it did not arise between the parties to the former suit, in execution, will lie for relief against the fraud charged and proved.

The appeal will therefore be dismissed with costs.

Petheram, C.J.—I agree with the judgment which has just been delivered.

Prinsep, J.—I am of the same opinion.

Tottenham, J.—I also agree with the judgment just delivered.

Ghose, J.—This case has been referred to a Full Bench in consequence of a conflict of opinion that exists upon the question whether, in the case of a fraudulent sale in execution of a decree where the decree-holder becomes the purchaser, a suit lies to set aside the sale. (The facts were then set out.)

[778] It has been contended before us that defendant No. 3 being, upon the finding of the Court below, the real holder of the decree, and having purchased the property, though in the name of defendant No. 2, must be taken to be a party to the suit in which the decree was passed within the meaning of s. 244 of the Civil Procedure Code, and that the question now raised by the plaintiffs, the judgment-debtors, is a question relating to the execution of the decree, and therefore no separate suit lies to set aside the sale. It has been further contended that the omission of the publication of the sale notification, though it might have been fraudulent, was but an irregularity within the meaning of s. 311 of the Procedure Code, and that it was open to the plaintiffs to apply to the Court for the purpose of setting aside the sale within 30 days from the time when the fraud was discovered, claiming exemption under s. 18 of the Limitation Act.

Upon the first of these two contentions, it seems to me that neither the defendant No. 3, who is only beneficially interested in the decree and in the purchase at the auction-sale, nor the defendant No. 2, the ostensible auction-purchaser, can be properly regarded as a party to the suit in which the decree was passed, or the representative of any such party, within the meaning of s. 244 of the Code. The defendant No. 1, by virtue of the assignment of the decree, may no doubt be regarded as the representative of the original decree-holders, but it can hardly be said that the defendant No. 3 fills that character, much less the defendant No. 2; and they are the persons against whom the plaintiff seeks relief in this suit. It follows, therefore, that the case does not fall within s. 244; and upon the finding of fraud that has been arrived at by the Courts below, there can be no doubt that the plaintiffs are entitled to recover. And in this respect, I agree with my learned colleagues.

If this is a correct view, it may not be necessary to answer the two questions which have been referred to us. They are :—

First.—" Whether, when circumstances affecting the validity of a sale have been brought about by the fraud of one of the parties to a suit, and give rise to a question between those parties, such as, apart from fraud, would lie within the provisions of **[779]** s. 244, a suit will lie on the ground of fraud notwithstanding the provisions of that section ? "

Second.—" Whether the case of *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (I. L. R., 11 Cal., 376) was rightly decided ? "

But perhaps it may be desirable, in view of the conflict of opinion that exists on the subject, and the importance of it, to answer these questions ; and I proceed shortly to state my views.

The Code of Civil Procedure prescribes that where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made, giving the time and place of sale (s. 287); and the proclamation shall be made in the manner prescribed by s. 274 on the spot where the property is attached, viz., on a conspicuous part of the property to be sold (s. 289).

After the notification of sale is thus published, the property is to be sold on the advertised day. The judgment-debtor may, however, apply under s. 311 to set aside the sale on the ground of material irregularity in publishing or conducting it; but if no such application is made, or if such application be made, and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser; and that no suit to set aside the sale on the ground of such irregularity shall be brought (s. 312). The Code further provides that the sale shall not become absolute until it has been confirmed by the Court (s. 314); and that when the sale has become absolute, the Court shall grant a certificate to the purchaser; and that upon such certificate being granted, the title to the property shall vest in the purchaser (s. 316).

In the present case, the sale was held on the 21st April 1885, and it was confirmed on the 26th May, no application having been made by the judgment-debtor to set aside the sale within the time prescribed by the Limitation Act, viz., 30 days.

The question then arises, -What is the remedy which the law allows to the judgment-debtor, and is this suit maintainable?

It was contended that it was open to the judgment-debtor to apply to the Court, which held the sale, for the purpose of setting it aside under s. 311 of the Code; and that he might have [780] made such an application, by virtue of s. 18 of the Limitation Act, within 30 days from the date of the discovery of fraud. It will be observed that an application under s. 311 can only be made upon the ground of irregularity in publishing or conducting the sale, and a question does arise whether the non-publication of the notification of sale is but an irregularity within the meaning of that section. But supposing for the sake of argument that it is an irregularity, the question is whether it was really *open* to the judgment-debtor to make the application, the sale having been already *confirmed*, and the fraud being not discovered until *after* that confirmation.

I have already referred to the several sections of the Code which bear upon this matter, viz., ss. 311, 312, 314, and 316; and it will be observed that if no objection to the sale is made within the time allowed by article 166 of the second schedule of the Limitation Act, *i.e.*, 30 days from the date when the sale is held, the sale *shall* be confirmed and a certificate granted to the purchaser, in whom the title to the property shall thenceforth vest. It seems to me, regard being had to the arrangement of the various sections in the sub-chapter G *(a)* and *(b)*, that so soon as the sale is confirmed and a certificate granted, the execution Court, so far as that sale is concerned, becomes *functus officio*, and that it is not competent to re-open a matter which is *concluded by the confirmation of the sale*. And this is practically the view that was expressed in a case decided by the Chief Justice and myself, *Gobind Chandra Majumdar* v. *Uma Charan Sen* (I. L. R., 14 Cal., 679). And the same view, I find, was adopted by the Bombay High Court in the case of *Sakharam Gobind Kale* v. *Damodar Akharam Gujar* (I. L. R., 9 Bom., 468).

Section 18 of the Limitation Act is as follows (omitting passages which are not necessary to be referred to in this connection):—" When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or the title on which it is founded, the time limited for instituting a suit or making an application against the person guilty of the fraud or accessory thereto shall be computed from the time when the fraud first became known to the person injuriously affected thereby."

[781] This section contemplates the *existence* of a right to make an application. And the question here arises whether, after a sale has been confirmed, and the title to the property has vested in the purchaser, the right exists in the judgment-debtor to apply to the Court which held the sale to set it aside. If the view I have already expressed be correct, it would seem that no such right exists.

If the application be made *before* the sale is confirmed, the Court would be competent to entertain it, even if it is presented after the expiration of 30 days from the day of sale, if it is satisfied that the judgment-debtor was by means of fraud kept from the knowledge of what had taken place. But it seems to me that so soon as the sale is confirmed, and a certificate of sale given to the purchaser, the right to make such an application ceases to exist.

In the case of *Rai Bal Krishna* v. *Masuma Bibi* (I. L. R., 5 All., 142; L. R., 9, I. A., 182) decided by the Judicial Committee, a question was raised whether the sale at which the plaintiff purchased was not bad by reason of non-compliance of the provisions of s. 219 of Act VIII of 1859 as to affixing of the notification of sale, and by reason of the period of 30 days having not expired from the notification before the sale was held. The High Court of the North-Western Provinces, apparently with reference to this question, and also with reference to a question of jurisdiction of the Court in which the sale took place, held that the plaintiff was not entitled to succeed as purchaser. But the Privy Council held otherwise. They observed. "With respect to the first case, their Lordships are of opinion that the judgment dismissing the suit on the ground that the plaintiff was not the purchaser of Bisheshur's mortgage, on the ground of the sale being irregular, and the Court not having jurisdiction to execute the decree, was wrong. The irregularities referred to, if they existed, were cured by the certificate of sale * * ." That was taken to be a case of an irregularity, and it was held that it was cured by the certificate of sale; and if this is the correct view of the law, I do not see how it can be said that after a sale has been confirmed, and a certificate granted, it is open to the judgment-debtor to apply to the Court to set aside the sale upon the ground of irregularity.

I next turn to the question whether what occurred in this case was merely an irregularity, or something different from that. What [782] is complained of is (and so it has been found by the Court below) that there was no notification of sale at all published. As I understand it, irregularity in publishing a sale refers to cases like these: the notification is required to be published on a conspicuous part of the property to be sold, but it is published in a hole or corner, or on some other property, or, where several properties are attached for sale, the notification is published on only one of them: the notification of sale does not contain some of the particulars mentioned in s. 287: the proclamation is to be fixed in the Court-house, but it is fixed in the Police Office. These are irregularities, and they would come under s. 311. But it seems to me that when there was no notification at all published, it is a different thing. It has been held in several cases, both in Calcutta and Allahabad,

that where there is an infringement of the provisions of s. 290, which provide that no sale can take place before the expiration of 30 days from the publication of the notification in the Court-house, or if a sale takes place before the time specified in the notification of sale provided by s. 287, it is an illegality vitiating the sale. It is not a mere irregularity, but rather it is no sale at all under the Code. [See *Sadhusaran Singh* v. *Panchdeo Lal* (I. L. R., 14 Cal., 1), *Basharutulla* v. *Uma Churn Dutt* (I. L. R., 16 Cal., 794), *Bakhshi Nand Kishore* v. *Malak Chand* (I. L. R., 7 All., 289), *Jasoda* v. *Mathura Das* (I. L. R., 9 All., 511), *Ganga Prosad* v. *Jag Lal Rai* (I. L. R., 11 All., 333)].

If these rulings be right, there can be no doubt that in this case the sale was no sale at all, and that the provisions of s. 311 as to irregularity in the publishing of the sale have no application. The case of *Rai Bal Krishna* (I. L. R., 5 All., 142; L. R., 9. I. A., 182) decided by the Privy Council, which I have already referred to, would, however, seem to be opposed to the view adopted in some of these cases. But however that may be, so far as the case before us is concerned, I am inclined to think that it was not simply an irregularity, but an illegality that occurred in the sale; for it is a condition precedent to a sale that a notification should have been previously published. No doubt instances have occurred where, in cases like this, the execution Court has interfered and set aside **[783]** the sale when the matter was brought to its notice in proper time; but I should think that it is a power inherent in a Court holding a sale to refuse to confirm the sale if it finds that there has been no sale under the Code. [See in this connection the remarks of Sir JOHN EDGE in the case of *Ganga Prasad* v. *Jag Lall Ray* (I. L. R., 11 All., 333, 337, 338)].

Having dealt with the question whether an application could be made by the judgment-debtor to set aside the sale under s. 311, I proceed next to discuss the question whether he could have in this case taken proceedings under s. 244 of the Code, and whether that section is a bar to the present suit.

I have already said that section 244 does not contemplate such parties as those whom we have before us. But assuming that it does for the sake of argument, and for the purpose of enabling one to answer the question referred to us, the question that presents itself is whether an objection to the validity of the sale raised by the judgment-debtor *after the sale has been confirmed* under s. 312 can be dealt with by the Court under s. 244 as a question relating to the execution of the decree. I think not; for, as I have already explained, after a sale has been confirmed, everything in regard to that sale is at an end, and indeed the Court becomes *functus officio*. Section 316 distinctly lays down that, so far as the parties to the suit and the purchaser are concerned, the certificate of sale, which is to bear the date of the confirmation of sale, shall vest the title upon the purchaser. Can it be said that, notwithstanding the title has thus vested in the purchaser, proceedings may yet be taken under s. 244 of the Code upon any grounds mentioned in s. 311, or upon any other ground, such as fraud? I do not think so; for then there would be no finality in a proceeding holding or confirming a sale. Suppose the judgment-debtor was aware of the sale in proper time, and he applied to set it aside under s. 311, but the Court being of opinion that there was no irregularity confirmed the sale: the judgment-debtor *subsequently* discovers the fraud: can he then move the Court to set aside the sale under s. 244 and obtain relief on the ground of fraud? I apprehend not. Of course if the proceeding may be re-opened by an application under s. 311, although made after the confirmation of sale by reason of discovery of **[784]** fraud, as to which I have already addressed myself, well and good;

otherwise I do not see how, notwithstanding the confirmation of sale, an application may be made under s. 244, and how can the matter be dealt with by the Court as a "Court executing the decree."

The ground upon which the present suit has been brought is fraud; and it seems to me that this gives to the plaintiff a cause of action upon which he is entitled to come to Court. Fraud vitiates the most solemn proceeding of a Court of Justice; it is an act which is extrinsic to the case. And although the proceeding cannot be impeached on the ground of mistake, it may be shown (and this I should think by a separate or counter-action) that the Court was led to make the decree or order by the fraud of one of the parties. Sir BARNES PEACOCK in the Full Bench case of *Nilmoni Bonik* v. *Puddo Lochun Chuckerbutty* (B. L. R., Sup. Vol., 379: 5 W. R., Act X. 20), where the suit was brought to set aside a sale in execution of a decree under Act X of 1859, observed as follows:—"There is no general power in one Civil Court to set aside a decree of another Court of competent jurisdiction upon the ground of an error or mistake on the part of the Court making the decree. But where a decree of one Court, or an execution of a decree, is obtained by fraud, the fraud gives a right of action to the party injured by it against the party guilty of the fraud. It is a cause of suit in a Civil Court which has jurisdiction to administer equity, justice and good conscience, and to restrain the parties to the fraud from reaping the benefit of their own fraud." And it has been held in other cases that, notwithstanding the provisions of s. 11, Act XXIII of 1861 (corresponding to s. 244), a suit may be brought if the sale was brought about by fraud. See *Umbica Churn Chuckerbutty* v. *Dwarkanath Ghose* (8 W. R., 506), *Nund Lall Doss* v. *Delawar Ali* (11 W. R., 244), *Mokort Nath Persad* v. *Gujadhur Persad* (25 W. R., 156). The same principle may perhaps be deduced from two other cases—*Pat Dasi* v. *Sarup Chand Mala* (I. L. R., 14 Cal., 376) and *Ujolla Dasi* v. *Dhiraj Mahtab Chand* (7 C. L. R., 215). In the first-mentioned case, the sale took place notwithstanding satisfaction of the decree out [785] of Court, and the decree-holder became the purchaser. It was held that a suit lay to recover the property. In the other case, where also the decree-holder was the purchaser, the suit was brought to set aside the sale. It was held that unless the judgment-debtor objected, or had opportunity to object, to the sale under s. 257 of Act VIII of 1859 (corresponding to s. 311 of the present Code), a suit would lie to set it aside. Regard being then had to the reason of the thing, and to the course of decisions in this matter, I should hold that a suit lies, notwithstanding the provisions of s. 244 of the Code, to set aside the sale. I freely admit that if an application had been made in proper time by the judgment-debtor to the Court which held the sale, it might have set it aside upon the ground of fraud; but this is, as has been held in "Indian Law Reports," II, Madras, page 264, and "Indian Law Reports," VI, Bombay, page 148, because it is always competent to a Court to vacate any judgment or order, if obtained by fraud, and not because there is any special provision (as there is none) in the Code as to setting aside a sale for fraud. However that may be, there is nothing, I think, to prevent the judgment-debtor from bringing a separate suit for the same purpose: he might at any rate sue to have it declared that the sale passed no title to the purchaser, or that the purchaser is a trustee for him. In this particular case the judgment-debtor, no doubt, sues to set aside the sale, and not to have the declaration which I have just mentioned; but the objection on this head is merely as to the form and not to the substance; and, indeed, the plaintiff in the last clause of his prayer asks that any other relief which the Court may deem fit may also be granted; and upon this prayer the Court may declare that under

the sale in question the defendant acquired no title, or that he should reconvey the property to the plaintiff. I observe that in the case of *Gunga Pershad Sahu* (I. L. R., 11 Cal., 136), which was brought to set aside a sale held in violation of petition for postponement of the sale, which was agreed to by the decree-holder, and where the High Court of Calcutta passed a decree in favour of the plaintiff to the effect that upon his depositing certain moneys due to the defendant the latter should reconvey the property to him, the Judicial Committee substantially affirmed the decree. [786] They, however, understood the decree of the High Court as one setting aside the sale. Sir BARNES PEACOCK in delivering the judgment of the Committee thus expressed himself: "It appears to their Lordships in this case that the Judges of the Court below were right in ordering the sale to be set aside." That was also a case where the decree-holder was the purchaser, and I do not see why, if the decree that was given in that case was correct (and it must be taken to be correct), this suit may not lie.

A. A. C. *Appeal dismissed.*

NOTES.

[This case was deemed in (1901) 26 Cal., 324; 6 C.W.N., 283; (1898) 21 All., 140; (1901) 23 All., 478 to have been overruled by the decision of the Privy Council in (1890) 19 Cal., 683. *See* also (1890) 18 Cal., 139; (1892) 19 Cal., 341; (1896) 2 C. W. N., 311; (1898) 3 C. W. N., 6; (1893) 21 Cal., 437; (1894) 21 Cal., 605.]

[17 Cal. 786]

ORIGINAL CIVIL.

The 27th and 28th May and 2nd July, 1890.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE PIGOT.

W. H. Kraal and others
versus
H. J. Whymper.*

Companies Act (VI of 1882) s. 4†—Registration of Association—"Gain"—Mutual Assurance Society.

In 1870 a fund was formed by a number of persons, over 20 in number, the object being, according to the prospectus and rules, to provide for the widows, children, and other relatives of the subscribers. The management was vested in a Board of Directors elected by the subscribers from amongst their own number. Subscriptions at fixed

* Original Civil Suit No. 109 of 1890.

†[Sec. 4:—No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letters Patent; and no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or of Letters Patent.]

Prohibition of partnerships exceeding certain number.

rates according to tables were paid by the subscribers to secure the provision of pensions for their widows, children, and relatives. The moneys so subscribed were invested in Government 4 per cent. securities, and in the course of management a large reserve fund was accumulated and so invested, the interest annually payable in respect of which amounted in the year 1888 to upwards of Rs. 64,000 ; but there was nothing to show that such reserve was larger than sound principles of management required. The rules provided for abatements of subscriptions according to a graduated scale, which might be granted or withheld from year to year by the Directors according to their opinion as to the condition of the fund. A subscriber to the fund was under no obligation to continue his subscription, but might stop it at pleasure, subject in certain contingencies to forfeiture of the benefit of past payments. Fines were also provided for unpunctuality in payment of subscriptions.

It was contended that the subscribers formed an association which required registration under s. 4 of the Indian Companies Act, inasmuch as they carried on business having for its object the acquisition of gain by the Association, or the individual members thereof, as the subscribers must be taken to contemplate the ordinary consequences of their acts, and the forfeitures, fines, and large and increasing reserve fund constituted "gain." *Semble* that these did not constitute gain.

[787] But *held*, that, whether they did or not, no business was carried on having for its object the acquisition of gain by the Association or the individual members thereof.

The subscribers to the General Family Pension Fund are not a company, association, or partnership formed for the purpose of carrying on business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, within the meaning of s. 4 of the Indian Companies Act.

Where the substantial purpose of an association is not to carry on a business for gain, the fact that gain may accrue incidentally, or may arise from merely subsidiary provisions, does not make registration necessary.

CASE stated for the opinion of the Court under the provisions of s. 527 of the Code of Civil Procedure.

The plaintiffs were the Chairman and Directors of the General Family Pension Fund and the defendant was one of the subscribers to the Fund. The question having arisen as to whether the subscribers to the Fund formed a company, association, or partnership which required to be registered under the provisions of s. 4 of the Indian Companies Act, and, whether the Fund not having been registered, it was not an illegal association, an agreement was entered into between the plaintiffs and the defendant to state this case. The agreement provided for the plaintiffs taking certain steps to register the Fund in the event of the Court holding registration to be necessary, and also provided for costs being paid out of the Fund.

The Fund was established in the year 1870, and was founded on the same general principles and used the same tables as the Uncovenated Service Family Pension Fund. [See *Falle* v. *MacEwen* (I. L. R., 7 Cal. 1)]. It was managed by a Board of Directors elected by the subscribers from amongst themselves, and its object, as stated in the prospectus, was as follows :—

"To provide for the maintenance of the widows, children, etc., of those who shall subscribe to it on the terms and conditions specified in the rules."

All Christian men in India, British Burmah, Ceylon, the Andamans and Nicobars, and the Straits Settlements, not being under the age of 18 or above the age of 65, were eligible to become subscribers but the Directors had the power to refuse **[788]** to admit any applicant. The rules also contained provisions with reference to the admission of military men not in *bonâ fide* civil

employ and others following a more or less risky calling at enhanced rates. The funds were, under an arrangement with the Government similar to that enjoyed by the Uncovenanted Service Fund, deposited with the Government bearing interest at Savings Bank rates until invested in 4 per cent. Government securities, which were, when purchased, placed in the safe custody of the Comptroller-General. Payments to the credit of the fund could also be made at the Goverment mofussil treasuries. As a condition, however, of this assistance the Government of India stipulated that it should be stated in the prospectus that it exercised no kind of supervision over the management of the Fund, and was in no way responsible for its solvency.

The working of the Fund was governed by certain rules and bye-laws, which it appeared had in some respects been modified since the fund was started. At the time this case was stated the material portions of those rules were as follows :--

"*Rule* 4.—That the payments for securing annuities be regulated according to the rates laid down in tables A, B, and C. That as each subscriber shall complete his 5th, 10th, and 15th year of payments respectively on each risk, he shall from the 1st April 1886 be entitled to abatement of subscription on the following scale :—

5 %	on subscriptions of	5	years'	standing.
12½ %	"	" 10	"	"
20 %	"	" 15	"	"

"Provided that in their annual report each year the Directors shall declare whether or not in their opinion the condition of the Fund allows of the above scale of abatements and that if their opinion be unfavourable the abatement shall be reduced or suspended for such time as may be necessary."

This rule then went on to make provision for a subscriber substituting one nominee in place of another dying, marrying, or coming of age and for subscribers allowing their subscriptions to lapse rejoining, and provided that the utmost amount of pension which could be subscribed for was, for a widow Rs., 200 and for each child Rs. 80 per mensem with a maximum aggregate of Rs., 300 per mensem for the children of one father, or Rs. 200 per mensem [789] for the daughters alone, and a maximum aggregate of the pensions depending on one life of Rs. 500 per mensem.

The pensions were payable to widows for life or till remarriage, but in the event of the death of the second husband the pension revived. Sons received pensions up to the age of 21, but there were provisions for subscribing for life pensions for them in the event of their being incapacitated by mental or bodily infirmity from earning their own livelihood. Daughters received their pensions up to date of marriage or death. A subscriber was also allowed to subscribe for his mother, sisters, or other near relatives under certain restrictions.

Rule 4, it appeared, had been considerably modified since the fund was started, the provisions as to abatements having been introduced some time after the fund had commenced and when it had become possible from the state of the invested funds to allow of their being made. It was pointed out during the argument in the case that owing to the present prosperous condition of the fund it had been proposed that the abatements should be increased, and that a reference had been made to an actuary with a view of ascertaining if that course could be safely adopted, but that since this case had been stated he had reported that it could not safely be adopted at present, the margin being in his opinion too small and the rates subscribed for daughter's annuities being too low.

The rules further provided that all applications for admission to the fund from intending subscribers should be made on certain specified forms, which included the usual medical report and certificate of a friend, and that upon admission an entrance certificate according to the following form, after it had been duly entered on the records of the fund, should be granted to each subscriber :—

F.

GENERAL FAMILY PENSION FUND.

Entrance Certificate.

Calcutta,——— ————18 .

Certified that Mr.————————————————————

has this day been admitted a member of the General Family Pension Fund [790]
under the rules, terms, and conditions thereof for the eventual benefit of the undernamed, and that registry fee (Rs.————————) and his entrance subscription for the month of ———(Rs. ——) have been duly received.

Class.	Names.	Date of birth.	AGE.		Where born.	Where resident.	PROVISION FOR WIFE AND CHILDREN.		Table.
			Years.	Months.			Per mensem.	Per annum.	
Subscriber...									
Nominee ...									

All casualties, as well as marriage of children, must be communicated to the Secretaries as they occur.

Subscribers moving from one station to another must inform the Secretaries of the change.

Registered as No. } *Directors.*

Secretaries.

This entrance certificate has to be given up to the Directors before any nominee could be admitted to the benefits of the fund.

Under the rules as they originally stood, non-payment of subscriptions until midnight of the last day of the month for which they were payable rendered void all claims on the fund by the nominees of the subscriber. That rule was, however, amended on the 31st May 1887, and under the amended rule

provisions were made against total forfeiture of past payments. The material portions of the amended rule were as follows :—

Rule 30.— That all subscriptions are due and payable in advance on the first day of every month for the current month.

(2) That when the subscription for any month has not been paid within that month, a fine of 10 per cent. of the registered subscription shall be charged : this fine, if not paid at once, to be deducted from any abatement to which the subscriber may afterwards become entitled, or, in the event of his dying and leaving it unpaid, to be charged against the pensions that may become due to his nominees.

[791] (3) That, with the exceptions noted in the following clauses of this rule, non-payment of subscription until midnight of the last day of the month for which it is due shall, in the event of the subscriber's death, render void his nominee's claim to the pension subscribed for, but the name of the subscriber shall not be removed from the list until expiry of three months from the last day up to which his subscription has been paid.

(4) That one month's grace be allowed for every complete year during which payment of subscription has been made on each risk, up to a maximum of six months, and that if a subscriber die within that period of grace his nominees be admitted to the full pension subscribed for after deduction of the unpaid subscription and the 10 per cent. fine incurred thereon. * * * *

(5) That when a subscriber, at the time of becoming a defaulter, satisfies the Directors of his having become unable to pay his subscription, he, or any person on his behalf, shall at any time within twelve months from the last day for which his subscription has been paid, provided the subscriber be alive at the time, be allowed to revive his full interest in the fund, without evidence of health, by paying the arrears of subscription in full to date, with ten per cent. on the amount of arrears for fine, but subject to the deduction of any abatement to which the subscriber may have become entitled.

(6) That in all other cases of default subscribers may be reinstated within twelve months from the date of removal of their names from the list of members on production of a Medical Report in Form C. satisfactory to the Directors, and payment of arrears in full to date with 10 per cent. fine, but subject to such abatement as the subscriber may be entitled to.

(7) That the past payments of members who were on the list of subscribers on 1st January 1886, or who joined or shall join subsequent to that date, shall not be entirely forfeited in the event of their discontinuing their subscription or any part of it after having paid it for at least three complete years, but shall entitle their nominees, if they survive the lapsed subscriber, to a pension proportionate to the subscription actually paid. Provided that the fund is kept informed, at least once a year, of the continued existence and address of the nominees, and in the case of daughters, of their being still unmarried ; and that neglect of this proviso shall be considered a bar to any subsequent claims, unless the nominees be admitted to pension as an act of grace under the authority of a majority of votes of the subscribers on the application of the nominees, through the Directors, as provided by rule 47 ; the expense of such application to be borne by the nominees. * *

(8) Provided that when a subscriber allows his insurance to lapse, and is subsequently re-admitted on behalf of the same nominee, the later insurance shall be held to be in supersession of equivalent value of the older one. That the payments on account of the older insurance shall, however, be [792] allowed to count in computing pension in the event of lapse of the latest one. * * * *

It was pointed out at the hearing of the case that under the above amended rule nominees, who would otherwise have lost all claim on the fund by reason of the subscriptions having ceased during the lifetime of the subscriber, had been granted annuities proportionate to the amount of subscriptions actually paid up, and this had been done by the vote of the general body of subscribers, the rules allowing this course to be adopted. The position in which the fund

stood in the years 1886—88, as shown by the Revenue Account, was as follows:—

	Funds at beginning of each year.	INCOME.			OUTGO			Net increase.	Funds at end of each year.
		Contributions.	Interest, &c.	Total.	Pensions.	Expenses.	Total.		
	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.
1886	13,15,711 1 7	1,56,341 1 0	55,233 14 0	2,11,574 15 0	54,592 15 9	23,903 4 9	78,496 4 6	1,33,078 10 6	14,48,789 12 1
1887	14,48,789 12 1	1,61,774 15 7	60,732 8 9	2,22,507 8 4	57,313 4 0	25,173 12 8	87,747 10 0	1,34,759 14 4	15,83,549 10 5
1888	15,83,549 10 5	1,77,411 15 8	64,301 4 7	2,41,713 4 2	75,442 13 4	35,748 11 3	1,11,191 8 7	1,30,521 11 8	17,14,071 6 1

Of the amounts shown in the last column, Rs. 26,500 represented the value of the house and premises 1, Grant's Lane, which had been bought in the year 1886 for the office of the fund.

The following was the case stated for the opinion of the Court:—

1st. The General Family Pension Fund was established in 1870 with the object of providing on the mutual principle for the maintenance of the widows and legitimate, natural, and adopted children and step-children of the subscribers thereto on certain terms and conditions contained in the rules of the said fund, which, together with the bye-laws, forms, tables and financial statements relative to the said fund and the 19th Annual Report thereof, are set forth in the schedule hereunto annexed.

2nd. All Christian men in India, British Burma, Ceylon, the Andaman and Nicobar Islands, and the Straits Settlements, not being under the age of 18 or above the age of 65, are eligible as subscribers to the said fund, but the Directors can refuse admission to any applicant.

3rd. The payments by subscribers for securing annuities to any of the persons mentioned in paragraph 1 hereof are regulated [793] according to the said rules and the rates laid down in the tables marked respectively A, B, and C, appended to the said rules, and vary according to the age of the subscribers and the age and sex of the persons to be benefited, and under certain circumstances set forth in rule 4 of the said rules according to the period during which the payment have been maintained.

4th. There are no shareholders interested in the assets or property of the said fund, nor is there any deed of settlement with reference to the said assets or property, and the said fund has never been registered as incorporated under any legislative enactment or otherwise.

5th. The subscribers to the said fund can at pleasure discontinue their subscriptions without incurring any liability whatsoever.

6th. Under rule 30 of the original rules of the said fund, non-payment of subscriptions until midnight of the last day of the month for which the same was payable, in the event of the death of the subscriber rendered void all claims of his family to benefit from the fund, and non-payment for three months from the day on which his subscription became due subjected a subscriber to be struck off the fund with forfeiture of all past payments. That rule has recently been modified as appears from the rules, bye-laws, forms and tables corrected to 31st May 1887, published by the said fund so as to provide against total forfeiture of past payments.

7th. The management of the said fund is vested in a Board of Directors elected from and by the subscribers.

8th. All sums of money over five hundred rupees, after leaving a sufficient margin in the Bank of Bengal for current expenses, are paid into the General Treasury, and are required from time to time to be invested in Government securities.

9th. The office of the said fund is situated at No. 1, Grant's Lane, Calcutta, and in 1886 the then Directors of the fund, by an indenture dated the 22nd of January 1886, purchased the said house and premises No. 1, Grant's Lane, for Rs. 26,500, and paid for the same out of the funds belonging to the said fund.

10th. On the 31st day of December 1888 there were 511 subscribers to the said fund, the nominees of which consisted of 418 [794] widows, 236 boys, and 397 girls. There were 163 annuitants, of whom 47 were widows, 57 boys, and 59 girls, to whom were paid during the year ending on the date last above mentioned pensions amounting in the aggregate to Rs. 75,442-13-4.

11th. All payments for the year 1888, including pensions, amounting to 43⅜ per cent. on the total yearly income of the said fund, which amounted to Rs. 2,41,713-4-2, and the capital of the said fund derived solely from the subscriptions of the said subscribers and the interest accumulated thereon, amounted to Rs. 17,14,071-6-1 in the fund, inclusive of the value of the said house, No. 1, Grant's Lane.

12th. The tables of subscriptions to the said fund were originally fixed by the projectors thereof at higher rates than was absolutely necessary, and it was subsequently found advisable to introduce the provisions regarding abatements of subscriptions comprised in rule 4 of the said rules as amended.

The questions for the opinion of the Court are:—

1. Whether the subscribers to the General Family Pension Fund are a company, association, or partnership formed for the purpose of carrying on business other than that of banking, that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof within the meaning of s. 4 of the Indian Companies Act, 1882?

2. If so, under what section of what Act, if any, can registration of the said fund be effected?

Mr. *Evans* and Mr. *O'Kinealy* appeared for the Plaintiffs.

Mr. *Woodroffe* and Mr. *Henderson* for the Defendant.

Annexed to the case were copies of the nineteenth Annual Report of the Fund for the year 1888, and the original prospectus, rules, bye-laws, form, and tables. The Report contained the rules and bye-laws as they stood at the time the case was stated. No witnesses were examined at the hearing, but the facts required to be proved by s. 531 of the Code were allowed to be proved by affidavit of Messrs. *H. H. Remfry*, the Chairman, Mr. *W. G. Ross*, the plaintiffs' Solicitor, and the defendant. In addition to the documents annexed to the case, the Annual Reports for the years 1886 and 1889 were tendered and admitted.

[795] Mr. *Evans*.—The main question to be decided is whether this is a Society which carries on business for the sake of gain, and my contention is that it cannot be treated as such. It is clear that the object, as stated in the prospectus, is not gain, and there can be no gain to the Society or to any individual member of it. The scheme provides for the investment of the accumulations so that they will yield a profit, and it may be said that should be treated as gain, but the House of Lords has held that profits from investments are not taxable as gains from a business. It is not a carrying on of a business. It is not, however, necessary here to go so far. This is not a Society or Association carrying on business having gain for its object within the meaning of s. 4 of the Indian Companies Act. As a matter of fact there is no gain to the Society, and even if it be held that there is gain, there is no business carried on with the object of acquiring gain. Next there is no gain to any individual member, that is to say, no gain in a legal sense, for the fact that provision is made for the widows and children of the subscribers cannot constitute legal gain to them. Not only does s. 4 of the Act not apply to this Society, but it is one that comes under the class referred to in s. 26, which refers to a class of Societies strongly contrasted with that covered by s. 4 and whose object is not gain. There is no provision in the prospectus or rules for doing anything else than carrying out the object for which the Society was formed. Except the rules relating to abatements, there is no provision for dealing with unnecessary accumulations. There is and can be no increase in the value of the annuities, or return of subscriptions, and the rules also provide against total forfeiture on a member failing to continue his subscriptions by the payment of annuities proportionate to the amount subscribed, so that the other

members do not gain by forfeitures. Even if the present subscribers put an end now to the Society, they could not divide the accumulated funds amongst themselves as the Court would compel the Fund being devoted to an object *ejusdem generis*. [*In re the Bristol Athenæum* (L. R., 43 Ch. D., 236), *Pease* v. *Pattinson* (L. R., 32 Ch. D., 154)]. The object of this Society is distinctly of a charitable nature, [*The Queen* v. *Commissioners of Income-tax*, (L. R., 22 Q. B. D., 296)], but the words of **[796]** s. 26 are quite wide enough to cover it even if it be held not to be "a charity." As regards the question as to whether there is any gain to the Society, it must be remembered that the words relating to gain to individual members were not found in the earlier English Act, and, as pointed out in *Smith* v. *Anderson* (L. R., 15 Ch. D., 247), they were introduced into the Act of 1862 in consequence of the decisions in the cases of *The Queen* v. *Whitmarsh* (15 Q. B., 600), *Bear* v. *Bromley* (18 Q. B., 271), and *Moore* v. *Rawlins* [6 C. B. (N. S.), 289]. The later cases all go on the question of gain to individual members, and, as in this case there can be no gain to them, my contention is that they do not apply here. Those three cases have never been overruled, and are still valid and binding decisions.

In *The Queen* v. *Whitmarsh* (15 Q. B., 600), the Court was considering the case of a Company whose object was the purchase of lands with funds raised by subscription, and the division of such land in an improved condition amongst the subscribers, and it held that such a Company was not formed for the purpose of acquiring gain so as to bring it within the Companies Act then in force. Individual members might benefit by the transaction, but the Company, as a whole, would not, and any profits that the Company might acquire would arise from sources merely subsidiary to the purpose for which the Company was established. In *Bear* v. *Bromley* (18 Q. B., 271) it was held that "profit" meant profit derived from outsiders, and that though some of the members might gain at the expense of others, that did not make it a Society established for profit. There, too, the Society derived profit from fines, but it was held that any transactions of the Society which resulted in profit were by virtue of powers which were only subsidiary to the general purposes of the Society, and that purpose was not one for profit. *Moore* v. *Rawlins* [6 C. B. (N. S.), 289], which was another building Society's case, also supports the view that though individual members may acquire profits as amongst themselves, that does not bring the Society within the Act.

In the latest case on the subject, *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381), the main questions arising in this case were **[797]** discussed by the House of Lords. That was a case of a Life Insurance Company which had no shares or shareholders, the members being the holders of participating policies, each being entitled to a share of the assets and liable for the losses. An account was annually taken, and the greater portion of the surplus premia over the expenditure referable to such policies was returned to the policy-holders, as bonuses, either by addition to the sums insured or in reduction of future premia. The House of Lords held that these so-called bonuses were not a profit or gain to the Company so as to be liable to income-tax. Lord HERSCHELL there pointed out that persons associated together for the purpose of mutual insurance could not be said to carry on a trade or vocation from which profits or gains accrue to them.

It cannot be said in this case that the interest arising from the investments in Government paper is profit arising from business. The cases are clear to show that investing money in Government paper is not carrying on a money-lending or any other business.

In support of the contention of the other side no doubt the dicta of Sir GEORGE JESSEL, M.R., in *In re Arthur Average Association, Ex parte Hargrove*

(L. R., 10 Ch. App., 542) will no doubt be relied on, but the Court of Appeal held that it was unnecessary to decide that point. It may possibly be true, as Sir GEORGE JESSEL put it, that marine insurance is not merely an indemnity against loss; but certainly his argument can have no possible bearing on life insurance. Then in *In re Padstow Total Loss and Collision Assurance Association* (L. R., 20 Ch. D., 137), it was pointed out by BRETT, L.J., that the opinion he expressed with regard to mutual insurance companies in *Smith* v. *Anderson* (L. R., 15 Ch. D., 247) could not be maintained. In that case it was held by the Lords Justices that the mere investment in securities, as opposed to dabbling in them, could not be regarded as carrying on a business within the meaning of the Act. No case goes further than that if the intention is that some of the individual members should gain as against the rest of the Association, the Act might apply. Some of the dicta go that length. [Counsel then cited *Wingfield* v. *Potter* (45 L. T., 612), and *Shaw* v. *Benson* (L. B., 11 Q. B. D., 563), and referred to [798] the judgment of LINDLEY, L. J., in the latter case, and continued] —We have no concern here with the new words, as there can be no gain to individual members. The view expressed in *Smith* v. *Anderson* (L. R., 15 Ch. D., 247) was followed in *Crowther* v. *Thorley* (32 W. R., 330), and *In re Siddall* (L. R., 29 Ch. D., 1). Section 26* of the Indian Companies Act would seem to refer to associations of this character, and Part VIII of the Act would appear to contemplate the existence of a large number of companies which do not require registration, and are therefore not unlawful.

Mr. *Woodroffe.*—After the exhaustive examination of the cases by Mr. *Evans*, I do not propose to deal with them at length, but merely to point out the grounds on which I think his argument is erroneous or defective. The decision in *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381) does not dispose of the question raised in the present case. Mr. *Evans'* definition of charity taken from the case of *The Queen* v. *Commissioners of Income-tax* (L. R., 22 Q. B. D., 296) is not applicable here, as we are not governed by the Statutes of Elizabeth, and charity is not limited to assisting the poor. The nature of the business carried on by this Association is mutual assurance, with the qualification that the person who is to be benefited is named and other than the insurer. As pointed out by Lord HERSCHELL in *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381), it is of the very essence of such an enterprise that a portion of the income should from time to time be invested in order to create and maintain a fund capable of meeting the liabilities that have been or are being created.

---

* [Sec. 26:—Where any association which might be formed under this Act as a limited company proves to the Local Government that it is formed for the purpose of promoting commerce, art, science, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may, by license under the hand of one of its secretaries, direct such association to be registered with limited liability, without the addition of the word "limited" to its name; and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to the obligations by this Act imposed on limited companies; with the exceptions that none of the provisions of this Act that require a limited company to use the word "limited" as any part of its name, or to publish its name, or to send a list of its members, directors, or managers to the Registrar, shall apply to an association so registered.

Special provisions as to associations formed for purposes not of gain.

The license by the Local Government may be granted upon such conditions and subject to such regulations as the Local Government thinks fit to impose; and such conditions and regulations shall be binding on the association, and may at the option of the Local Government be inserted in the memorandum and articles of association, or in both or one of such documents.]

How this was done in the present case appears from the reports of the Fund. In 1888 the accumulations, exclusive of the value of the house, are shown to be nearly 17 lakhs, which at 4 per cent. would yield about Rs. 68,000 a year, while the total amount of pensions payable for that year amounted to about Rs. 75,000. The report shows that there is a large annual increase in the accumulations, and at this rate of progressive advance, there will soon be no need for further subscriptions, as the interest from the Fund will be ample to meet the liabilities. It is contended that the object of the Fund was not gain, but people must be taken [799] to intend the natural consequences of their own acts, and there certainly has been a considerable gain to this Association. The members must have contemplated the increase of the Fund by means of interest, accumulations, and forfeitures, which has been the actual result. The Society cannot be looked on as a charitable or eleemosynary one ; the object of the Fund was insurance, and it stands on the same footing as an Insurance Association, and insurance for the benefit of one's wife and family is certainly not a charity. Then the Society carries on a business, namely, a business of insurance. In *Crowther* v. *Thorley* (32 W. R., 330), the definition given by JESSEL, M.R., in *Smith* v. *Anderson* (L.R., 15 Ch. D., 247) is adopted. It is stated to be the reiteration of transactions. *In re Siddall* (L. R., 29 Ch. D., 1) followed *Crowther* v. *Thorley*. I contend therefore that this Association carries on a business, and that it has for its object the acquisition of gain by the Association or by the individual members thereof. All that the earlier cases [*The Queen* v. *Whitmarsh* (15 Q B., 600)], *Bear* v. *Bromley* (18 Q. B., 271), and *Moore* v. *Rawlins* [6 C. B. (N. S.) 289] decided was that the mere fact that profit was made by the individual members of an Association was not enough to bring the Association within the words of the old Act, but we have it on the highest authority that it was to get rid of the difficulty brought about by those decisions, and the danger of allowing a large number of persons being associated together, as in this case, without registration, that the words " or to the individual members thereof " were subsequently introduced into the Act. The weight of the later decisions goes to show that if gain results to some individuals, if the business is carried on at all, that is sufficient to bring the Association within the Act. In the present case it has been pointed out that Government gives certain facilities to the Fund, but neither from the prospectus nor from the rules does it appear that it is essential that the funds should remain in the hands of Government. And as a matter of fact the Government expressly declines all responsibility. Supposing the present subscribers were to decide that they would no longer continue the Fund, what would there be to prevent them, after making provision for the annuities now in [800] existence being paid, dividing the rest of the fund amongst themselves. The nominees would have no voice in the matter and could not stop them, for they are merely in the position of recipients of charity. In that case there would be undoubted gain to the members of the Society. All that was decided in *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381) was, that the proportion of the payments in excess over liabilities returned to the participating policy-holders was not " profit " which was taxable under Schedule D of the Income-tax Act ; and it is worthy of observation that the case was decided against the opinions of two of their Lordships, and reversing the unanimous decisions of the High Court and Court of Appeal. At the most, the decision amounts to this, that the abatements do not amount to profit to the individual. It leaves untouched the question whether the Society carried on business for the purpose of gain. That case is also distinguishable from the present on the ground that there the funds, declared free from income-tax, were derived wholly from the participating policy-holders ; whereas here the abatements are made from a fund derived from a number of other sources,

such as forfeitures, payments made by others, fines, entrance fees, and interest on investments. The reason why the three earlier cases are not referred to with any disapproval in the later cases is that they were rightly decided under the then existing law, and that the law was changed to meet them. Supposing. the members of this Association were now to say, we will provide for the existing annuities, and divide the surplus now, who could prevent them. It was to provide against such a state of things that the law was amended so as to compel such Associations to be registered.

The decision in *Moore* v. *Rawlins* (6 C. B. (N. S.), 289) was based on the opinion that the purchase of land, etc., contemplated by the deed of settlement was merely an isolated transaction and consequently no business was carried on. In *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381) the judgments of Lords HALSBURY and FITZGERALD, the two dissenting Lords show that the point on which they differed from their collagues was the construction of the eleventh clause of the Company's charter. The majority decided **[801]** upon the assumption that the portion of the surplus returned to the policy-holders was derived solely from the *premia* paid by the participating policy-holders of that year, which was a state of facts which the two dissenting Lords did not acquiesce in. They considered that the surplus was derived from other sources as well, which is the case here. In the case of *Madras Equitable Assurance Company* v. *The President, Municipal Commission, Madras* (I. L. R., 11 Mad., 238), the Court held that the investment for interest of the funds of a Mutual Insurance Company constituted "carrying on business for gain."

The House of Lords decided the case of *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381) on the supposition that all the money returned came from the persons to whom it was so returned, but that was not so in the Madras case, for there, as here, the funds came from other sources. Thus the original object of an Association need not be one for gain to bring the Association within the Act. In *In re Arthur Average Association, Ex parte Hargrove* (L. R., 10 Ch App. 542), Sir George Jessel points out that it is enough if gain is acquired, that is to say, if gain is the legitimate result of the business of the Company. In that case, as here, there was a reserve fund, which was held to constitute "gain." The facts of this case are very similar to the facts of that case, for here the subscribers by means of the abatements participate in the general profits of the fund, and do not get merely a return of what they may themselves have paid in excess of what was required.

The same opinion was expressed in *In re Padstow Total Loss and Collision Assurance Association* (L. R., 20 Ch. D., 137). We are not affected here by the case of *Smith* v. *Anderson* (L. R., 15 Ch. D., 247), for there it was held that the business was not carried on by the certificate-holders, but was managed by trustees, whereas here there are no trustees, but directors, who are agents elected by and from amongst the subscribing members themselves. In the *Padstow* case the Judges were unanimously of opinion that the Company was an illegal one. Unless therefore a distinction can be drawn between **[802]** mutual marine insurance and life assurance that case cannot be distinguished from the present one.

Wingfield v. *Potter* (45 L. T., 612) is a case of a single and isolated transaction and not a carrying on of a business, and the decision in *In re Siddall* (L. R., 29 Ch. D., 1) proceeded upon those in *Crowther* v. *Thorley* (32 W. R., 330) and *Smith* v. *Anderson* (L. R., 15 Ch. D., 247), the former of which was decided on the ground that the business was carried on by the trustees, who were under 20 in number. Therefore I contend that the decision in the *New York Life*

Insurance Company v. *Styles* (L. R., 14 App. Cas., 381) does not govern this case, and that those in *Shaw* v. *Benson* (L. R., 11 Q. B. D., 563) and *Jennings* v. *Hammond* (L. R., 9 Q. B. D., 225) show that the possibility of gain to individual members is sufficient to bring the Association within the Act. My view is also supported by the *dicta* of Sir George Jessel in *In re Arthur Average Association, Ex parte Hargrove* (L. R., 10 Ch. App., 542) and *Smith* v. *Anderson* (L. R., 15 Ch. D., 247) does not apply. The cases show that if there be a profit in which all the members may share, it may be looked on as a gain to the Association or to the individual members. The only case in this country, *Madras Equitable Assurance Company* v. *The President, Municipal Commission, Madras* (I. L. R., 11 Mad., 238) also supports my view.

Mr *Evans* in reply :—The words of the Act under which the Madras case was decided include "Benefit Societies," and the Court relied on those words. In the *New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381) the Attorney-General expressly pointed out that the funds divided came from other sources. Here there can be no gain to the individuals, unless the declared object of the Society is expressly disregarded, and it cannot be contended that one of its objects is to disregard the object for which it was started and put an end to the Fund. Although it has been sought to make out that the Fund is, or shortly will be, ample to provide for all contingencies, that is not so ; and it appears from the last report that in the opinion of the actuary the rate of subscription for daughters is too low, and the present surplus too small to justify any further abatements at present. Besides, as the Fund increases, so [803] do its liabilities for future pensions. In any case there is no intention indicated of benefiting the subscribers by division of surplus funds or otherwise than by the abatements as provided by the rules.

The **judgment** of the Court (WILSON and PIGOT, JJ.) was delivered on 2nd July, and was as follows :—

This matter comes before us in the form of a special case stated for the opinion of the Court under s. 527 of the Code of Civil Procedure. The first question submitted to us, and the only one which we propose to answer, is :—" Whether the subscribers to the General Family Pension Fund are a company, association, or partnership formed for the purpose of carrying on business, other than that of banking, that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, within the meaning of s. 4 of the Indian Companies Act, 1882." If it does fall within that description, then the Companies Act requires that it should be registered as a Company under that Act, unless formed under some other Act of Parliament, or of the Indian Legislature, or by Royal Charter, or Letters Patent ; and, not being so registered or formed, it is an illegal association. If the association does not fall within the above description, it is not an illegal association.

The facts concerning the Fund are given in full detail in the special case and the documents annexed to it ; it will be sufficient for the present purpose to summarise them briefly The Fund was founded in 1870, the object being, according to the rules to provide for the maintenance of the widows and children of those who subscribe to it. The scope was afterwards enlarged so as to include other relations of subscribers. The management is vested in a Board of Directors elected by the subscribers. Subscriptions were originally at fixed rates according to published tables ; but at a later period abatements of subscriptions were introduced, according to a graduated scale, for subscriptions of five, ten, fifteen, and twenty years' standing. These abatements the directors are empowered to grant or withhold, according to their opinion as to the condition

of the fund from year to year. The subscriptions of a member are intended to secure an annuity to the nominee for whose benefit he subscribes. He is under no obligation to continue his subscriptions, but may stop them at pleasure, subject in certain contingencies [804] to forfeiture of the benefit of past payments; and fines are provided for unpunctuality in payments. In the course of management a large reserve fund has been accumulated and invested. There is nothing to suggest that this reserve is larger than sound principles of management require.

In order to bring a company, association, or partnership within the section in question, first, it must be formed for the purpose of carrying on a business; secondly, that business must have for its object the acquisition of gain, but the acquisition of gain contemplated may be either by the association or by the individual members of the association. The language of the Act before us is the same as that of the Act in force in England, and we have therefore the advantage of the English decisions on that Act, as well as on some other Acts, to assist us in applying the law to the present case.

It may perhaps be assumed (it is not necessary to decide it) that the operations of this association constitute a business: the real question is whether that business has for its object the acquisition of gain either by the association or by its members. The primary object is certainly not to confer any benefit upon the association as a body, or its individual members, but to make provision for the nominees of members. And the means by which it is sought to attain that object is by the adoption of a scale of payments so calculated as to render the intended provision secure, without unnecessarily burdening the contributors. But it was argued that the process adopted for attaining these ends naturally, and indeed necessarily, involves the acquisition of gain, and that, as people must be taken to contemplate the ordinary consequences of their own acts, the acquisition of gain must be held to be among the objects of the association.

The sources of gain suggested were these:—forfeitures on the part of members ceasing to subscribe, which it was said formed a gain to the association by increasing its resources and diminishing its liabilities, and to members by lightening in the long run their contributions; fines imposed upon members not paying their contributions punctually; and lastly the large and increasing reserve fund derived from the surplus of the contributions over current outlay and the general receipts of the fund. This reserve [805] fund it was argued, was a gain to the association directly, and a gain to the members indirectly, by lightening their contributions. It was further suggested that the reserve fund might conceivably in time attain such dimensions as to exceed the liabilities charged upon it, and that the members for the time being might possibly be entitled to divide the surplus among themselves. This, however, would be to frustrate, not to carry out, the objects of the association. As to these matters, two questions arise: first, are they gains of the business within the meaning of the section; secondly, if so, is the acquisition of such gains the object of the association.

With regard to the first of these questions, it is at least extremely doubtful whether any of these matters can be called gains of the business. The case of *The New York Life Insurance Company* v. *Styles* (L. R., 14 App. Cas., 381) seems to us an authority for the proposition that they are not so within the meaning of another Act. In that case the House of Lords had to consider, with regard to a Mutual Life Insurance Society, whether the amount of premiums received from year to year, so far as it was in excess of the outgoings for the year, and which excess was partly returned to the member in the form of reduction of future premiums, or added by way of bonus to the amounts insured, and partly carried to a reserve fund, constitutes profits, or gains within

the meaning of Schedule D of the Income-tax Act (16 and 17 Vic., Ch. 34). We take the statement of the facts from the judgment of Lord HERSCHELL at pages 407 and 408. "The appellant-company has no shareholders and no shares. Each policy-holder is a member of the company, and is entitled to a share of the assets of the company and liable to all losses and expenses incurred by the company. A calculation is made by the company of the probable death-rate among the members of the company, and the amount claimed for premiums from the policy-holders is commensurate therewith. The chief part of the surplus shown by the accounts to which I have referred is paid, or, as the company alleges, is returned to the policy-holders (that is, to members of the company) as bonuses. The remainder of the surplus is carried forward as funds in hand to the credit of the general [806] body of the members of the company. These bonuses are not paid in cash, but the amount of the same is deducted from the next premium due or is added to the policy." Thus in that case, as in this, there was a reserve fund. In that case, as in this, there was a forfeiture clause, which was embodied in the policies. All these circumstances were relied upon in argument, and the same considerations were urged which have been laid before us. But those arguments did not prevail, and the majority of the Lords held, that in the case of a mutual association, in which the members contribute to a fund intended to secure objects in which they are all interested, any excess of the year's contributions over the outgoings does not constitute profits or gains, whether the shares of the individual members in the excess payments be returned to them in the form of reduction of subsequent contributions, or be added by way of bonus to the sums ultimately secured, or whether the amount be carried into a reserve fund for the benefit of all those concerned. It is difficult to see any distinction in principle between that case and the present.

If any of the things relied upon could properly be called gains by the association or by its members, we do not think it could be held that the acquisition of such gains was the object of the business of the association. And for this there seems to us ample authority. The case of *The Queen* v. *Whitmarsh* (15 Q. B., 600) was decided upon the former Company's Act, 7 and 8 Vict., c. 116, s. 2, which provided for the registration of associations "for any commercial purpose or for any purpose of profit," by which words it was held that the profit contemplated was profit to the association, not profit to the individual members. In that case a company claimed to be registered, the object of which was to acquire lands and make allotments to the subscribers, but there were powers of selling lands, from the exercise of which profits might accrue to the company. The judgment of the Queen's Bench, delivered by Lord CAMPBELL, C.J., dealt with the matter thus: "The governing purpose of the company, according to the provisions of the deed, is the purchase of land by funds raised by subscription, and the division of such land among the subscribers. Each subscriber or shareholder, to whom an allotment of such land might be made, would obtain the [807] advantages and enjoyment arising from the ownership in severalty of land, with the buildings and other improvements placed thereon: but these advantages to individual shareholders do not fall within the description of a profit to the company arising from its funds, and were not relied on in the argument. With respect to the powers conferred upon the directors, of selling land that might have been purchased, they are not given for any purpose of profit by purchase and resale, but as subsidiary only to the governing purpose of providing allotments, in respect of which the sale or other transfer of parcels of land might occasionally become convenient. It would be accidental only if profits arose from the exercise of these powers; and the exercise of them was clearly not the purpose for which the company was established."

That decision was followed in two other cases which arose upon the same Act, *Bear* v. *Bromley* (18 Q. B., 271) and *Moore* v. *Rawlins* (6 C. B. (N. S.), 289). The latter case is a very instructive one. The society in question was one for the acquisition of land, the erection of houses thereon, and the allotment of them to the subscribers. This was held not to be a purpose of profit to the society. But the society was further empowered to make and sell bricks, to purchase and sell building materials, and to perform all kinds of work in the building business and in relation thereto. It was held on the construction of the deed of settlement that these latter powers did not authorize the carrying on of the trade of brick-making or building generally, but only on the lands to be acquired, and for the purpose of carrying out the substantial object of the association; and it was therefore decided that they did not render registration necessary. Several later cases have been decided with regard to societies of a like character under the subsequent Companies Act, 25 and 26 Vict., c. 82, s. 4, the words of which are the same as those of the Indian Act, and apply to profits whether acquired by the Company or by its members; *Wingfield* v. *Potter* (45 L. T., 612), *Crowther* v. *Thorley* (32 W. R., 330), *In re Siddail* (L. R., 29 Ch. D., 1). In each of these cases it was held that the association did not require registration, though in each of them **[808]** there were possibilities of incidental advantage, such as a possible resale of land at an advantage, or the benefit of forfeitures.

These authorities show that, where the substantial purpose of an association is not to carry on a business for gain, the fact that gain may accrue incidentally, or may arise from merely subsidiary provisions, does not make registration necessary. And the same rule is expressly laid down by BRETT, L. J., in *Smith* v. *Anderson* (L. R., 15 Ch. D., 247, see p. 279).

Some other cases were referred to in argument, which do not seem to us to bear very strongly upon the case now before us, for the decisions turned upon considerations which do not arise in it. Thus in *Smith* v. *Anderson* (L. R., 15 Ch. D., 247, see p. 279) JESSEL, M. R., considered that there was an association formed with the object of dealing in shares for profit, and accordingly he held the proceeding illegal for want of registration. The Court of appeal took a different view of the nature and objects of the undertaking, and hence came to a different conclusion as to the law applicable. In other cases registration has been held necessary, because it has been considered that associations have been formed to carry on business, the object of which has been to enable some of the members to acquire gain by their dealings with the rest. To this class belong the cases relating to Mutual Marine Insurance Societies; *In re Arthur Average Association, Ex parte Hargro* (L. R., 10 Ch. App., 542), by JESSEL, M. R.; *In re Padstow Total Loss and Collision Assurance Association* (L. R., 20 Ch. D., 137); and those relating to Mutual Loan Societies, *Jennings* v. *Hammond* (L.R., 9 Q.B. D., 225), *Shaw* v. *Benson* (L. R., 11 Q. B. D., 563), *In re Thomas, Ex parte Poppleton* (L. R., 14 Q. B.D., 379).

We think the subscribers to the General Family Pension Fund are not a company, association or partnership formed for the purpose of carrying on business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, within the meaning of section 4 of the Indian Companies Act, 1882; and our decree will declare accordingly.

Attorney for the Plaintiffs: Mr. *Rose.*

Attorneys for the Defendant: Messrs. *Dignam, Robinson & Sparkes.*

H. T. H.

NOTES.

[As regards '*chit funds*,' see 19 Mad., 31: 20 Mad., 68; 29 Mad., 177; 1 M. L. T., 106.]

[809] PRIVY COUNCIL.

The 22nd November and 11th December, 1889.

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Lala Gauri Sanker Lal and others............Defendants

versus

Janki Pershad and others............Plaintiffs.

[On appeal from the High Court at Calcutta.]

Sale for arrears of revenue—Act XI of 1859, sections 18 and 33—Collector's order of exemption.

A Collector's order under section 18 of Act XI of 1859 for exempting an estate from sale for arrears of revenue must be an absolute exemption, and not an order having effect as an exemption or not, according to what may happen, or be done, afterwards. It must not depend on an act which may, or may not, be performed.

The High Court having set aside a sale, as contrary to the provisions of the Act XI of 1859, upon a ground other than that declared and specified in an appeal made to the Commissioner of Revenue against the order for the sale, the Judicial Committee, referring to section 33 as prohibiting such a course, reversed the decision of the High Court.

APPEAL from a decree (28th June 1887) of the High Court, reversing a decree (9th March 1886) of the Subordinate Judge of zilla Chupra.

The suit out of which this appeal arose was instituted on the 23rd May 1885 by numerous co-plaintiffs, some of whom were zemindars owning, and others were interested in, a mehal named Dumaria in Chupra, of which the jumma was Rs. 458-10-8, in respect of which there had been a default for certain months of 1883. The March and June kists being in default, the estate was sold by order of the Collector of Sarun on the 25th September 1883. It was purchased in the name of the defendant and present appellant, Lala Gauri Sanker Lal. Against this sale an appeal was preferred by the plaintiffs to the Commissioner of Revenue of the Division; but he, on the 18th September 1884, dismissed it, holding that there was no ground for interference.

The proprietors of Dumaria accordingly brought this suit on 23rd May 1885, alleging the sale to have been contrary to the provisions of the Sale Law, and specifying irregularities. They claimed that the sale should be set aside, and that they should have possession, mesne profits, and costs.

[810] The auction-purchasers and the Government were made defendants. The grounds of defence were substantially the same, viz., that there had been actual default.

The issues raised questions whether there was any cause of action against the Government, and whether the sale was or was not contrary to the provisions of the Sale Law. The plaint alleged that an application tendering payment had been made on 22nd September 1883, whereupon the Collector after inquiry in effect ordered that the arrears should be received. This was called the special order in the judgment below. It was also alleged that the Collector, before the sale, viz. on 24th September 1883, made an order that the mehals on which arrears should have been deposited before a certain time would be released. This was termed the general order.

The Subordinate Judge decided that the sale was in accordance with the Sale Law, Act XI of 1859, and dismissed the suit with costs. On an appeal by the plaintiffs to the High Court a Division Bench found that the arrears were not paid in due time, but were tendered before the sale. Differing from the Subordinate Judge, the High Court held that the special order had the effect of exempting the estate from sale. They, therefore, upon this special order, decided in favour of the plaintiffs. They were of opinion, at the same time, that had the plaintiffs failed on the strength of that order in getting the sale set aside, they could not have succeeded upon the general order of the 24th September. The appeal was decreed, the sale was set aside, and possession was awarded to the plaintiffs, with an account of mesne profits.

The Government, not having joined the co-defendants in preferring this appeal, were in the record made respondents under the statutory name.

On this appeal.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the Appellants, contended that the special order of the 22nd September 1883, even if proved to have been made as alleged by the plaintiffs, had not the effect of exempting the estate from sale under Act XI of 1859. Nor had the general order of the 24th September that effect. There was a subsisting arrear of revenue for which the mehal was liable to be sold. There was no obligation, legally binding on the Collector, to postpone the sale or to accept payment [811] after sunset on the last day allowed for payment. The sale was regular and the plaintiffs were bound by it, with the result that the property had passed to the purchaser.

None of the Respondents appeared.

Their Lordships' **judgment,** on a subsequent day, 11th December, was delivered by

Sir R. Couch.—The appellants were defendants in a suit to set aside a sale of an estate or mehal called Dumaria for arrears of revenue due from the plaintiffs, made by the Collector of Sarun under the provisions of Act XI of 1859. The lower Court dismissed the suit, but the High Court of Bengal reversed its decree, and ordered the sale to be set aside, and that the plaintiffs should recover possession of the estate.

On the 13th August 1883, Rs. 8-13-5 of Government revenue due on the 7th June 1883 being unpaid, a notification was issued by the Collector of Sarun that the estate would be publicly sold on Monday, the 24th September, and was duly published. On the 24th September the Collector made an order in these terms:—"Payments of revenue in arrear will be received in the treasury up to the time of sale. Applications for exemption on the ground of payment will be received up to 1-30 P.M., but they must be supported by treasury receipts for payment in full of all demands. No applications will be received, and no payments will be accepted, after the sale has commenced." On the 22nd September, Bindeswari Pershad Singh, one of the respondents, presented a petition to the Collector, stating that in mehal Dumaria there was an arrear of Rs. 8-12-5 in consequence of default in payment of revenue made by the other shareholders, and that he had brought the amount of arrears, and praying that it might be received and entered in the account and the mehal released from sale. On the back of this petition there is a written order,

"Receipt not produced before sale."

"C. C. QUINN."

dated the 24th September, that the office report be submitted, and after entries of the office reports there are the following :—

"The 25th September 1883."

"Accept on payment of all Government demands."

"R. C. P., Sarun Collectorate."

"The——September 1883."

[812] In the lower Court, and in the High Court, the last entry is spoken of as made on the 22nd September 1883. It does not appear for what reason. Mr. Quinn was the Collector. It is not known who was the person who used the initials R. C. P., but no issue was raised in the suit as to the authority to make that entry, and that cannot now be disputed.

In the judgment of the lower Court it is found that the payment was not made before 1-30 P.M., on the 25th September, to which day the sale of Dumaria and a number of other estates in arrear had been duly adjourned by the Collector, and at the time of the sale no treasury receipt was produced. The payment was made at the Collector's office some time before 2 p.m. on the 25th and before the commencement of the sale, but after the officers had left the office and gone to the Collector's ijlas (bench) to attend it.

Thus the order of the 24th September, called the general order, under which an exemption might have been granted, was found not to have been complied with, and the plaintiffs were obliged to rely upon what is called in the issues the special order dated the 22nd September. The lower Court held that this is not an order for exemption under section 18 of Act XI of 1859. The High Court has held that it is. That Court says the effect of the order may be expressed as follows :—"I exempt this estate from sale, provided the arrears are paid before sale." It appears to their Lordships that what is called the special order is not such an order as is intended by s. 18. It should be an absolute exemption, not an order which may have effect as an exemption or not according to what may happen or be done afterwads. The section says it shall be competent to the Collector or other officer, at any time before the sale, to exempt the estate from sale. The Collector is to record in a proceeding the reason for granting exemption. Although this, as the High Court says, may be done at any time, the reason should exist at the time the exemption is granted, and not be a fact which may happen afterwards, or an act which may or may not be performed. The words "accepted, etc." have been called by the lower Courts an order and considered as one, but it may be doubted whether they are more than a note by one of the Collector's [813] officers that the Rs. 8-12-5 would be received, and therefore the mehal would be released from sale.

There is another and, their Lordships think, a fatal objection to the decree of the High Court. Section 25* makes it lawful for the Commissioner of Revenue to receive an appeal against any sale made under the Act if preferred

* [Sec. 25 :—It shall be lawful for the Commissioner of Revenue to receive an appeal against any sale made under this Act, if preferred to him on or before the fifteenth day from the date of sale, reckoning as in section XXIII, or, if preferred, to the Collector or other Officer as aforesaid, for transmission to the Commissioner, on or before the tenth day from the day of sale, and not otherwise; and the Commissioner shall be competent, in every case of appeal so preferred, to annul any sale of an estate or share of an estate made under this Act, which shall appear to him not to have been conducted according to the provisions of this Act, awarding at the same time to the purchaser a payment from the proprietor of any moderate compensation for his loss, if the sale shall have been occasioned by neglect of the proprietor, such compensation not to exceed the interest at the highest rate of the current Government Securities, on the amount of deposit or balance of purchase-money during the period of its being retained in the Collector's Office; and the order of the Commissioner shall in such cases be final.]

Appeals.

within a specified time, and gives him power to annul any sale made under the Act which shall appear to him not to have been conducted according to its provisions. Section 26* gives power to the Commissioner, on the ground of hardship or injustice, to suspend the passing of final orders in any case of appeal from a sale, and to represent the case to the Board of Revenue, who, if they see cause, may recommend the Local Government to annul the sale, and the Local Government may do so, and cause the estate to be returned to the proprietor on such conditions as may appear equitable and proper. And s. 33 enacts that no sale shall be annulled by a Court of Justice upon the ground of its having been made contrary to the provisions of the Act, unless the ground shall have been declared and specified in an appeal made to the Commissioner. The plaintiffs appealed to the Commissioner. In their grounds of appeal they say the Collector on the 24th September passed a general order and they complied with it. They do not mention any order of the 22nd September. The Subordinate Judge thought paragraph 1 of the memorandum of appeal was sufficient, but it is not. It only says the sale is fit to be set aside for reasons detailed in the following paragraphs. If the case now set up had been stated in those paragraphs, the Commissioner would have inquired into it, and if he thought there was hardship or injustice might have represented the case to the Board of Revenue. The second issue, as summarized by the Subordinate Judge is, "Does s. 33 of XI of 1859 bar the suit?" and upon his opinion of paragraph 1 he held that it did not bar the suit. In the judgment of the High Court this issue is not noticed. It is said that the two points upon which the parties went to trial were—1st, Was the amount due for arrears paid before the sale commenced? 2nd, What was the meaning and legal effect of the orders of the 22nd September and 24th September? This is a misapprehension. The issue upon s. 33 was tried by the Subordinate Judge. It was decided against the [814] defendants, but the decree being entirely in their favour, it was not necessary for them to file a notice of objection under s. 561 of the Code of Procedure. They could support the decree on the ground that the second issue ought to have been decided in their favour. The High Court ought to have decided that issue, or have shown in their judgment a reason for not doing so. If it had been decided that the suit was barred by s. 33, the appeal to the High Court ought to have been dismissed

Upon both the grounds which have been considered, their Lordships are of opinion that the decree of the High Court ought to be reversed, and the appeal to that Court dismissed, with costs, and the decree of the lower Court affirmed, and they will humbly advise Her Majesty to order accordingly.

The respondents, other than the Secretary of State for India in Council, must pay the costs of this appeal.

Appeal allowed.

Solicitors for Appellants: Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[As regards the order of exemption this was followed in (1905) 2 C.L.J., 325; (1894) 21 Cal., 844. See (1893) 21 Cal., 70 as regards ground of appeal; and also (1911) 12 I.C., 20.]

* [Sec. 26:—It shall be competent to the Commissioner of Revenue, on the ground of hardship or injustice, to suspend the passing of final orders in any cases of appeal from a sale, and to represent the case to the Board of Revenue, who, if they see cause may recommend to the Local Government to annul the sale; and the Local Government in any such case may annul the sale and cause the estate or share of an estate to be restored to the proprietor on such conditions as may appear equitable and proper.]

Annulment of sale in special cases.

[17 Cal. 814]

PRIVY COUNCIL.

The 31st January and 4th and 5th February, 1890.

PRESENT :

LORD WATSON, LORD MORRIS, SIR B. PEACOCK AND SIR R. COUCH.

Khagendra Narain Chowdhry and others............Plaintiffs

versus

Matangini Debi and another............Defendants

and a cross appeal.

[Consolidated appeals from the High Court at Calcutta.]

Decree—Form of decree—Suit for possession by owners of adjoining estates—Right of parties to equal moieties of property decreed, although each had claimed the exclusive title—Decrees dismissing their suits reversed, the evidence being sufficient as to the former, but not the latter right.

In cross suits between the owners of adjoining estates, each claimed against the other to be entitled to, and to be put into possession of, property situate on the boundary between their estates.

The High Court dismissed both claims on the ground that the evidence of the exclusive right of either party was insufficient.

Held that, although this might be so, there was nevertheless sufficient evidence of possession having been held by both the one and the other, and of the title of both, to support the conclusion that each had a claim to an equal moiety, to which each should be declared entitled. Each should be put into possession of the moiety which was opposite to and adjoined his estate.

[815] Two appeals, consolidated and heard as one, from two decrees (21st May 1885) of the High Court, reversing one decree and affirming another (21st September 1883) of the Subordinate Judge of Goalpara, whereby the latter had dismissed the appellants' suit and had decreed the other. The decrees of the High Court dismissed both suits.

These consolidated appeals arose out of cross suits between, on the one side the appellants, who were zemindars of the Mechpara zemindari, and on the other the respondents, who represented the late Kirti Narain Chowdhry, the zemindar of Chapar, the latter having died while the suits were pending before the Subordinate Judge. Each party claimed the exclusive title to a water-course, termed by the one the danga of Bahirgacha or the Kodalkati bil, and by the other the Tilukmari sota, together with the julkar or fishery, of which the value was stated to be Rs. 5,500. It was situate on the boundary between the two zemindaries, on the west, north and east of it being villages belonging to Chapar, while on the west, south and east of it were villages belonging to Mechpara. According to the High Court, it was "what is called a sota," "apparently an elbow, or offset of part of the Brahmaputra river," or low-lying land exposed to the action of the river or its channels. The boundaries were differently stated in the plaints in the two cases, while the amin's report made a third statement. The right to possess it had been for many years in dispute, the earliest decision, which however did not dispose of the question, having been in 1828. In 1849 the thakbust survey, preceding the regular survey, commenced, and the Deputy Collector in that year made an order, based on the

"permanent lands having been washed away," which was followed by litigation in the Civil Courts, with orders for the amendment of maps in 1850, 1863, and 1875. None of these however were conclusive as to the present issue, which in effect was whether the disputed sota and julkar were within the one zemindari or the other. The disputes in the year 1877 were such that the Deputy Commissioner of Goalpara, as Magistrate of the district, attached the piece of water under the provisions of the Code of Criminal Procedure then in force, section 530 of Act X of 1872, by an order of 10th December 1877, which both parties in their suits filed in December 1880, on the same **[816]** day, sought to have set aside, each party claiming exclusive possession.

The judgment of the Subordinate Judge, which by consent was to govern both the cases, dealt first with the name of the disputed water, and on this point concluded that Mechpara was right. His judgment continued thus :—

"I consider from all the circumstances of the case that the title to the disputed water has always been vested in the Mechpara zemindars. I now come to the question of possession, and I think from the fact of title alone a strong presumption of possession in favour of Mechpara is created, and this presumption is supported by the oral evidence of witnesses and by the production of kabuliyats and other documents. As I said in the course of the trial, I am not disposed, in cases of this kind, to place much reliance on the oral testimony of fishermen and villagers in regard to title and possession; but in the present suit the documentary evidence produced by Mechpara is ample. Chapar has also produced kabuliyats and jumma-wasil-bakis to show that they have for years leased and collected the rent of the Tilakmara sota; but, as I have already held, the disputed water is not the Tilakmara sota."

He therefore decided in favour of the Mechpara zemindars, ordering that the attachment of 10th December 1877 be set aside, and that they should be put in possession of the disputed water, receiving the money realised by the Collector by the lease of it during attachment.

This decision was not maintained by the Judges of a division bench of the High Court (FIELD and O'KINEALY, JJ.), who were dissatisfied with the evidence relating to the possession of the sota by either party. They found that the maps represented only [what ?] had been the Deputy Collector's view of the merits, and not the real possession by either party. Looking at all the proceedings from 1849 onwards, they found it to be impossible to decide that either party had been in possession of the disputed sota. Both parties were clearly out of possession at one time, and the possession in 1849, 1850, and 1851 had been disputed. Being of opinion that neither party had shown a title to the possession or to the property, sufficient to outweigh the evidence in **[817]** favour of the other, the Appellate Court was of opinion that both suits should be dismissed. Decrees were made, accordingly, from which both parties preferred their appeals, under sections 595 and 596 of the Civil Procedure Code.

On these appeals,

Mr. *T. H. Cowie*, Q.C., and Mr. *J. H. A Branson*, for the Mechpara zemindars, argued that there was sufficient evidence to show that they were the owners of the sota as belonging to the Mechpara zemindari, and that they were in possession when possession was taken by the Deputy Commissioner of Goalpara in 1877. The decree of the Subordinate Judge had been set aside on insufficient grounds. Not claimed by the Government, nor by any third party, the sota was, in any view of the case, the property of either the plaintiffs or the defendants, unless, as might be the case, it belonged to both. The property had not been attached in order to its remaining in the possession of the

Government for an indefinite time, and it was contended that both parties, according to a view of the evidence least favourable to the Mechpara zemindars, were shown to be entitled.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the representatives of the Chapar zemindar, argued that the evidence had shown an exclusive possession by the latter for a considerable period, and that the absence of claim by the Government, and the entire failure to prove title or possession on the part of Mechpara, gave weight to the claim on behalf of Chapar.

Mr. *T. H. Cowie*, Q.C., in reply, contended that the judgment of the High Court, being purely negative, proceeded on evidence that in reality required an affirmative decision, viz., that Mechpara was entitled in equal part with Chapar. It was not necessary that the shares should have been marked out by evidence in the suit: that could be effected in future proceedings, and the statement of the title of the parties would satisfy the requirement of section 565, Civil Procedure Code, which, in effect, was that when the evidence on the record was sufficient, the Appellate Court should determine finally. The present judgment should be reversed, and an affirmative decree passed, in favour of each plaintiff, for half the sota, opposite to and adjoining Mechpara and Chapar, respectively.

[818] At the end of the argument, their Lordships' **judgment** was delivered by

Lord Morris.—These two appeals, which have been consolidated, come before their Lordships on appeal from the High Court at Calcutta. The High Court came to the conclusion that neither party had proved their case, and that both the suits instituted in the Subordinate Court should be dismissed with costs.

It appears that the Subordinate Judge had decided in favour of the zemindars of Mechpara, and had given them a decree setting aside an Order of Attachment which had been issued by the Magistrate under the 530th and 531st sections of the Criminal Procedure Code, and declaring in favour of their title to the sota in dispute and to the consequent relief.

Their Lordships are of opinion that the decrees of the High Court cannot be sustained, although their Lordships concur in the decision on the matters of fact which the High Court arrived at, namely, that neither of the parties, the zemindars of Mechpara or their representatives on the one side, or the zemindars of Chapar or their representatives on the other, have proved a title to the exclusive possession of the sota in question. The Mechpara zemindars claim the piece of water as the northern boundary of that part of their estate, and included in their estate, and known as "the Codalkati, Bahirgacha danga," while the Chapar zemindars allege that the piece of water is a portion of their estate and is called the "Tilukmari sota." The identity of the place appears to be very clear upon the map made by the amin who was sent to survey it, and that is the map which their Lordships now deal with, and which was dealt with by the High Court and by the Subordinate Judge. Their Lordships arrive at the same conclusion as the High Court with regard to the insufficiency of proof given either by the zemindars of Mechpara or by the zemindars of Chapar as to the right and title to the exclusive possession of the sota in question. But their Lordships are of opinion that the decrees of the High Court cannot be supported as pronounced by the High Court. They are of opinion that, although neither party has proved a title to an exclusive possession, there can be no doubt that possession belongs to the zemindars of Mechpara and to the zemindars of Chapar.

[819] The Government, who have attached the valuable point of the fishery pending this litigation make no claim, and they are really in the position of stakeholders.

The evidence in the opinion of their Lordships is insufficient, as already stated, to establish an exclusive possession by either of the parties. On the other hand it is equally cogent in their Lordships' opinion to show that there is possession between the two.

The result that their Lordships arrive at is that the decrees of the Subordinate Court and of the High Court should be respectively reversed and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective zemindaries, and be decreed to be put into possession thereof accordingly, and that both of the parties having failed in their contention as to an exclusive possession, each should bear their own costs of the litigation in the Subordinate Court, in the High Court, and of these appeals; and their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the Mechpara Zemindars, Khagendra Narain Chowdhry and others: Messrs. *Watkins and Lattey.*

Solicitors for the Representatives of the Chapar Zemindar, Kirni Narain Chowdhry: Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[This was followed in (1891) 11 A.W.N., 45; (1891) P.R., 67 as regards decreeing *joint* possession upon the evidence when the suit was for *exclusive* possession.]

[17 Cal. 819]
APPELLATE CIVIL.

The 29th April, 1890.
PRESENT:
MR. JUSTICE O'KINEALY AND MR. JUSTICE GHOSE.

Madhub Nath Surma............Plaintiff
versus
Myarani Medhi............Defendant.*

Assam Land and Revenue Regulation, 1886, ss. 2, prov. (b), 12, 39, 151, and 154—Settlement-holder, his rights under a settlement—Nisf-kherajdar, his right to a settlement—Section 154 of the Regulation.

The effect of sections 39 and 151 of the Assam Land and Revenue Regulation, 1886, is that a settlement made by a Settlement Officer, unless [820] interfered with by the Chief Commissioner, is final; but the settlement-holder does not thereby acquire any right to the land so settled as against any person claiming rights to it.

The effect of an order by the Government of India before the passing of the Assam Regulation in regard to the right of a nisf-kherajdar to hold land found upon survey to be in excess of his nisf kheraj estate, and to obtain a settlement thereof, considered.

In 1881 *S*, a nisf-kherajdar, obtained a settlement for a year of certain lands which were found upon survey to be in excess of his nisf-kheraj estate. Subsequently a pottah was granted to *S*, for a portion of the excess lands, while the other portion was settled by the revenue authorities under a kobala pottah with *M*, who entered into possession under his settlement. In a suit by *S*, the nisf-kherajdar for a declaration of his right to a settlement of the portion settled with *M* and for possession.

Held, that, having regard to the provisions of section 2, proviso (b), section 12 of the Regulation, and the order of the Government of India, the nisf-kherajdar was entitled to a declaration of his right to a settlement, but in view of section 154 he was not entitled to a decree for possession.

THIS was an appeal from the decision of the Deputy Commissioner of Kamrup, who held that the plaintiff's suit was barred by s. 154, clause (*a*), of the Assam Land and Revenue Regulation 1886.

On 27th Jhyt 1708 Sak (7th June 1785) certain lands were granted by the then Rajah of Assam to the predecessor of the plaintiff Madhub Nath Surma. This grant was subsequently confirmed by the British Government, and the lands were assessed as nisf-kheraj lands. At the nisf-kheraj survey in 1879 it was found that the plaintiff held certain lands in excess of his grant; and these excess lands, including the land in suit, were excluded from his nisf-kheraj estate. In accordance, however, with an order of Government that lands so excluded from a nisf-kheraj estate should first be offered at full rates to the nisf-kherajdar, the excess lands were in 1881 settled with the plaintiff for one year. Subsequently the plaintiff obtained a pottah for a portion of the excess lands held by him, and the other portion, amounting to two bighas of land, was settled by the Revenue authorities under a kobala pottah with the defendant Myarani Medhi. The plaintiff afterwards brought a suit against the defendant for a declaration that he was entitled to a settlement of these two

* Appeal from Appellate Decree No. 943 of 1888, against the decree of A. C. Campbell, Esq., Deputy Commissioner of Kamrup, dated the 1st of February 1888, affirming the decree of Baboo Sibo Prasaud Chuckerbutty, Extra Assistant Commissioner of Gauhati, dated the 30th of August 1887.

bighas of land, being part of the lands which had been excluded from his nisf-kheraj estate and settled with him in 1881, and also for possession of the same.

[821] The Court of First Instance dismissed the suit on the ground that the land had been excluded from the plaintiff's nisf-kheraj estate and settled with the defendant, who had entered into possession under his settlement. An appeal from this decision was dismissed by the Deputy Commissioner, who was of opinion that inasmuch as the defendant had obtained a kobala pottah in respect of the land, a decree for possession would affect the validity of the settlement made by the Revenue authorities, and that section 154, clause (*a*), of the Assam Land and Revenue Regulation, 1886, barred the suit.

The plaintiff appealed to the High Court.

Baboo *Jasoda Nundan Paramanick* for the Appellant.

Baboo *Sharoda Churn Mitter* for the Respondent.

The **judgment** of the High Court (O'KINEALY and GHOSE, JJ.) was as follows:—

The facts of this case, as we gather from the two judgments of the lower Appellate Court, dated the 1st February 1888 and 23rd July 1889, are shortly these. A certain estate, known as "nisf-kheraj," was settled very many years ago by the then Rajah of Assam with the predecessors of the plaintiff. This grant was subsequently confirmed by the British Government. In the year 1879, when the said nisf-kheraj estate was surveyed, it was found that the plaintiff held certain lands in excess of the grant: and these lands, including the land in suit, were excluded from the nisf-kheraj estate and settled in 1881 with the plaintiff for a year. This settlement was in conformity with an order of the Government of India that when lands were thus excluded from a nisf-kheraj estate settlement was first to be offered at full rates to the nisf-kherajdar. Subsequently, however, a pottah was given to the plaintiff for a portion of the lands held by him, and the other portion was settled under a kobala pottah with the defendant. The plaintiff afterwards brought the present suit to recover possession of two bighas of land, being a part of the lands excluded from the nisf-kheraj estate and settled with him in 1881.

The suit of the plaintiff is upon the ground of unlawful dispossession; and the question which we have to consider upon the facts found by the lower Appellate Court is whether he is entitled to any relief in this action. The learned Deputy Commissioner is of [822] opinion that inasmuch as a settlement has been made with the defendant by the Revenue authorities, a decree if given to the plaintiff would affect such settlement; and that this suit cannot, by reason of the provisions of section 154, clause (*a*), of the Assam Land and Revenue Regulation, 1886, lie in the Civil Court.

It has been further contended before us by the learned vakeel for the respondent, referring to sections 2, 6, and 11 of the Assam Regulation, that all previous Regulations and Rules (if any) in regard to any of the matters dealt with by the said Regulation have been rescinded, and could not therefore now be relied upon; that the Regulation recognises only certain rights which are specifically mentioned in section 6; and that the right claimed by the plaintiff does not fall within that section.

Section 2 no doubt says that "all Regulations and Rules (if any) in force there relating to any of the matters provided for by this regulation shall be repealed:" but the proviso (*b*) to this section lays down that "all rules prescribed, appointments and settlements made, powers conferred and notifications published under any enactment hereby repealed, and all other rules (if any) in force on the date on which this Regulation comes into force relating to any of the matters hereinafter dealt with, shall (so far as they are consistent with this Regulation, and

could be prescribed, made, conferred, or published thereunder) be deemed to have been respectively prescribed, made, conferred, and published thereunder."

With reference to this proviso, we have to consider whether the orders of, and the rule laid down by, the Government of India, and referred to in the judgment of the Deputy Commissioner "are consistent with this Regulation, and could be prescribed, made, conferred or published thereunder."

Section 6 provides as follows :—" No right of any description shall be deemed to have been, or shall be, acquired by any person over any land to which this chapter applies, except the following :—

(*a*) rights of proprietors, landholders, and settlement-holders other than landholders, as defined in this Regulation, and other rights acquired in manner provided by this Regulation ;

(*b*) rights legally derived from any right mentioned in clause (*a*) ;

(*c*) rights acquired under sections 26 and 27 of the Indian Limitation Act, 1877 ;

[823] (*d*) rights acquired by any person as tenant under the rent law for the time being in force :

Provided that nothing in this section shall be held to derogate from the terms of any lease granted by or on behalf of the British Government."

Sections 7, 8, 9, and 10 declare the rights of proprietors and landholders.

Section 11 refers to settlement-holders, and it is as follows :— " A settlement-holder, who is not a landholder, shall have no rights in the land held by him beyond such as are expressed in his settlement lease."

The Regulation then proceeds in section 12 to give to the Chief Commissioner certain powers, and it runs as follows :—" The Chief Commissioner may make rules for the disposal, by way of grant, lease, or otherwise, of any land, over which no person has the rights of a proprietor, landholder, or settlement-holder under this Regulation." So that the Chief Commissioner is empowered to make rules for the disposal of any land in respect of which no person may have a right under the Regulation.

We then find that in giving to the Settlement Officer a discretion in respect of the settlement of lands in which no person has a permanent and heritable interest, the Regulation lays down in section 32 (2) that this discretion must be "subject to such rules as the Chief Commissioner may make under section 12." And section 35 lays down " If the person to whom a settlement is offered refuses to accept it, it shall be in the discretion of the Settlement Officer, subject to such rules as the Chief Commissioner may make under section 12, to exclude him for the term of the settlement from possession of the estate, and to offer the settlement thereof to any other person he thinks fit."

Now, referring back to the proviso (*b*) of section 2, it would appear that, assuming that the plaintiff has no right to this land as a *settlement-holder* (as in fact he has none), the rule, prescribed by the Government of India before the promulgation of the Regulation, that when lands were found by survey to be in excess of a nisf-kheraj estate, a settlement thereof should be, in the first instance, offered to the nisf-kherajdar, was a rule which is fully " consistent with this Regulation, and could be prescribed, made, [824] conferred, or published thereunder " by the Chief Commissioner under section 12; and as such, it must be taken to have been prescribed under this Regulation.

In this view of the matter, it seems to us that the plaintiff has a right to hold the land and obtain settlement thereof, and that this right can only be forfeited if he refuses to take settlement at full rates. And it does not appear that a settlement was offered to the plaintiff, and that he refused to accept it. That being so, the Settlement Officer was not justified in excluding the plaintiff from settlement.

It would appear, however, from the judgment of the Deputy Commissioner that a kobala pottah for the land in question had been granted by the Settlement Officer to the defendant when this suit was brought. We do not know what are the terms of this settlement.

Section 39 of the Regulation provides that, "subject to the provisions of s. 151 of this Regulation, the order of a Settlement Officer as to the person to whom a settlement should be offered, the amount of revenue to be assessed, and the nature and term of the settlement to be offered, shall be final, and a settlement concluded with that person shall be binding on all persons from time to time interested in the estate; but, except as provided by ss. 35 and 36, no person shall, merely on the ground that a settlement has been made with him or with some person through whom he claims, be deemed to have acquired any right to or over any estate, as against any other person claiming rights to or over that estate."

And s. 151 lays down:—" The Chief Commissioner, a Commissioner, a Deputy Commissioner, a Settlement Officer, and a Survey Officer, may call for the proceedings held by any officer subordinate to him, and pass such orders thereon as he thinks fit."

Sections 39 and 151 read together amount to this—that a settlement made by a Settlement Officer, unless interfered with by the Chief Commissioner, is *final*; but the settlement-holder does not thereby acquire any *right* to the property as against any other person claiming rights to it. So that the settlement already made with the defendant cannot now be interfered with; but he has not thereby acquired any right to the land as against the plaintiff.

[826] And section 154, which has been relied upon by the Deputy Commissioner as debarring the plaintiff from obtaining relief in the Civil Court, has merely the settlement actually made by a Settlement Officer in view. The first portion of the section runs as follows:—"(1) Except when otherwise expressly provided in this Regulation, or in rules issued under this Regulation, no Civil Court shall exercise jurisdiction in any of the following matters:—

(a) Question as to the validity or effect of any settlement, or as to whether the conditions of any settlement are still in force;

(b) Question as to the amount of revenue, tax, cess, or rate to be assessed, and the mode or principle of assessment."

It is not necessary to notice the remaining portion of the section except *(m)* "Any matter respecting which an order expressly declared by this Regulation to be final, subject to the provisions of s. 151, has been passed." And then clause 2 says: "In all the above cases jurisdiction shall rest with the Revenue authorities only."

If the plaintiff had sought in this case to set aside the settlement made with the defendant, we apprehend we could not give him that relief. But he does not ask for that: what he asks for is the declaration of his right, and recovery of possession of the land from which he has been dispossessed. We think that, having the right to hold the land and to obtain a settlement thereof, his dispossession under the circumstances already mentioned was improper. But the property having already been settled with the defendant by the Revenue authorities on the date when the suit was brought, and the defendant having entered into possession under that settlement, we are unable to interfere with it, and give a decree to the plaintiff for possession. He is, however, in a position in this case to obtain a declaration that he is entitled to a settlement of the lands in question.

We, therefore, direct that the plaintiff be declared entitled to a settlement of the lands in suit, and that the decrees of both the lower Courts be set aside, but, in the circumstances, without costs.

C. D. P. *Appeal allowed.*

NOTES.

[As regards the maintainability of declaratory suits, when settlements are made with third persons, *see* also (1896) 24 Cal., 289; (1911) 15 C.L.J., 241; (1912) 17 C.L.J., 118; (1910) 14 C.W.N., 990.]

[826] APPELLATE CIVIL.

The 30th April, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE RAMPINI.

Nil Madhab Sikdar and others............Plaintiffs

versus

Narattam Sikdar and others............Defendants.*

Lease—Condition restraining alienation—Alienation voluntary or by act of law —Condition for benefit of lessor—Re-entry—Forfeiture—Landlord and Tenant— Transfer of Property Act (IV of 1882), ss. 10, 11, 12, 111, clause (g).

By a clause in a lease it was stipulated that the lessee would not transfer in writing the land leased to him, and that if he did so the sale was to be void. The land was sold to the defendants in execution of a decree obtained against the lessee. In a suit in ejectment by the assigns of the lessors:—

Held, that the condition was void under s. 10 † of the Transfer of Property Act (IV of 1882), no right of re-entry being reserved to the lessors by the lease.

Held, also that the land having been sold against the will of the lessee by the act of a Court, the lessee could not be said to have voluntarily transferred his interest. *Tamaya* v. *Jimapa Ganpaya* (I. L. R., 7 Bom., 262) and *Subbaraya* v. *Krishna* (I. L. R., 6 Mad., 159) approved.

Semble, that where a landlord grants a permanent and heritable tenure in land, he has no estate left in him unless he reserves to himself a right of re-entry or reversion. *Sonet Koer* v. *Himmat Bahadur* (I. L. R., 1 Cal., 391).

* Appeal from Appellate Decree No. 732 of 1889, against the decree of Baboo Parbutty Coomar Mitter, Subordinate Judge of Jessore, dated the 4th of February 1889; reversing the decree of Baboo Monmatha Nath Mookerjee, Munsif of Jhenidah, dated the 26th of March 1888.

† [Sec. 10:—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.]

Condition restraining alienation.

THIS was a suit to recover possession of certain homestead lands comprised within the plaintiff's *kaimi mokarari jama*, which had been leased to one Jai Chandra Kundu by the plaintiff's predecessors in the tenure on the 22nd May 1875 on a permanent *maurasi* lease. The defendants alleged that Jai Chandra Kundu had abandoned the lands, and that they had purchased his interest, which was a permanent and transferable interest in the lands in suit, at a sale in execution of a decree obtained against the lessee.

The Court of First Instance decreed the suit, holding that the *jama* was not transferable. On appeal the Lower Appellate Court held that it appeared upon Jai Chandra's kabuliyat that the [827] tenure was permanent and hereditary, and was therefore transferable according to law. The kabuliyat contained a proviso that the sale of the *jama* by the grantee will be void, but did not empower the grantor to take possession in case the *jama* should be sold. Upon the construction of the kabuliyat the Lower Appellate Court held that ss. 10 and 12 * of the Transfer of Property Act (IV of 1882) did not apply to the case, no condition for re-entry being expressly reserved for the benefit of the lessors, and that the clause restricting alienation was therefore inoperative, and dismissed the plaintiff's suit. From this decision the plaintiffs appealed.

Dr. *Rashbehari Ghose* for the Appellants.

Baboo *Mohini Mohun Roy* for the Respondents.

The judgment of the High Court (PETHERAM, C. J., and RAMPINI, J.) was as follows :—

In this case the plaintiffs are tenure-holders, and they seek to eject the defendants from some *bastu* land which was leased by the plaintiff's predecessors in the tenure to one Jai Chandra Kundu by a registered lease on the 9th Joisto 1282 or 22nd May 1875. The lease is a permanent and *maurasi* one at a fixed rent of Rs. 2-8 per annum, and in the kabuliyat executed by Jai Chandra Kundu there is a clause by which he stipulates that he will not transfer in writing in any way to any person the aforesaid *bati* (or homestead land), adding—" If I do so, it (*i. e.*, the transfer) shall become void." The land was, however, in 1879 sold in execution of a decree obtained against Jai Chandra Kundu, and the defendants then purchased it and have since then been in occupation of it. The plaintiffs accordingly contend that the covenant in the lease restraining the lessee from alienation has been broken, and that they are therefore entitled to re-enter and eject the defendants from the land. The Lower Appellate Court decided against the plaintiffs, and they now appeal to this Court.

We are, however, of opinion that the plaintiffs are not entitled to eject the defendants, as the lease contains no clause giving the lessors a right of re-entry or providing that the lease shall become void in case of a breach of a covenant against alienation. There being no such proviso in the lease, the condition against alienation cannot be said to be for the benefit of the lessor, and hence it is void under the provisions of s. 10, Act IV of 1882, and the

* [Sec. 12 :—Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.]

[828] lease cannot be said to have determined under the provisions of s. 111,* clause (*g*) of the same Act.

It has been pressed upon us by the learned pleader for the appellant that in the case of occupancy raiyats a landlord has always the right of re-entry when the raiyat abandons the land leased to him—*Bibi Suhodra* v. *Smith* (12 B. L. R., 82; 20 W. R., 139); *Narendro Narain Rai* v. *Ishan Chandra Sen* (13 B. L. R., 274; 22 W. R., 22); *Dwarka Nath Kisra* v. *Murrish Chandra*, (I. L. R., 4 Cal., 925). But the original lessee in this case was not an occupancy raiyat, and the subject of the lease is not agricultural land. Moreover, it seems doubtful whether, when a landlord grants a permanent and heritable tenure in land, he has any estate left in him, unless he reserves to himself a right of re-entry or reversion; for it has been held in the case of *Sonet Koer* v. *Himmat Bahadur* (I. L. R., 1 Cal., 391) that in the case of the grant of an absolute hereditary *mokarari* tenure it will, on failure of heirs of the lessee, escheat to the Crown, and will not revert to the original grantor or his heirs.

We are further of opinion that even if the lessor had provided in the lease for a right of re-entry in case of a breach of the covenant against alienation, no such breach as would entitle the lessor to re-enter can in this case be said to have been committed.

In the kabuliyat executed by Jai Chandra Kundu, he merely stipulates not to transfer in writing the land leased to him; but when the land has been sold against his will by the act of a Court, as in this case, we do not think that he can be said to have voluntarily transferred in writing the land forming the subject of the contract between him and the plaintiff's lessor. (See *Tameya* v. *Jimapa Ganpaya* (I. L. R., 7 Bom., 262), and *Subbaraya* v. *Krishna* (I. L. R., 6 Mad., 159.)

We accordingly dismiss the appeal with costs.

A. A. C. *Appeal dismissed.*

NOTES.

[A clause of re-entry is required in these cases :—28 All., 400; 21 Bom., 195; 18 Bom., 603; 14 C.L.J., 585; 36 Cal., 745; see also 26 Mad., 157; 29 Cal., 363. In 7 C.L.J., 309 the case there was treated as one of implied surrender.]

Determination of lease. *[Sec. 111 :—A lease of immoveable property determines—

* * * * *

(*g*) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case he lessor or his transferee does some act showing his intention to determine the lease :]

[829] APPELLATE CIVIL.

The 26th May, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Rubiun-Nessa...... .....Plaintiff

versus

Gooljan Bibee and others............Defendants*.

Bengal Tenancy Act (VIII of 1885), section 149—Suit by third party claiming rent paid into Court in rent suit, nature of—Title suit.

The object of section 149 of the Bengal Tenancy Act is to prevent tenants being harassed when disputes arise between rival claimants to the land in respect of which the rent is due. In a suit, therefore, under clause (3) of section 149 the plaintiff is entitled to have the question of title as well as that of possession tried, and to obtain the injunction therein mentioned. *Jagadamba Devi* v. *Protap Ghose* (I. L. R., 14 Cal., 537) referred to and explained.

THIS was a suit arising out of a rent suit brought by the defendant No. 1 against the defendant No. 2. The latter denied the relationship of landlord and tenant, and alleged that the rent was due to the plaintiff, upon whom a notice was accordingly served in terms of section 149, clause 2 of the Bengal Tenancy Act (VIII of 1885). The plaintiff now sued to obtain an order under clause (3) of that section to restrain payment out of the money deposited by defendant No. 2, and to direct payment of the said money to herself, upon establishment of her right to the land in the occupation of the defendants No. 2 and No. 3, the plaintiff alleging a title to the same derived from her husband, the defendant No. 4.

The Court of First Instance held upon the evidence that the plaintiff had clearly established her title to the land in question as falling within her husband's admitted share in the mehal and as having been purchased by her from him, and decreed the suit in her favour The Lower Appellate Court remarked as follows :—

"The first Court considered and tried the suit as a title suit raising several issues. In the case of *Jagadamba Devi* v. *Protap Ghose* (I. L. R., 14 Cal., 537) it has been held by the High Court that such a suit is [830] not a title suit. The object of it, it appears from the clause, is to obtain an order restraining payment of the deposited money to the plaintiff in the rent suit. The only legitimate issue therefore in such a suit of a summary kind is in my opinion whether the plaintiff is entitled to restrain the payment to the defendant No. 1 of the money deposited by the tenants . . . . In a case like this the question of the conflicting titles of the hostile parties ought not, I think, to be gone into. Before the plaintiff can succeed, she is bound to prove that she has been actually and in good faith in receipt of the whole of the rent from the tenants, and if she fail to prove this the present suit ought to fail."

The Lower Appellate Court held upon the evidence that upon this ground the plaintiff's suit ought to fail, but expressly abstained from deciding any

* Appeal from Appellate Decree No. 1342 of 1889, against the decree of Baboo Bhagwan Chunder Chatterjee, Subordinate Judge of Chittagong, dated the 22nd of April 1889, reversing the decree of Baboo Paresh Nath Chatterjee, Munsif of Sitakund, dated the 21st of April 1888.

question of title. From this decision the plaintiff appealed to the High Court on the ground that the lower Court had misapprehended the ruling cited, and had erred in restricting the enquiry to the question as to who was in actual receipt of the rent, the real question being as to the title to the land.

Mr. *M. L. Sandel* for the Appellant.

Baboo *Akil Chunder Sen* for the Respondents.

The **judgment** of the High Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

Petheram, C.J.—This is a suit which was brought in consequence of money having been paid into Court by a tenant under section 149 of the Bengal Tenancy Act. One of the defendants to the present suit sued a ryot to recover some rent. The ryot stated that the rent was claimed by the present plaintiff, and paid the amount into Court under section 149. When that was done, the plaintiff brought the present suit against the defendants to establish her right to the land in respect of which she said that the rent was payable to her.

The matter came before the Munsif. He went into the matter and decreed the plaintiff's claim. The defendants appealed to the Subordinate Judge, and the Subordinate Judge has dismissed the plaintiff's suit, not because he found that the plaintiff was not entitled to the rent as an incident to the title to the land, but because he says you have not proved that you had been in possession in the sense that you were getting this rent from these **[831]** tenants for the last five years, and he refused to go into the question of title at all, relying upon the case of *Jagadamba Devi* v. *Protap Ghose* (I.L.R., 14 Cal., 537).

In that case the Judges held, for the purposes of stamp duty, that that was not a title suit, and that was all they held. That, no doubt, was a suit which was brought to determine which of two parties was entitled to the money paid into Court under that section; but we do not know what the form of that suit was, or in fact anything more than that the Judges considered that the suit was not a title suit. That does not determine that no suit which is brought under circumstances such as these can be a title suit, or that the plaintiffs in a suit to establish their right where the matter has come into dispute by reason of another rent suit, and of the money having been paid into Court, may not go into their title. It seems clear to me that the object of section 149 was to prevent tenants being harassed where disputes arise between rival claimants to the land in respect of which the rent is due, and consequently whether the dispute between such parties is a dispute as to title, or a dispute as to possession only, they are at liberty to have that tried, and in the suit in which that is being tried to obtain the injunction which is mentioned in sub-section 3 of section 149 of the Bengal Tenancy Act.

For these reasons we think that the Subordinate Judge was wrong in the view which he took of this case, and that the case must be remitted to him for him to consider the matter in all its bearings, and, having regard to title as well as to possession, determine whether the plaintiff or the defendants in the present suit are entitled to this sum of money which has been paid into Court by the tenants.

The costs will abide the result.

A. A. C. *Case remanded.*

[832] ORIGINAL CIVIL.

The 26th May, 1890.

PRESENT:

MR. JUSTICE WILSON.

Nursing Chunder Dawn

versus

Nuffer Chunder Dutt and another.*

Arbitration—Jurisdiction of Court over Arbitrators—Civil Procedure Code (Act XIV of 1882), ss. 508, 516.

When a Court has referred a suit to arbitration it has jurisdiction over the arbitrators to compel them to give up documents filed before them as exhibits during the course of the arbitration, and to return the original records of the suit which may have been handed to them. Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators.

THE plaintiff sued to have a declaration of his right to a share in a certain trading partnership, for a dissolution of such partnership, and for the usual partnership accounts to be taken by the Court, and for a decree for such amount as might be found due to him from the defendants on the taking of such accounts.

The plaint was filed on the 21st August 1888, and the defendants in due course appeared and filed a joint written statement.

On the 6th December 1888 the case came on for hearing in the presence of counsel for both the plaintiff and the defendants, and an order was made referring all matters in difference in the suit between the parties to the final decision of Mahomed Haniff and Gour Chunder Dutt, who by the order were directed to make their award in writing and submit the same to the Court, together with the proceedings, depositions, and exhibits in the suit, within one month from the date of the order, or within such further extended time, not exceeding six months, as they might allow themselves by endorsement in writing on an office copy of the order. The order also contained the usual provision for the appointment of an umpire, and conferred on the arbitrators and the umpire the usual powers to examine witnesses, etc., and also a direction to the Registrar to deliver over to the arbitrators the original records of the suit.

The order was drawn up and filed on the 31st December 1888, and served on the arbitrators who took up the arbitration and by endorsement on the office copy of the order on the 5th January [833] 1889 extended the time within which to make their award till the 5th June 1889. On the 20th of February 1889 the arbitrators appointed an umpire, and on the 4th June 1889 they further extended the time within which to make their award till the 5th July 1889.

The original records of the suit were, in compliance with the terms of the order, handed to the arbitrators, who proceeded with the reference, and held several meetings, in the course of which various books of account and documents were put in and filed before them as exhibits.

On the 8th July 1889 an order was made by the Court in the suit extending the time for the making and filing of the award till the 5th September

* Motion in Original Civil Suit No. 158 of 1888.

1889, and after the last mentioned order was passed the arbitrators held various other meetings, making some 35 meetings in all held in the course of the arbitration.

Before any award was made the parties amicably settled all questions at issue between them in the suit, but such settlement was not recorded in Court until after the notice of the present motion was given, and after the motion had in fact been brought on for hearing and adjourned.

On the 26th April 1890 a notice was served on the arbitrators and the plaintiff, at the instance of the defendants, of an application to the Court for an order directing the arbitrators to deliver up to the defendants, or their attorney, or to the Court, the papers, books, and documents filed by the defendants as exhibits in the course of the hearing before the arbitrators, and to pay the costs of the application. The application was based on the proceedings in the suit and a joint affidavit of one of the defendants and a clerk in the employment of the defendants' attorney.

The affidavit, after setting out in detail the proceedings referred to above, stated that the arbitrators had agreed to act as such without remuneration, and that neither the defendants nor the plaintiff were indebted to either of them, and went on to set out certain correspondence which had passed between the arbitrators and the parties through their respective attorneys, in which the former claimed their fees and complained of the settlement being made behind their backs, and the latter made charges of incompetence, irregularities, and fraudulent conduct on the part of [834] the arbitrators. These charges, however, were not gone into at the hearing of the motion. The affidavit also set out correspondence between the defendants' attorney and the arbitators, in which the former demanded the return of the books and documents the subject-matter of the present application, and in which the arbitrators expressed their willingness to comply with such request, and went on to state that the defendants had sent to take delivery of them, but had failed to get them, and to describe the various unsuccessful attempts made to obtain them.

On the notice of motion being given, the arbitrator, Mahomed Abdul Haniff, appeared to contest the application and filed an affidavit in reply, in which the various charges referred to above were denied, and in which he denied that he and his co-arbitrator had ever consented to act without remuneration, and stated that they had been always ready and willing to proceed with the arbitration, but had been prevented from doing so by the parties not appearing before them on dates fixed for meetings, and he submitted that the settlement by the parties should not be allowed to deprive him of his rights under the order of reference, and that he was entitled to be paid his fees for the meetings which had been held.

On the motion coming on to be heard—

Mr. *Bonnerjee* appeared on behalf of the Defendants.

Mr. *Pugh* for the Plaintiff.

Mr. *Bonnaud* on behalf of Mahomed Abdul Haniff.

The other Arbitrator, Gour Chunder Dutt, did not appear.

Upon Mr. *Bonnerjee* moving, the Court raised the question as to whether it had any power to make an order of the kind asked for against an arbitrator, and at the suggestion of Mr. *Bonnerjee* the motion was allowed to stand over.

During the interval an application was made to the Court on behalf of the plaintiff to have the settlement of the suit recorded.

On the 15th May the motion came on to be heard, the same Counsel appearing.

Mr. *Bonnerjee.*—The Court has jurisdiction to make the order asked for. The order of reference directs the arbitrators to submit the proceedings, depositions, and exhibits, with their award to the Court. The original record of the suit was directed to be made over to the arbitrators, and was made over to them, and the [835] Court must have the power to order that to be returned to itself. The arbitrators having taken up the arbitration under the order of reference, must be bound by and obey its terms. If they had refused to act, as it was open to them to do, the Court would then have had no jurisdiction over them, but by voluntarily accepting the burden of the reference, they must obey the order. Section 516 * of the Code provides that arbitrators shall cause their award to be filed in Court *together with* any depositions and documents which have been taken and proved before them. In *Fitzpatrick* v. *Macnaghten* (21 W. R., 211), PHEAR, J., held that, under the corresponding provisions of Act VIII of 1859, the Court which had referred a case was vested with the jurisdiction to control and direct the proceedings of the arbitration. Section 514 † of the present Code provides that the Court may make an order superseding the arbitration in certain cases, and in such case proceed with the suit itself, and to do that the Court must necessarily be clothed with power to compel the record and documents being brought back into Court. In the case of *Joy Mungal Singh* v. *Mohun Ram Marwaree* (12 W. R., 397; see pp. 401-402), NORMAN, J., in noticing the conduct of one of the arbitrators in allowing certain books to be removed from the record, states as follows:— "The documents were entrusted to him by the Court and it was his plain and simple duty to return them to the Court." It is clear, therefore, that an arbitrator owes a duty to the Court in respect of documents entrusted to him by the Court, or filed by the parties, and this case shows that the Court has exercised jurisdiction over arbitrators. [WILSON, J.—It does not appear from the report of that case on whom the order was made.] It would seem from the concluding portion of the judgment that all the books and exhibits, together with the proceedings, were ordered to be brought into Court with the award, and that would seem to point to the order being made on the arbitrators. In *Jagat Sunderi Dasi* v. *Sonatan Bysak* (5 B. L. R., 357) the Court exercised jurisdiction over the surviving arbitrator, and NORMAN, J., stated that the arbitrator ought not to make over the proceedings, depositions, and exhibits in the suit to one of the parties, but that it would be his plain duty to transmit them to the Court. [836] In *Rambullub Pal* v. *Ramanando Pal* (Suit No. 63 of 1885, unreported), notice was given to the arbitrators to show cause why certain documents should not be returned by them to the Court, and the order was made, but in that case the arbitrators appear to have submitted themselves to the jurisdiction of the Court, and the present question was not raised. All these cases, however, show that here, where we are governed by the provisions of the Civil Procedure Code, arbitrators owe a plain duty to the Court, and consequently the Court has jurisdiction to make the order asked for.

Award to be signed and filed.

* [Sec. 516:—When an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.]

Extension of time for making award.

Supersession of arbitration.

† [Sec. 514:—If, from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the suit.]

Counsel then went into the merits of the case, and submitted that the order asked for was one which should be made.

Mr. *Pugh* supported Mr. *Bonnerjee*, and contended on the merits that the order ought to be made, and that the jurisdiction contended for was clearly a salutary one, and one that should be exercised.

Mr. *Bonnaud*.—The Court has no jurisdiction to make the order asked for—

1st—Because it has no summary jurisdiction over arbitrators.

2nd—Because the parties having, after the order of reference, settled the case, there is no suit pending before the Court in which any order can be made. The parties have, by their own act, put an end to the arbitration, and thereby divested the arbitrators of their character as such, and have therefore rendered it impossible for any order to be made against them.

3rd.—When matters in dispute in a suit have been referred by consent to arbitration the effect of the reference is, not only that the suit in Court is abandoned, but also that the Court is divested of all jurisdiction in the suit in all matters except one, namely, to deal with the award when made and filed in Court. As no award has been or could be made in this case, the Court has no jurisdiction to make any order such as that asked for.

The cases cited by Mr *Bonnerjee* have no application to the present matter, as they are cases in which the awards of the arbitrators have been filed in Court, and confirmed by the Court, the Court thereby having jurisdiction to deal with them. The case here is totally different, for the award could not be made in consequence of the parties having settled their disputes out of Court and without notice to the arbitrators, thereby rendering them *functi officio*.

[837] Again, the reference to arbitration having been made by an order of Court and with the consent of the parties, all that remains for the Court to do is to pass orders under ss. 513 and 514 of the Code of Civil Procedure, namely, "summoning witnesses," "enlarging the time for making the award," &c., all of which duties are of a purely ministerial character. The subsequent sections of the chapter only deal with the award when made and filed, and there is no section in the Code which gives the Court jurisdiction over an arbitrator where no award is made or filed, or where, as in the present case, the parties having settled their differences there is no matter in question in the action to be adjudicated upon. Under the circumstances, the case of *Penrice* v. *Williams* (L. R., 23 Ch. Div., 353) is strongly in point. There it was held by CHITTY, J., that the effect of an order, made by consent of the parties, referring the action and all matters in dispute to arbitration, was that there was no longer any action or question in an action pending before the Court, and therefore that the jurisdiction of the Court was exhausted; and that for all practical purposes the action, so far as the Court was concerned, had disappeared in every respect except one, viz., to allow judgment to be entered up according to the award, when made. It was therefore held that the power of the Court to make any judicatory order over the arbitrator was gone. [See also *Woodley* v. *Johnson* (1 Molloy, 394); Chitty's Equity Index, 4th Ed., p. 153; *Sheoambar* v. *Deodat* (I. L.R., 9 All., 168); *Haradhun Dutt* v. *Radhanath Saha* (10 W. R., 398); Russell on Awards, 5th Ed., p. 477.]

There is no summary jurisdiction in the Court over an arbitrator. Here the arbitrators have been brought before the Court on a notice of motion which is irregular. When it has been sought to deal with an arbitrator, the usual practice has been to issue a rule on him to show cause.

In *Dossett* v. *Gingell* (2 M. & G., 870), an arbitrator refused to deliver up the award except on payment of an exorbitant fee, and so compelled the party to pay it, as he did under protest. The Court, on the ground of want of jurisdiction over the arbitrator, refused an application for an attachment to force him to refund the amount [838] found on taxation to be excessive, Tindal, C. J., holding that the Court was not warranted by any principle of law, or by the practice which prevailed, in making the rule absolute against the arbitrator. In the present case the parties have clearly compromised the case with a view to deprive the arbitrators of their fees, and under the circumstances the Court, even if it had the jurisdiction contended for, ought not to make the order asked for.

Mr. *Bonnerjee* in reply.—The case of *Dossett* v. *Gingell* (2 M. & G., 870) does not help the other side, as it was a very different case from the present. Here the arbitrators made no award and could make no award. Had they done so, section 516 gives ample power to the Court to compel arbitrators to bring in the papers and documents filed before them, and, if it could have done so if the award had been filed, it can equally do so if no award be filed. Under section 514 the Court can put an end to an arbitration, and all incidental powers for that purpose must be taken to be conferred on the Court.

The following judgment was delivered on May 26th:—

Wilson, J.—The defendants have applied for an order directing that the arbitrators appointed to decide the matters in difference in this suit should give up certain documents which came to their hands as arbitrators.

The order of reference was made on the 6th December 1888. It prescribed a time, with a limited power of extension by the arbitrators, for the arbitrators to make and file their award, "together with all proceedings, depositions and exhibits." The Registrar was by the same order directed to deliver over to the arbitrators the original records of the suit. By another order of the Court the time for making an award was extended beyond the period to which the arbitrators could have extended it. Ultimately the extended period expired without any award being made, and the parties have since settled their differences amicably. There remain in the hands of the arbitrators certain documents filed as exhibits while the arbitration proceedings were pending. They do not and could not claim any lien upon the documents or any right to them of any kind. The only question raised is whether the Court has jurisdiction to order the arbitrators to give up the documents.

[839] After an order has been made referring the subject-matter of a suit to arbitration, the Court, by section 508 of the Procedure Code, is precluded from itself dealing with the matter which has been so referred, except in the contingencies and in the modes provided by the Code. But the suit nevertheless continues to be a pending suit; it may in certain events have to be heard by the Court itself; and, while the arbitration proceeds, the Court may have to make orders of various kinds in furtherance of the proceedings.

The arbitrator cannot be compelled by the Court to undertake the reference or to proceed with it or to make an award. But if, and so far as, he acts as arbitrator, he takes upon himself, not only a duty towards the parties, but also, as was pointed out in the case of *Maharajah Sir Joy Mungul Singh* v. *Mohun Ram Marwaree* (12 W. R., 397), a duty to the Court, and this is distinctly the case with respect to documents. Section 516 expressly requires arbitrators who have made an award to file it, together with any depositions and documents which have been taken and proved before them. With regard to documents transmitted by the Court to the arbitrator as part of the record, it was said, in the case already referred to:—"The documents were entrusted to him by the Court, and it was his plain and simple duty to return them to

the Court." As to documents entrusted directly by the Court to an arbitrator, such as the records of the suit, I think it clear that he is bound to return them when his right to keep them as arbitrator comes to an end, whether by the making of his award or by the making of an award becoming impossible; and I see no solid distinction between such documents and exhibits with which he is entrusted by reason of the order appointing him arbitrator and directing exhibits to be filed. This being the duty of the arbitrator, and a duty towards the Court, it follows, in my opinion, that that duty can be enforced by order made upon the arbitrator.

There will be an order directing the arbitrators to deliver up to the Court the documents mentioned in the notice served upon them with costs against Abdul Haniff, who opposed the application.

Application granted.

Attorney for the Plaintiff: Baboo *Kali Nath Mitter.*
Attorneys for the Defendants: Messrs. *Gregory & Moses.*
Attorney for the Arbitrator, Abdul Haniff: Mr. *J. Remfry.*
H. T. H.

[840] ORIGINAL CIVIL.

The 27th May, 1890.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE PIGOT.

Ali Kader Syud Hossain Ali............Plaintiff

versus

Gobind Dass............Defendant.*

Discovery—Interrogatories—Fishing questions—Suit or recovery of land—Title—Defective pleadings—Issues—Code of Civil Procedure (Act XIV of 1882), sections 112, 121—127, 146.

Interrogatories are not, in this country, to be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. Where the pleading of either party is too vague, the Court may call for a further or fuller written statement, or may frame and record issues until the case raised by the pleadings is ascertained with sufficient clearness.

A plaintiff may interrogate with a view to obtain information or admission in support of his own case and this right extends not only to his original case, but also to any answers which he has to make to the defendant's case, subject to the qualification (*inter alia*) that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it.

* Original Civil Suit No. 261 of 1888.

THIS was a motion in support of a summons taken out on the part of the plaintiff to consider the sufficiency of affidavits made by the defendant in answer to certain interrogatories administered to him by the plaintiff.

The plaintiff, the Nawab Bahadoor of Moorshedabad, stated in his plaint that certain tenanted land, situate and numbered 49, Strand Road, 234 and 235, Durmahatta Street, and 3, 4. and 5, Nawab's Lane at Juggernath Ghât in the town of Calcutta, and forming part of talook Sootanutty, was, on the 14th January 1874, and had, for many years prior thereto, been the absolute property of his father, the late Nawab Nazim of Bengal, Behar and Orissa, and the plaintiff became entitled to the said land (together with other property) for his own absolute benefit under and by virtue of an indenture made between his father and himself on the date last mentioned. The plaint further stated that the said land had always been in the occupation of certain persons as the tenants thereof paying rent for their respective holdings from time to time [841] to the person or persons entitled for the time being to receive such rent; that for many years prior to the 30th August 1862 the said land was in the direct possession of the plaintiff's father, and the tenants paid their rents to his agents and servants, and that one of such tenants occupying a portion of the said land on the last-mentioned date and prior thereto was a person of the name of Itcharam, the quantity of land occupied by him being 8 chittacks and the rent paid therefor being Rs. 9-9 per annum.

The plaint further stated that by an indenture dated the 30th August 1862 the plaintiff's father farmed (amongst other property) the said land to one Heeraloll Seal (since deceased) for a period of 15 years from the date thereof, and under and by virtue thereof the said Heeraloll Seal, and after his death his representatives, remained in direct possession of the land until the 30th August 1877, when they made over possession to the plaintiff as the owner of the land, and the plaintiff had been since then and still was in direct possession thereof. The plaintiff after obtaining direct possession proceeded to make a fresh settlement with the tenants, and it was then ascertained that the 8 chittacks of land formerly in the occupation of Itcharam had been increased in area by encroachment upon other lands belonging to the plaintiff to 13 chittacks, and the said 13 chittacks were at the time of the settlement found to be in the occupation of the defendant.

After mentioning the boundaries the plaint further stated that the 13 chittacks of land found in the defendant's possession were numbered as plot 16 in a survey plan prepared under the orders of Government by a special Deputy Collector appointed for that purpose. The defendant on being called upon to come to a settlement with the plaintiff or to give up possession of the land declined to do so, and had since been in possession without paying any rent to the plaintiff. The plaintiff, therefore, prayed for ejectment, mesne profits, and further or other relief.

The defendant Gobind Dass pleaded limitation in bar of suit and, without waiving that objection, further stated that he was the present owner and shebait and mohunt of the Thakoor Ram-Sittah located in a temple standing on a piece of land about 13 chittacks in area (setting out the boundaries), and that he had been in possession of the land and temple and buildings and [842] Thakoor for a period of about forty-five years, and that he had never attorned to or paid rent to the plaintiff or his father, or to any other person.

Upon information and belief the defendant also stated that up to about fifty years ago there had existed on the said piece of land an old temple which was rebuilt about that time by one Rampersaud Hurropersaud at his own expense as a pious act, and that from that time down to the time when the

defendant came into possession one Goomlee Dass had been the shebait and mohunt of the Thakoor, and had been and was in possession of the land and temple and had never attorned or paid rent to the plaintiff or any other person, and that the land and buildings had never been in the occupation of any one of the name of Itcharam. The defendant also denied the possession of Heeraloll Seal, or that any rent had ever been paid to him, and denied the statements contained in the plaint save and except what was expressly admitted by him.

After affidavits of documents had been filed by both parties, the plaintiff applied for, and under the leave of the Court administered certain interrogatories for, the examination of the defendant as to the history of the temple and the other allegations set out in the defendant's written statement, to which the defendant filed an answer objecting to many of the interrogatories on the ground that the matters therein contained were inquisitorial, and related solely to the defendant's case and title, and in no way to the plaintiff's case or his alleged title.

The interrogatories which the defendant objected to answer were as follows:—

"2. State to the best of your knowledge, information, and belief where Rampersaud Hurropersaud named in your written statement resided; whether he is alive or dead, and what connection he had with the land the subject-matter of this suit.

"3 State . . . by whom the said Rampersaud Hurropersaud had it (the old temple) rebuilt, and whether the person or persons rebuilding the same is or are alive or dead, and if alive, where he or they may be found.

"5. State, similarly, under what circumstances you obtained possession of the 'said land and temple and buildings and Thakoor' [843] mentioned in the said second paragraph of your said written statement.

"6. State, similarly if you were ever appointed shebait and mohunt of the Thakoor mentioned in the said third paragraph of your said written statement. If aye, state to the best of your knowledge, information, and belief by whom were you so appointed, and when and how was such appointment evidenced.

"7. If the said appointment was evidenced by any instrument in writing, state to the best of your knowledge, information, and belief in whose power, possession, or control such instrument now is, or in whose possession, power, or control you last saw the same.

"8. If you state in answer to the latter part of the 6th interrogatory that such appointment was not evidenced by any writing, then state to the best of your knowledge, information, and belief in whose presence was such appointment made, and whether the person or persons in whose presence such appointment was made is or are alive or dead, and if alive, where he, she, or they may be found.

"11. State to the best of your knowledge, information, and belief how old you were when you obtained possession of 'the said land and temple and buildings and Thakoor.'"

The plaintiff applied for a summons to compel the defendant to answer the above interrogatories fully and sufficiently.

At the hearing of the application, Mr. *Pugh* and Mr. *Ameer Ali* appeared for the plaintiff and Mr. *Dunne* for the defendant. The Court (WILSON, J.) after hearing arguments on both sides decided to have the matter re-argued before a Bench of two Judges, the points raised being of considerable importance.

On the 29th April the Court (WILSON and PIGOT, JJ.) sat to hear the further arguments.

Mr. *Pugh* and Mr. *Bonnerjee* appeared for the Plaintiff in support of the summons, and Mr. *Dunne* appeared for the Defendant.

Mr. *Bonnerjee.*—This case is different from the usual cases in ejectment. Here the plaintiff as a zemindar is entitled, on finding a person in possession, to claim rent from him. I rely upon the case of *Kripamoyi Dabia* v. *Durga Govind Sirkar* (I. L. R., 15 Cal., 89) and the cases [844] there cited as showing that it is for the tenant to prove that he is not liable for rent. This is a zemindary forming part of talook Sootanutty as set out in the plaint. If I prove that this is my zemindary, then the onus will lie on the defendant. [Mr. *Dunne.*—There is no allegation as to this in the pleadings Part of the talook is vested in the Sobha Bazar Rajahs.] These interrogatories are preliminary to the plaintiff proving his case. The presumption I claim will only arise on my proving that the land is within my zemindary. The principle enunciated in *Lyell* v. *Kennedy* (L. R., 8 Ap. Ca., 217) clearly lays down a proposition entitling me to an answer here. There is no difference between an action in ejectment and any other action. That case is also an authority that whether the plaintiff claims on legal or equitable grounds, his right is the same. I rely on the case of the *Attorney-General* v. *The Corporation of London* (2 M. & G., 247) to show that a plaintiff may administer interrogatories in support of his own case, or to repel the defendant's case, or to obtain admissions from the defendant, and he is entitled to ask the defendant what his defence is and the manner in which he means to support it, but not to see the proofs by which his case is to be established. [PIGOT, J.- He is to be confined to establishing his own substantive case, and cannot seek a discovery of the evidence on the other side—*vide* the remarks of KAY, J., in *Bidder* v *Bridges* (L. R., 29 Ch. D., 29, 34).] We want to discover, not his proofs, but the nature of his defence, and I can repel his defence by showing that some one else was in possession as my tenant, and that he holds from him. To make his title stronger than that of the defendant the plaintiff may interrogate as to everything but evidence. In *Lyell* v. *Kennedy* (L R., 8 Ap. Ca , 217) Lord SELBORNE at page 225 refers to the two cardinal rules as laid down by Wigram on Discovery, 2nd Ed., 1840, p. 14, and I rely upon his statement of the law (pp. 223-229), and Lord BRAMWELL goes even further (pp. 229-230). Interrogatories 2 and 3 are relevant to the plaintiff's case. The language the defendant has used in refusing to answer is not sufficient according to the authorities —*Minet* v. *Morgan* (L. R., 8 Ch. Ap., 361). He should allege that they do [845] not go to support the plaintiff's case The case of *Towne* v. *Cocks* (L. R., 9 Ex., 45) is also in my favour. If limitation is set up the plaintiff is entitled to ask the defendant when he came into possession. The cases are to be found collected in Sichel and Chance on Discovery, at pp. 94-99. [PIGOT, J., referred to the remarks of JESSELL M. R. in *The Attorney-General* v. *Gaskill* (L. R., 20 Ch. Div., 519) at p. 527.] I would also refer to the case of *Bemolemoney Dassee* v. *Hullodhur Bulluh* (Boulnois, 618), where Lord COTTENHAM'S observations in *The Attorney-General* v. *The Corporation of London* (2 M. & G., 247) are cited with approval.

Mr. *Dunne* for the Defendant:--The principle has never been decided in any of the cases cited that the plaintiff is entitled to know more than a bare statement of what the defendant says his case is. The rule is fined down in *The Attorney-General* v. *The Corporation of London* (2 M. & G., 247) at p. 262, and even there all that was decided was that the plaintiff was entitled to obtain admissions and information from the defendant which would prove the

plaintiff's own case. In that case no title of any kind was pleaded by the defendant, and, as has been pointed out in *Horton* v. *Bott* (2 H. & N., 249), which is expressly in point in this case, *The Attorney-General* v. *The Corporation of London* was decided on special grounds. The rule laid down in *Lyell* v. *Kennedy* (L. R., 8 Ap., Ca., 217) does not affect the question here, as all that was there laid down was that in an action of ejectment the plaintiff is entitled to the discovery of matters relevant to his own case, and it simply extends to actions in ejectment the same right to interrogate as was laid down in *The Attorney-General* v. *Gaskill* (L. R., 20 Ch. Div., 519), as existing in an action other than in ejectment. Here the plaintiff wishes to know how we make out our title, and his interrogatories are entirely directed to that object, and are of an inquisitorial or fishing character. *Horton* v. *Bott* (2 H. & N., 249) is distinctly approved of in *Lyell* v. *Kennedy* (L. R., 8 Ap., Ca., 217), and is stated to have been rightly decided, and it is an express authority for the proposition that a plaintiff in ejectment is not entitled to interrogate as to the title of the defendant in possession. As to the case of *Towne* v. *Cocks* (L. R., 9 Ex., 45) it is referred to in the arguments in *Lyell* v. *Kennedy* (L. R., 8 Ap. Cal., 217), and if it can be said to be in conflict with [846] *Horton* v *Bott* (2 H. & N., 249) it must be taken to have been overruled to that extent. The case of *The Attorney-General* v. *Gaskill* (L. R., 20 Ch. Div., 519) was not a case of ejectment, and goes no further than to show that the plaintiff is entitled to discovery of material facts which are part of and tend to prove his own case. *Minet* v. *Morgan* (L. R., 8 Ch. Ap., 361) is no authority for the proposition that our answers should expressly state that these matters do not support the plaintiff's case. That was a case of the right to discovery by the defendant, and the question was not as to whether the plaintiff was compellable to answer as he did, but whether, having made certain statements, they afforded a sufficient answer to the discovery claimed. The case of *Emerson* v. *Ind Coope & Co.* (L. R., 33 Ch., Div., 323) is also a case of discovery, and shows that it is sufficient to answer that the matters in question relate solely to the defendant's case, and the plaintiff is not thereupon entitled to discovery for the sole purpose of showing that the defendant has not a title. In that case also the defendants relied upon their possession, as we do here. In *Ivy* v. *Kekewick* (2 Ves. Jr., 679) the demurrer was allowed on the ground that it was a fishing bill to know how a man made out his title as heir, and the defendant was not obliged to tell the plaintiff how he was to make it out. In *Bidder* v. *Bridges* (L. R., 29 Ch. D., 29), KAY, J., after referring to Wigram on Discovery and most of the authorities cited in the present case, disallowed the summons, saying that the interrogatories were in effect directed to the discovery of the evidence by which the plaintiffs intended to prove their case at the hearing. I submit that these interrogatories are of the same nature, and this furnishes a conclusive answer to the application.

Mr. *Pugh* in reply :—The rule is correctly stated in *The Attorney-General* v. *Corporation of London* (2 M. & G., 247) at pp. 256 and 263 of the report. Some of the interrogatories are open to objection, but we are entitled to get admissions, or to repel the defendant's case, or to support our own. I contend that I am entitled to know not only the nature of the case, but the facts on which the defendant relies, in order that I may know what case I have to meet—not the evidence, but what the defence is. *Eade* v. *Jacobs* (L. R., 3 Ex. D., 335). We are entitled to know the facts.

[847] The **judgment** of the Court (WILSON and PIGOT, JJ.) was delivered by

Wilson, J.—The plaintiff in this suit seeks to recover a plot of land and sets out his alleged title to it in the plaint. The defendant, in answer, relies

upon the law of limitation as a bar to the plaintiff's claim and also asserts a title in himself, the particulars of which are given in the written statement. The plaintiff obtained leave to interrogate the defendant, and filed his interrogatories accordingly. The defendant, by his affidavit, answered certain of the interrogatories, and objected to others as being questions which he was not bound to answer. Those objected to are the second, part of the third, part of the fifth, the sixth, seventh, eighth, and eleventh. The matter comes before us on a summons taken out by the plaintiff to consider the sufficiency of the answers. And the question is whether the defendant is bound to answer the interrogatories to which he has objected. As to some of these interrogatories it was admitted by the learned Counsel for the plaintiff that they could not be supported, for it was admitted that their effect was to ask the defendant by what evidence he intended to support his case. The rest of the interrogatories were insisted upon. It is not necessary to refer to the questions in detail: it is enough to say that they have all one characteristic in common. They all refer to, and are based upon, not matters alleged in the plaint as part of the case of the plaintiff, but matters alleged in the written statement as part of the case of the defendant.

It was sought to support these interrogatories on two distinct grounds. First, it was contended, on the strength of English authorities, that a plaintiff may interrogate a defendant in order to ascertain with sufficient clearness, and in sufficient detail, what the case of the defendant is which he has to meet at the hearing. Such interrogatories are really framed to anticipate or supply defects of pleading. Interrogatories for this purpose have undoubtedly been frequently allowed in England; but this has been the result of the systems of pleading and procedure prevailing in English Courts of several kinds. The system of procedure in this country differs widely from anything that has ever prevailed in England, and under the Procedure Code two modes are specially provided for [848] meeting the difficulty in question. If the pleading of either parties is too vague, the Court may require him to file a further and fuller written statement under s. 112.* This method is not, so far as we know, in use in this province outside Calcutta; but in this Court it has several times been adopted. The other method provided by the Code is the settlement of issues. By s. 146," at the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to the Court to depend " This is the provision under which, not in this Court only, but in the mofussil as well, the case raised on the one side and on the other, by the plaint and written statement, is ordinarily ascertained with the necessary precision. If, under the system of procedure in force in this country, we were to allow interrogatories to be used by one party in order to ascertain with sufficient clearness the case of the other side, we should, we think, be misapplying the English authorities, following the decisions and overlooking the reasons on which they were based. We should further be introducing a practice wholly

---

No written statement to be received after first hearing. *[Sec. 112.—Except as provided in the last preceding section, no written statement shall be received after the first hearing of the suit:

Provisos. Provided that the Court may at any time require a written statement, or additional written statement, from any of the parties, and fix a time for presenting the same:

Provided also that a written statement, or an additional written statement, may, with the permission of the Court, be received at any time for the purpose of answering written statements so required and presented.]

novel, so far as we know, unnecessary, and likely to prove very inconvenient. Moreover, if in any case such a use of interrogatories were allowable, they would not, we think, be so in this case, for we do not think the written statement is open to exception on the ground of insufficiency of information as to the case set up.

The second ground upon which it was sought to support these interrogatories was this. It was said that a plaintiff may interrogate with a view to obtain information or admissions in support of his own case, and that this right extends, not only to his original case, but also to any answer which he has to make to the defendant's case. With proper qualifications this may be accepted as correct. But, amongst other qualifications, it is always subject to this qualification, that the interrogatories must be directed to a case on which the plaintiff has already determined, and to which he has committed himself. He cannot be allowed to put fishing [849] questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it. If this test be applied, it is clear, we think, that the interrogatories in question are inadmissible. The summons must therefore be dismissed with costs.

The same considerations govern the case of the same *plaintiff* v. *Hurdeb Das*, in which also the summons must be dismissed with costs.

Summons dismissed.

Attorneys for the Plaintiff: Messrs. *Remfry and Rose.*

Attorneys for the Defendant: Messrs. *Swinhoe and Chunder.*

NOTES.

[*See* also (1895) 23 Cal., 117.]

[17 Cal. 849]

APPELLATE CIVIL.

The 28th May, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE RAMPINI.

Satis Chunder Mukhopadhya............Defendant

versus

Mohendro Lal Pathuk, minor, through his guardian, Patu Mondul............Plaintiff*

Evidence Act (I of 1872), ss. 32, clause (6), 35—Certificate under Act XL of 1858—Horoscope—Minority.

A certificate of guardianship under Act XL of 1858 is no evidence of minority under s. 35 of the Evidence Act (I of 1872), being neither a book nor a register nor a record kept by any officer in accordance with any law.

* Appeal from Appellate Decree No. 1082 of 1889, against the decree of J. Whitmore, Esq., Judge of Beerbhoom, dated the 2nd of April 1889, modifying the decree of Baboo Shambhu Chunder Nag, Munsif of Suri, dated the 26th November 1888.

In a suit to set aside a decree on the ground of minority the plaintiff relied upon a horoscope to prove his age. *Held*, following *Ram Narain Kallia* v. *Monee Bibee* (I. L. R., 9 Cal., 613), that the horoscope was not admissible under s. 32, clause 6 of the Evidence Act.

THIS was a suit brought to set aside a decree obtained against the plaintiff on the 3rd April 1888 by the present defendant in a suit upon a bond alleged to have been executed by the plaintiff in favour of the defendant's father, and to have the bond declared invalid upon the ground that the plaintiff at the time of the alleged execution of the bond and at the date of the decree was a minor.

[850] The Court of First Instance decreed the suit, holding that the weight of the evidence upon the issue of minority was in the plaintiff's favour. Apart from oral evidence, the plaintiff relied upon a certificate of guardianship under Act XL of 1858 obtained by the plaintiff's brother on the 23rd February 1884, which was cancelled on the 22nd June 1888, and a fresh certificate granted to the plaintiff's present guardian, Patu Mondul. These certificates declared that the plaintiff would attain his majority in the month of April 1889. The plaintiff also relied on a paper purporting to be a horoscope by one Ram Mohun Gunuk, an astrologer, since deceased, whose handwriting was deposed to by an ex pupil of his. According to this document the plaintiff was born on the 29th June 1868.

The District Judge discarded the oral evidence as vague and inconclusive, but regarded the certificate of guardianship as admissible in evidence under s. 35 of the Evidence Act and the horoscope as admissible under s. 32, clause 6. Upon this evidence he decided in favour of the plaintiff's minority. The defendant appealed to the High Court.

Dr. *Rashbehari Ghose* and Baboo *Nobin Runjan Chatterjee* for the Appellant.

Baboo *Jogendra Nath Bose* for the Respondent.

The **judgment** of the High Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by

Petheram, C.J. (who after stating the facts, continued) —It is contended before us that neither the certificate of guardianship nor the horoscope upon which the District Judge relies, and upon which alone he relies, is evidence in this case for the plaintiff at all.

We think that this contention is well founded, and that neither of those documents is evidence. And first as to the certificate of guardianship. A certificate of guardianship is a document which is issued to a person appointing him the guardian of a certain person on the ground that that person is a minor, and it is said that the document is evidence of the age of that person under s. 35 of the Evidence Act. It is only necessary to read s. 35 to see that it is nothing of the kind. That section relates to entries made in public or official books, registers, or records, which are kept in the performance of a duty specially enjoined **[851]** by the law of the country. This certificate is neither a book nor a register, nor a record kept by any officer in accordance with any law, but is a certificate, as it professes to be, of which there is only this one, and which is not a public record or register of any kind, but is a document issued to a particular person giving to that particular person, and only to him, a particular kind of authority.

Then the next question is with reference to the horoscope. That horoscope has been admitted as coming within s. 32 of the Evidence Act and within clause 6 of that section. That clause makes entries made by deceased persons evidence on questions of relationship, blood, marriage, or adoption, where the

deceased person had some special means of knowledge. As to that it is enough to say that it is not shown that the person who made this horoscope had any special means of knowledge, and that the question which we have to decide is not one either of relationship, blood, marriage, or adoption. That shows that neither of these documents is any evidence at all.

In holding this we are acting in accordance with the view taken by Mr. Justice NORRIS in the case of *Ram Narain Kalha* v. *Monee Bibee* (I. L. R., 9 Cal., 413), and also with our own view of the law. Therefore, we come to the conclusion that the finding of fact, that this person, the plaintiff, was a minor--the Judge having rejected the oral evidence—is supported by no evidence at all, and as his judgment rests upon that finding, the judgment must be set aside.

In doing so we do not wish to be understood as expressing any opinion or as agreeing in the opinion expressed by the learned Judge that the decree obtained against the minor who has been sued without a guardian is a nullity, or that the suit will lie to set that decree aside, supposing all the plaintiff's allegations have been proved.

In the result, this appeal will be decreed and the plaintiff's suit dismissed with costs.

A. A. C. *Appeal allowed.*

NOTES.

[This was followed in (1896) 18 All., 478 as regards the evidentiary value of the certificate. As regards *horoscope*, *see* also (1893) 17 Mad., 134.]

---

[852] CRIMINAL MOTION.

The 27th March and 15th April, 1890.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Romesh Chunder Sannyal............Petitioner

versus

Hiru Mondal and another............Opposite Party.*

Penal Code (Act XLV of 1860), ss. 295, 378, 403, and 425—"Object held sacred by any class of persons—Killing bulls set at large at Sradha, in accordance with Hindu religious usage—"Res nullius"—Property in Brahmini bull—Construction of Acts—Reference to Report of Indian Law Commissioners and of Select Committee—Theft—Criminal Misappropriation—Mischief.

The word "object" in s. 295 of the Penal Code does not include animate objects.

A bull dedicated and set at large at the *Sradha* of a Hindu in accordance with religious usage is not an "object" within the meaning of that section.

* Criminal Motion No. 89 of 1890 against the order passed by Baboo Mobini Chunder Ghosh, Deputy Magistrate of Nattore, dated the 18th of January 1890.

Where such an animal was killed by certain Mahomedans secretly and at night in the presence of none but Mahomedans for the sake of the meat and value of the skin, *held*, that no offence had been committed under s. 295. *Queen-Empress* v. *Imam Ali* (I. L. R., 10 All., 150) followed.

Held further, that such a bull is not "moveable property" within the meaning of s. 378 and 403, or "property" within the meaning of s. 425 of the Penal Code, and could not therefore be the subject of theft, criminal misappropriation, or mischief.

The fact that such a bull receives some attention from the cowherd of the persons who set it at liberty, and is daily fed by him by direction of his employers, and is not used for breeding purposes without their permission being asked, is not inconsistent with a total surrender by those who set it at liberty of all their rights as proprietors. *Queen-Empress* v. *Bandhu* (I. L. R., 8 All., 51) followed. *Queen-Empress* v. *Nalla* (I. L. R., 11 Mad., 145) referred to and commented on.

For the purpose of construing a section of an Act and ascertaining the intention of the Legislature, the Report of the Indian Law Commissioners or a Select Committee appointed to consider a Bill may be referred to. *Queen-Empress* v. *Kartick Chunder Das* (I. L. R., 14 Cal., 721) followed.

IN this case the two accused, who were Mahomedans, were charged with an offence under s. 295 of the Indian Penal Code. It appeared that at the *Adya Sradha* of the mother of Raja Jogendra Nath Rai, of Nattore, which was performed in the [853] year 1888, a bull was dedicated and set at large with the usual ceremonies. After the bull was so dedicated, it was tended by the Rajbari cowherd under the supervision of the Rajbari Sirdar, and he gave it a seer of rice a day and used to drive it away if he found it eating any one's crops. It appeared in the evidence taken in the case, that the bull was used by the villagers for breeding purposes with the permission of the Rajbari people.

The accused were charged with having killed the bull. They were shown to have killed it at night in a straw-field some distance from the village, no Hindu being present. It appeared that the reason for their killing it was to obtain its flesh and skin, the former being eaten and the latter sold.

The Deputy Magistrate discharged the accused under s. 253 of the Code of Criminal Procedure for reasons given in his judgment, which is set out below in the judgment of Mr. Justice NORRIS.

The petitioner, who was the complainant in the Court below, applied to the High Court to have the order of discharge set aside and the case sent back for retrial on the ground that the Deputy Magistrate was wrong in law in holding that s. 295 of the Indian Penal Code had no application to the case.

The application was made by the Advocate-General (Sir *G. C. Paul*), and a rule was issued calling on the two accused to show cause why the order of discharge should not be set aside and the case remanded for retrial.

The rule came on to be heard on the 27th March.

The Advocate-General (Sir *G. C. Paul*) and Baboo *Pramatha Nath Sen* for the Petitioner in support of the rule.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Opposite Party.

The Deputy Legal Remembrancer (showing cause).—The essence of the offence provided for in s. 295 is the intention of insulting the religious feelings of any class of persons. In this case it is clear the accused had no such intention as the bull was killed at night secretly, and their object was to eat the flesh and sell the hide. They were only charged under s. 295, not with theft, criminal misappropriation, or mischief (ss. 378, 403, and 425). It has often been held in this Court that these sections do not apply. A Brahmini bull is "*Nullius proprietas.*" See *Dwarka Moochi* [854] v. *Queen-*

Empress (Criminal Motion No. 86 of 1884, unreported, decided by MCDONELL and FIELD, JJ.), *Queen-Empress* v. *Bandhu* (I. L. R., 8 All., 51), *Queen-Empress* v. *Nihal* (I. L. R., 9 All., 348). It is clear from these cases that no charge of theft, criminal misappropriation, or mischief would lie; and as it is equally clear from the evidence that there was no intention to insult the religious feeling of any one, s. 295* does not apply. [NORRIS, J.—Is there not in the evidence something to show that the complainant claims a proprietary right in the bull?] No, there is no claim of right set up. The bull was let loose to go where it chose. and abandoned by the owner. The dedication of and letting loose the bull, as shown by the Allahabad cases, necessarily involve the surrender and abandonment of all proprietary rights in it.

Then again a bull is not an "object" within the meaning of s. 295. This was decided by all the Judges of the Allahabad Court in *Queen-Empress* v. *Imam Ali* (I. L. R., 10 All., 150). The word "object" as used in the section means "an inanimate object," such as an idol.

The Advocate-General.—This case is one of considerable importance, and although the case of *Queen-Empress* v. *Imam Ali* (I. L. R., 10 All., 150) is no doubt against me, the principle therein laid down has not been followed everywhere, and the word "object" in s. 295 has not been given the restricted meaning put on it by the Allahabad Full Bench. In the case of *Hakim* v. *Empress* (Punjab Record, 1884, No. 27), referred to in the note to *Imdad Katun* v. *Bhagirath* (I. L. R., 10 All., 159), the word was held not to be limited to inanimate objects, but is wide enough to include animate objects which are held sacred. Chapter XV of the Penal Code deals with offences relating to religion, and s. 295 is of a most comprehensive character. There would seem to be no real reason why the destruction of a picture of a monkey which is worshipped should be held to be within the section, while the destruction of a monkey itself, which is equally worshipped, should be excluded. The interpretation put on the section by Sir JOHN EDGE in the case of *Queen-Empress* v. *Imam Ali* (I. L. R., 10 All., 150) is erroneous, and he has misapplied the doctrine of [856] *ejusdem generis* (see Maxwell on Statutes, 2nd Ed., p. 540). Then the word "destroy" in section 295 undoubtedly includes "to kill." There is also a decision of the Madras Court which is opposed to that of the Allahabad Court (*Queen-Empress* v. *Nalla*, I. L. R., 11 Mad., 145). So that on the decided cases we have the Madras and Punjab Courts deciding one way, as against the Allahabad Court deciding the other. Then if we look to see what mischief this Chapter of the Code was intended to provide against, we find that it was certainly not intended to restrict section 295 to inanimate objects. In the notes to the Penal Code prepared by the Indian Law Commissioners published in the year 1837, Lord MACAULAY says in note J to Chapter XV (see pp. 71 and 49)—[NORRIS, J.—I don't think you are entitled to refer to that] In *In re Mew* v. *Thorne* (31 L. J. Bkcy., 87) it was held that this could be done, and the Lord Chancellor there referred to the Commissioners' report made in the year 1854, and to the speech of the Member in the House who introduced the Bill in 1860. [NORRIS, J.—I don't undersand that judgment to lay down that you can refer to speeches of Members of Parliament to show what the definition of a word in a section is.] The Lord Chancellor

* [Sec. 295:—Whoever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons, or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

Injuring or defiling a place of worship, with intent to insult the religion of any class.

states that he does it "for the purpose of gaining assistance in interpreting the words of the law, not that one will be warranted in giving to these words any different meaning from that which is consistent with their plain and ordinary signification, but at the same time it may somewhat assist in interpreting these words and in ascertaining the object to which they were directed," and it is for that purpose I desire to refer to Lord Macaulay's note. (See also *Hawkins* v. *Gathercole* (6 De J.M. and G. 1, see p. 21). Maxwell on Statutes, 2nd Ed., p. 30 *et seq.*, and *The Queen* v. *The Bishop of Oxford* (L. R., 4 Q. B. D., 525, p. 549). [NORRIS, J.--My brother MACPHERSON thinks you are entitled to read it, and although I am of a contrary opinion I think that when one Judge of a division bench thinks so it is enough.] In that note Lord Macaulay expressly refers to the slaughter of a cow in a sacred place at Benares as being a very serious matter and likely to lead to tumult, outrage, and even insurrection, and treats that as one of the offences for which the Commissioners had provided in this Chapter. There can be no doubt **[856]** that a Brahmini bull is looked on as a very sacred object by Hindus (see Manu's Institutes, Chapter VIII, Sloke 242; Colebrooke's Digest, Vol. II, p. 370), and therefore the slaughter of such an animal is clearly an insult to Hindu religion. I submit therefore that the Allahabad decision is erroneous, and that the case does come within s. 295, which should not be restricted to damaging or destroying inanimate objects only.

In addition to this the evidence in this case shows that the parties who set the bull at large still retained their property in the animal, so that it was capable of being stolen, misappropriated, or the subject of mischief, and was not *feræ naturae.*

C. A. V.

The **judgment** of the Court (NORRIS and MACPHERSON, JJ.) was delivered on the 15th April, and was as follows:—

Norris, J.—The facts of this case are as follows:—

At the ceremony of the *Adya Sradha* of the mother of Raja Jogendra Nath Rai of Nattore, which was performed about twenty months ago, a bull was dedicated and set at large after being branded on the hind part. After the dedication and setting at large the Rajbari cowherd tended the bull under the supervision of the Rajbari sirdar; he gave it a seer of rice a day and used to drive it away if he found it eating any one's crops. The bull was used by the villagers for breeding purposes, and there is some evidence to show that it was not so used without permission having been obtained from the Rajbari. Some eighteen months after the bull had been so dedicated and set at liberty, Hiru Mondal, and Modhu Mondal. both Mahomedans, with others killed it. The killing took place at night in a straw-field some distance from the village, and was not witnessed by any Hindu.

Information of the slaughter of the bull reaching the Rajbari, a complaint was made to the Deputy Magistrate, and Hiru and Modhu were sent up for trial under s. 295, Indian Penal Code. The Deputy Magistrate, after taking the depositions of two witnesses called for the prosecution, discharged the accused under s. 253, Code of Criminal Procedure.

The Deputy Magistrate's judgment, so far as it is material to set it out, is as follows:—"It appears that the bull was killed by some **[857]** Mahomedans, including the two accused, for the sake of the meat. It has been held that the word 'object' in s. 295 of the Penal Code does not include animate objects [*Queen Empress* v. *Imam Ali* (I. L. R., 10 All., 150)]; hence section 295, Indian Penal Code does not apply to the present case. Nor do I think that the case comes under the definition of 'mischief.' To constitute the offence

of mischief the act done must be shown to have caused destruction of some *property* or such a change in the property, or the situation of it, as destroys or diminishes its value or utility or affects it injuriously. Now it has been held that a bull so dedicated and set at large is *nullius proprietas* and it is therefore, in my opinion incapable of being made the subject of mischief. For the same reason it is not 'property' which is capable of being made the subject of criminal misappropriation or larceny. [*Queen Empress* v. *Bandhu* (I. L. R., 8 All., 51); *Queen Empress* v. *Nihal* (I. L. R., 9 All., 348)]. No doubt the killing of such a bull is simply outrageous to the religious feeling of a Hindu and specially of one who dedicated it, but the rulings cited above leave me no option but to discharge the accused".

On the motion of the *Advocate-General* we granted a rule calling upon the two discharged persons to show cause why the order of discharge should not be set aside and the case sent back for re-trial.

The rule was argued before us a few days ago; Mr. *Kilby* showing cause and the *Advocate-General* supporting it.

Mr. *Kilby* contended that the evidence conclusively negatived any "intention" on the part of the discharged persons "to insult the religion of any class of persons." The bull, he pointed out, was killed secretly at night at a distance from the village in the presence of none but Mahomedans for the sake of the meat and for the value of the skin which the evidence showed was sold for Rs. 2.

The learned Counsel further contended on the authority of *Queen Empress* v. *Imam Ali* (I. L. R., 10 All., 150) that the bull was not an "object" within the meaning of s. 295, Indian Penal Code; and he relied upon the two other cases decided by the Allahabad High Court referred to by the Deputy Magistrate and upon an unreported case [858] decided by MCDONELL and FIELD, JJ. [*Dwarka Moochi* v. *Queen-Empress* (Criminal Motion No. 86 of 1884, unreported)] as establishing that the bull was not "moveable property" within the meaning of ss. 378 and 403, Indian Penal Code, nor "property" within the meaning of s 425,* Indian Penal Code, and therefore he contended the discharged persons could not properly have been convicted of an offence under either of these sections. The *Advocate-General* contended that the case of *Queen-Empress* v. *Imam Ali* (I. L. R, 10 All., 150) was wrongly decided; that EDGE, C.J., had misapprehended the rule of *ejusdem generis*, and had misapplied it; that the evidence showed that those who had dedicated the bull and set it at large still retained such a "property" in the animal as to make it capable of being the subject of theft, or criminal misappropriation, or mischief.

The case is one of considerable importance, affecting as it does the religious feelings of the Hindu population of the Empire; I have given it the most

*[Sec. 425:—Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public, or to any person, causes the destruction of any property, or any such change in any property, or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief."

Mischief.

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.]

careful consideration, and as the result have arrived at the following conclusion, viz.—

1st.—That the killing of the bull was not a "destroying" within the meaning of s. 295, Indian Penal Code.

2nd.—That the bull was not an "object" within the meaning of the same section.

3rd.—That the bull was not "moveable property" within the meaning of ss. 378 and 403, Indian Penal Code, and could not therefore be the subject of theft, or of criminal misappropriation.

4th.—That the bull was not "property" within the meaning of s. 425, Indian Penal Code, and could not therefore be the subject of mischief.

5th.—That if the killing of the bull was a "destroying," and if the bull was an "object" within the meaning of s. 295, Indian Penal Code, there is no evidence that the discharged persons "destroyed that object with the intention of thereby insulting the religion of any class of persons."

The correctness of the first conclusion depends upon the soundness of the second, for it is clear that if the bull is an "object" within the meaning of the section, the person who kills it "destroys" it. My reasons for holding that the bull is not an "object" within [859] the meaning of s. 295 are the same as those to be found in the judgments of EDGE, C.J., and BRODHURST and MAHMOOD, JJ., in *Queen-Empress* v. *Imam Ali* [I. L. R., 10 All., 150].

I think that by the word "object" the Legislature meant something, "*ejusdem generis*" with a place of worship, such as an idol, or a picture which was the subject of litigation in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (L. R, 16 I. A., 137; I. L. R., 17 Cal, 3); something that is capable of "destruction" in the sense in which that word is ordinarily used, or of "damage," or of "defilement." Had the Legislature intended to make the killing of a dedicated bull an offence under s. 295, I think that they would have used language clearly expressing that intention.

I cannot agree with the Advocate-General that EDGE, C.J., has either misapprehended or misapplied the rule of *ejusdem generis* in construing the section, nor do I think that the passages cited from Maxwell on Statutes support the contention The Advocate-General, in support of his argument as to the intention of the Legislature, referred to the Notes to the Penal Code prepared by the Indian Law Commissioners and submitted by them, to the then Governor-General of India in Council. In note J, being the note on "the chapter of offences relating to religion and caste," the Commissioners say of section 275 of the Penal Code, which corresponds with section 295 of the present Code:—

"We have prescribed a punishment of great severity" (the proposed punishment was rigorous imprisonment for a term which might extend to seven years) "for the intentional destroying or defiling of places of worship, or of objects held sacred by any class of persons. No offence in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a sacred place at Benares in 1809 caused violent tumult, attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable and alarming. We have therefore empowered the Courts in cases of this description to pass a very severe sentence on the offender." The Advocate-General contended that this passage showed that the Commissioners intended that the word "object" should include a cow.

[860] I am unable to place this construction on the passage. What caused "the violent tumult at Benares in 1809" was not the slaughter of the

cow, but its slaughter in a sacred place. The naming of two instances, one the defilement or pollution of a sacred place, the other the pollution of a place of worship, and then the use of the words "cases of this description," so far from helping the learned Advocate-General's contention, seems to me to militate against it.

With reference to the reading of this note, I may observe that when the Advocate-General proposed to refer to it, I was of opinion that he was not entitled to do so; MACPHERSON, J., however, thought that he was so entitled, and so the note was read. I wish to say that upon consideration I think the Advocate-General was entitled to read the note, which seems to stand in much the same position as the Report of the Select Committee on the Evidence Act, which was referred to by the Full Bench in *Queen-Empress* v. *Kartick Chunder Das* (I. L. R., 14 Cal., 721).

In support of the 3rd and 4th conclusions at which I have arrived, I rely upon the judgment of STRAIGHT, J., in *Queen-Empress* v. *Bandhu* (I.L.R., 8 All., 51). That was a case of a "bull dedicated and set at liberty," as was the bull in this case. The learned Judge says:—

"It was not only not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor and had given it its freedom to go whithersoever it chose; it was therefore *nullius proprietas*, and as incapable of larceny being committed in respect of it as if it had been *feræ naturæ*." In *Queen-Empress* v. *Nihal* (I. L. R., 9 All., 348), the same learned Judge again expressed the same opinion.

In opposition to these cases, the Advocate-General relied upon a Madras case, *Queen-Empress* v. *Nalla* (I. L. R., 11 Mad., 145). In that case two persons had been convicted of mischief and criminal misappropriation in respect of a bull described as "the Kamatchi Amman temple bull." On appeal, the Sessions Judge, "having regard to the principle on which the case of *Queen-Empress* v. *Bandhu* (I. L. R., 8 All., 51) was decided, namely, that a bull set at large in accordance with Hindu religious usage, when the original owner abandons all proprietray [861] right in such animal, cannot be the object of larceny, and being of opinion that no material distinction in principle could be drawn between the case of a beast so abandoned by its former owner and dedicated or attached to a temple, not however without considerable hesitation, held the bull in the latter case to be a *fera bestia*, and as *res nullius* to be incapable of being the object of the offences in respect of which the accused were convicted," and quashed the conviction. On the case coming before the Court in the exercise of its revisional jurisdiction, the learned judges, MUTTUSAMI AYYAR and BRANDT, JJ., said:—We do not think it necessary to interfere in revision, not because we agree with the Sessions Judge that there is no material distinction between the case of an animal, property in which is wholly renounced or abandoned, and allowed, in accordance with religious or superstitious usage, to roam at large free from all control, and that of such an animal so abandoned and at large after dedication to a temple, but because the accused have undergone three months' rigorous imprisonment for the offences of which they were convicted. We consider there is a material distinction between the two cases * * * * If on the evidence it appeared that the animal was turned loose after dedication to the temple, and that it was actually or inferentially accepted as so dedicated on behalf of the temple, then, though the animal were allowed to be at large free from all control, it would, *primâ facie*, be the property of the temple."

I fail to see anything in this judgment in the least degree impeaching or questioning the correctness of the law laid down by STRAIGHT, J., in *Queen-Empress* v. *Bandhu* (I. L. R., 8 All., 51). I do not think that the fact that the

bull in this case still receives some attention from the Rajbari cowherd and is daily fed by him by the direction of his employers is at all inconsistent with "a total surrender" by those who set him at liberty "of all their rights as proprietors."

A bull thus dedicated and set at liberty is regarded as sacred by all Hindus, and it is a religious, and meritorious act on the part of strangers even to feed it; but it is peculiarly sacred in the eyes of **[862]** the person who performed the *Sradha* and set the animal at liberty, and he regards it as a moral duty to feed it after it has been set at liberty.

Even if it be true that the villagers do not use the bull for breeding purposes without asking permission of the Rajbari people, I think this is only a matter of courtesy on their part, and ought not to be construed as evidence of any property in the animal remaining in those who set him at large.

In support of the 5th conclusion at which I have arrived, I rely upon Mr. *Kilby's* argument which I have summarised above, and to which I have nothing to add. I am therefore of opinion that the rule should be discharged.

Macpherson, J.—I agree and would discharge the rule.

H. T. H. *Rule discharged.*

NOTES.

[As regards the right to slaughter cows, *see* also (1908) 30 All., 181;

As regards 'animals' being 'objects' within sec. 295, I.P.C., *see* also (1884) P. R., 27; (1888) P.R., 34 where the rulings were different.

As regards referring to statements of objects and reasons etc., this case was dissented from in (1891) 14 All., 145.]

[17 Cal. 862]

CRIMINAL APPEAL.

The 22nd April, 1890.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Jai Narayan Rai

versus

The Queen-Empress.*

Confession—Criminal Procedure Code (Act X of 1882), ss. 164, 364, and 533—Evidence Act (I of 1872), s. 91—Examination of accused—Defect in confession—Confession not recorded in language in which it is given, admissibility of, in evidence.

An accused, when in custody, made a confession to a Deputy Magistrate, in the presence of a Sub-Inspector, and during an investigation being held into a case of murder, under the provisions of chapter XIV of the Criminal Procedure Code. The confession was recorded by the Deputy Magistrate in English, though made in Hindi, which the Deputy Magistrate perfectly well understood and could write. It purported to have been recorded under the provisions of section 164, and was in reply to one question which was set out. The record bore the signatures of the accused and of the Deputy Magistrate, as well as the certificate as required by the section. It occupied about five pages of foolscap. At the trial the Sessions Judge excluded his confession on the ground that, not having been recorded in the language in which it was

* Criminal Appeal No. 223 of 1890 against the order passed by A. C. Brett, Esq., Sessions Judge of Tirhoot, dated the 30th of January 1890.

made, and there being no reason why it should not have been so recorded, the document was inadmissible in evidence. He, however, called the Deputy Magistrate as a witness and admitted in evidence his statement as to what the accused told him. This evidence, which occupied only a few [863] lines, was to the effect that the accused told him he had committed the murder, and on this evidence alone the accused was convicted. On appeal—

Held, that the provisions of section 164 read with s. 364 are imperative as to the language in which a confession is to be recorded, and that section 533 does not contemplate or provide for any *non*-compliance with the law in this respect, and that, therefore, as it was not impracticable to record the confession in Hindi, the Sessions Judge was right in refusing to admit the document in evidence.

Held, further that the Sessions Judge erred in admitting the oral evidence of the Deputy Magistrate as to what the accused told him, as, seeing that he was acting under the provisions of section 164 of the Criminal Procedure Code, the confession was matter which was required by law to be reduced to the form of a document, and therefore, under s. 91* of the Evidence Act, no evidence could be given in proof of such matter except the document, where, as in this case, it was in existence and forthcoming.

Held also, that as the defects in the record could not be cured under s. 533 of the Criminal Procedure Code, and no secondary evidence could be given, no proof of the confession could be given, and the accused must be acquitted.

THE prisoner, Jai Narayan Rai, was charged with the murder of one Mahabir under the following circumstances. It appeared that in the month of September 1889 there had been some rioting going on in the village of Patuha, and during one of these riots a man named Soorji, who was the father of Jai Narain Rai, was killed. A charge was preferred against several persons, including Mahabir, in respect of this riot, and they were committed for trial on that charge. During the investigation of that case, it appeared that Mahabir had stated that he had dealt Soorji a blow on the head which had killed him. After the committal, Mahabir was released on bail by the Sessions Judge, and the night following his release he was killed when he was asleep in the verandah of his house, a deep gash being found in his throat, which, in the opinion of the Civil Surgeon, must have caused death very rapidly and prevented him ever speaking after it had been inflicted. It was alleged that the occurrence took place on the night of the 21st October. On the morning of the 22nd information was sent to the thana, and a Sub-Inspector proceeded to investigate the case. It seemed that the prisoner was suspected of the crime, and in the afternoon a Sub-Deputy Magistrate, who had been sent out by the Sub-divisional officer, arrived at the village and recorded a confession made by [864] the prisoner. The circumstances under and manner in which the

*[Sec. 91 :—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Evidence of terms of written contract.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills under the Indian Succession Act may be proved by the Probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.]

confession was recorded are fully stated in the judgment of the High Court. The day following the prisoner was taken before a Magistrate of the first class and a further statement made by him was recorded, which purported to have been taken under section 164* of the Criminal Procedure Code. This statement was in reply to questions put by the Magistrate and was as follows:— *Q.* "Did you make the statement you made yesterday before the Sub-Deputy Magistrate of your own free will"? *A.* "Yes, of my own free will, and it is correct." *Q.* "Did any one teach you anything"? *A.* "No; no one taught me anything." Both the confession and the statement before the Magistrate were recorded in the English language, and contained the memorandum signed by the respective Magistrates, who recorded them in the form required by section 164. The prisoner was committed for trial on the charge of murder, and at the trial the prosecution called several witnesses and tendered these statements made by the prisoner. The evidence given by witnesses who sought to connect the prisoner with the crime was disbelieved by the Judge, and the above statements were held by him to be inadmissible in evidence. He, however, called the Sub-Deputy Magistrate and recorded his evidence, which will be found in full in the judgment of the High Court. He also called the Joint-Magistrate and recorded his evidence as to the circumstances under which he recorded the statement set out above. The Joint-Magistrate deposed that when he recorded the statement he had the confession said to have been made to the Sub-Deputy Magistrate, before him, but that he probably did not read it over to the prisoner. One of the Assessors found the prisoner guilty and the other considered he ought to be acquitted. The Sessions Judge agreed with the verdict of the former, and convicted the prisoner and sentenced him to transportation for life.

The material portion of his judgment was as follows:—

"The Government Pleader has put into the box a number of witnesses sent up by the committing officer (Narghoon being the principal witness), who say that the prisoner was seen just after he had struck the blow (with a chopper called 'gharasa'), that he was pursued and seized, but got away by struggling and escaped by threats. In putting his case however, he did not rely on this evidence. And he was quite right not to do so. [865] Narghoon's story will not fit in with Ghina's, and I have no manner of doubt that the whole of this direct evidence is manufactured. I believe that the murderer, whoever he was, got clear off without any sort of detection, and that the denunciation of the prisoner was grounded on mere suspicion. The determination of the case turns entirely on the prisoner's confession, and unfortunately the Sub-Deputy Magistrate has not followed the procedure laid down by law. He has recorded the confession in English (though he himself can write Hindi), and I have therefore been obliged to rule that the record is inadmissible. The prisoner was taken to the Sub-divisional Officer himself next day (23rd), and was still in a confessing mood, but curiously enough the opportunity of rectifying the Sub-Deputy Magistrate's

*[Sec. 164:—Any Magistrate not being a Police-officer may record any statement or confession made to him in the course of an investigation under this chapter, or at any time afterwards before the commencement of the inquiry or trial.

Power to record statements and confessions.

Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is in his opinion best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession he shall make a memorandum at the foot of such record to the following effect:—

"I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.]

error was not seized, and all that was asked of the prisoner was whether he had made the 'yesterday's' statement of his own free will and without dictation. The Joint-Magistrate did not apparently even read over the confession to him (see his evidence). On the 11th November the prisoner told the Joint-Magistrate that he had been 'compelled by blows' by the Police, who threatened to dishonour him. To this Court he does not allege that he was beaten (an accusation that he could hardly support), but he says that the police threatened to tie him and his wife and mother together. This procedure, I take it, would be considered very dishonouring.

"As I put it to the assessors, the problem before us is to consider whether the prisoner in telling the Sub-Deputy Magistrate that he killed Mahabir, was speaking the truth or was lying. One assessor is satisfied that he was telling the truth and the other is doubtful. I entirely agree with the former assessor. The prisoner's contention that he was bullied into confessing is manifestly a conventional plea. That he told the Deputy Magistrate that he killed Mahabir is proved to demonstration both by the evidence of that officer and the evidence of the joint-Magistrate, as well as by the prisoner's own statements and pleas. That he was telling the truth when he said so, I have no doubt whatever.

"Then how does the matter stand? It is quite true that we cannot accept the record which purports to have been made under s. 164, Code of Criminal Procedure, by the Deputy Magistrate, and the record made by the Joint-Magistrate does not carry us further, but the position is only thereby reduced to this, that it is the same as if no record had been made, and that the Deputy Magistrate had come into the box and said 'the prisoner told me he killed Mahabir, but I did not write down what he had said.' Is this 'evidence' that the prisoner killed Mahabir? I have no hesitation in saying that it is. The definition of 'evidence' in Act I of 1872 is as follows:—'Evidence means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry, etc.' To put it in another way, 'evidence' means *inter alia* words spoken in order to convince the Court [866] of the existence of facts. I do not think any reasonable man will deny that if *A* tells a Court that *B* told him he had killed *C*, *A* does so in order to convince the Court of the existence of the fact that *B* did kill *C*. This is the case here.

"As I am satisfied that the prisoner told the truth when he told the Deputy Magistrate that he killed Mahabir, I am satisfied that the prisoner did kill Mahabir; and what I have said above will show that I am so satisfied on 'evidence.'"

The prisoner appealed to the High Court against the conviction and sentence, the main ground being that the Sessions Judge should not have admitted the evidence given by the Sub-Deputy Magistrate after holding that the confession itself was inadmissible.

Baboo *Durga Mohun Dass* (for Baboo *Umbica Churn Bose*) for the Appellant.

The Deputy Legal Remembrancer (Offg., Mr. *Leith*) for the Crown.

The nature of the arguments appears sufficiently from the **judgment** of the High Court (MACPHERSON and HILL, JJ.), which was as follows:—

The prisoner has been convicted of the murder of Mahabir Rai on the evidence of a Sub-Deputy Magistrate who deposes to a confession which the prisoner made. His evidence is this—"He (the prisoner) told me that he had killed a man named Mahabir, because Mahabir had admitted to the Magistrate that he had killed his (the prisoner's) father Suroop. He said he had cut the throat of Mahabir in the night with a *gharasa* as he slept on a bed. He pointed out the *gharasa*, which lay on the ground in front of him."

There is no other proof against the prisoner, as the direct evidence which implicated him was disbelieved by the Judge, who says it was not relied on by the prosecution, that he has no manner of doubt it is manufactured, and that the murderer, whoever he was, got clear off without any sort of detection, the

prisoner being afterwards denounced on mere suspicion. There is, however, evidence that the prisoner's father had been killed in a riot which took place some time previously, and that Mahabir, who with others had been committed to the Sessions on a charge of being concerned in it, had stated that he had inflicted the wound which caused his death. That case was still pending in the Sessions Court, and Mahabir and the other accused had been released on bail. The confession to which the Sub-Deputy Magistrate speaks was recorded [867] by him under the provisions of s. 164 of the Criminal Procedure Code, but the recorded confession was rejected by the Judge on the ground that the provisions of that section read with s. 364 as to the manner of recording it had not been complied with, and that it was therefore inadmissible. The Judge in rejecting the recorded confession treats it as if it had never been made and was not in existence. "The position, (he says) is only thereby reduced to this, that it is the same as if no record had been made and that the Deputy Magistrate had come into the box and said 'the prisoner told me that he had killed Mahabir, but I did not write down what he had said.'" He then comes to the conclusion that the confession deposed to by the Deputy Magistrate is true and sufficiently proved

It is contended for the prisoner that if the recorded confession is rejected and put aside oral evidence is inadmissible to prove that he did confess. We think the contention is correct, and that the only confession (if any) which can be proved against the prisoner is the confession which was recorded under s. 164 of the Procedure Code.

There can be no doubt that the Deputy Magistrate was acting under s. 164. At the time when the confession was made, the Police had commenced an investigation under chapter XIV of the Procedure Code, the prisoner was in their custody, the confession was recorded in the presence of the Sub-Inspector, and the Deputy Magistrate purported to act under s. 164. That section, which is part of chapter XIV, provides that when a confession is made to a Magistrate under such circumstances, the confession shall be recorded and signed in a specified manner. It is therefore a matter which is required by law to be reduced to the form of a document; and under s. 91 of the Evidence Act, the only evidence which could be given in proof of such matter is the document itself, for, as this is forthcoming, there is of course no question of secondary evidence.

Section 533* of the Criminal Procedure Code modifies, however, as regards confessions, s. 91 of the Evidence Act. It provides that when, on the tender of a confession recorded under s. 164, it is found that the provisions of that section and of s. 364 have not been fully complied with, the Court shall take [868] evidence that the accused person duly made the statement recorded. That section does not authorise the Court to proceed as if there had been no recorded confession, or to treat such confession as non-existent: it clearly means that the evidence which is to be taken shall be evidence that the accused person duly made the particular confession which was recorded and tendered. If, therefore, a document framed under s. 164 of the Procedure

*[Sec. 533—: If any Court before which a confession or other statement of an accused person recorded under s. 164 or s. 364 is tendered in evidence finds that the provisions of such section have not been fully complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, s. 91, such statement shall be admitted if the error has no injured the accused as to his defence on the merits.]

Non-compliance with provisions of s. 164 or 364.

Code is inadmissible owing to a non-compliance with the provisions of the law, the Court must proceed under s. 533, if the defects are cured by the provisions of that section. If they are not cured, no proof of the confession can be given.

The Judge does not profess to have acted under s. 533: he makes no allusion to it, but apparently considers that the defects in the record of the confession are not cured by it. He has in effect, however, admitted oral evidence of a matter which is required by law to be reduced to the form of a document, although he rejected that document when it was tendered. The Deputy Magistrate does not, it is true, profess to speak to the contents of the document, but there is no pretence for saying that he spoke to any other confession than that which was made to him on the 22nd October, and which he recorded under s. 164. The course which the Judge has followed seems to us not only without authority of law, but opposed to the law as it is in this country. We might also point out the great danger attending it. The recorded confession, which the Legislature has attempted to safeguard in every possible way so as to make it a perfect record of all that the prisoner did say covers five pages of foolscap. The confession as spoken to by the Deputy Magistrate covers four or five lines. The former may or may not amount to a confession : no one can say without reading the whole of it. Yet it is not to be looked at, and the Deputy Magistrate's condensed version of it, possibly for all that is known an erroneous version, is to be accepted.

On this part of the case we have no doubt. But we have assumed so far that the Judge was right in holding that the defects which made the document inadmissible were not cured by the provisions of s. 533 of the Procedure Code. He can hardly have overlooked that section, and we must take it that this was what he intended to find, although he does not expressly [869] say so. The question whether he was right in this conclusion is a much more difficult one. It does not arise on the appeal of the prisoner, who, if he can get rid of the admitted evidence, is of course content to accept the Judge's decision as to the excluded portion ; but the case is before us as a whole, and we think we must deal with it.

The confession which was recorded under s. 164 and tendered in evidence is written entirely in English. There is only one question " Did you kill Mahabir Roy ? " Then follows a long statement covering five pages of foolscap paper. The record bears the signature of the prisoner and of the Deputy Magistrate, and has attached to it the certificate prescribed by s. 164, which is also signed by the Deputy Magistrate. The statement purports, however, on its face to be made on solemn affirmation. The first page is written on the form furnished for the depositions of witnesses, but it may be there was an omission to strike out the words inappropriate to the examination of an accused person or to a confession, although it is singular that while the word "statement" has been substituted for "deposition" and the words "oath or" have been struck out, the words " solemn affirmation " have been allowed to remain. This, however, is a matter which might be cleared up by evidence. Probably no questions were asked, as the recorded confession was rejected as inadmissible. The ground of the rejection was that it was written in English, which was not the language used or understood by the prisoner, although the Deputy Magistrate understood and could write such language.

Section 364 read with s. 164 enacts that the confession shall be recorded in full in the language in which the accused person is examined, or if that is not practicable, in the language of the Court, or English. It is clear

that this provision of the law was not complied with. The question is whether the defect is cured by the provisions of s. 533, which is as follows :—

"If any Court before which a confession or other statement of an accused person recorded under s. 164 or s. 364 is tendered in evidence finds that the provisions of such section have not been fully complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and notwithstanding any thing contained in [870] the Indian Evidence Act, s. 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

The point, so far as we know, has not been definitely decided. In the *Queen-Empress* v. *Viran* (I. L. R., 9 Mad., 224) the confessions were taken down in English, and not in the language in which they were made, but there was in other respects hardly any attempt to conform to the provisions of ss. 164 and 364. PARKER, J., held that the provisions of s. 164 are imperative, and that s. 533 will not render the confession admissible when no attempt at all has been made to conform to its provisions. In the *Queen-Empress* v. *Nilmadhub Mitter* (I. L. R., 15 Cal., 595), which came before a Full Bench of this Court, the question arose but it was unnecessary to determine it. The Chief Justice in delivering the judgment of the Court said with reference to a confession :—"We wish to guard ourselves from being supposed to hold that when answers are made by an accused person in one language and written down in another, unless it was shown that it was impracticable to write them in the language in which they were spoken, s. 164 would be complied with, on the contrary, we think that when such a proceeding is adopted, the statement of the accused would not be recorded under that section read with s. 364, and we have very grave doubts whether the defect could be cured under the provisions of s. 533."

The question, which is not free from difficulty, is therefore still an open one. In our opinion the provisions of s. 164 read with s. 364 are imperative as to the language in which a confession is to be recorded, and s. 533 does not contemplate or provide for any non-compliance with the law in this respect. It is clear from the two sections first mentioned that the confession is to be recorded in the language in which it was made, or, if that is not practicable, in the language of the Court or English. It would be for the prosecution to establish the impracticability, if any existed. Here there was obviously none.

The recorded confession speaks for itself, but the Magistrate is directed to do certain things in connection with it, and to render the [871] document admissible in evidence it must appear on its face that these things have been done. He is directed to sign it, to certify that he believes the confession to be voluntary (and he is prohibited from recording a confession until he has satisfied himself by questioning the person making it that it is voluntary); he is also to certify that it was taken in his presence and hearing, that it was read over to the person making it and admitted by him to be correct, and that it contains a full and true account of the statement made by him. The provisions of the Act would not be fully complied with by the Magistrate if he failed to sign the confession and the certificate, and to certify all the facts which he is required to certify; and it is against omissions of this kind by the Magistrate that we think s 533 was intended to provide a remedy by allowing evidence to be taken that the accused person duly made the statement recorded. The section would only come into operation when a confession or other statement of an accused person recorded under s. 164 or s. 364 was tendered, but a confession recorded, in direct violation of those sections would not be a confession recorded under them; and

the recorded statement, to be proved, must mean a statement recorded in accordance with the provisions of the Act and not in violation of them. It may be argued that if the Magistrate recording the confession records it in a language other than that directed by law, there is on his part a non-compliance with the provisions of the law which is cured by s. 533, as much as non-compliance with any other provisions; but there is a difference between non-compliance, an omission to do something which a person is directed to do, and a direct violation of the law; and, as I have said, the section seems to assume that the confession has been recorded in accordance with the provisions of the law. It is a section which provides a remedy in cases in which certain provisions of the law have not been fully complied with by the Magistrate, and, operating as it does against the accused person and not in his favour, it must be strictly construed. It would, we think, be extremely dangerous so to construe it as to include not only omissions to comply with the law, but infractions of it.

We think, therefore, the Judge was right in holding that the recorded confession was inadmissible, and that it could not be proved; but as we have held that he was wrong in admitting evidence to [872] prove a confession to the Deputy Magistrate, and, as apart from the confession, there is no proof against the prisoner, we must set aside the conviction and direct that the prisoner be acquitted.

H. T. H *Appeal allowed and conviction quashed.*

NOTES.

[This was disapproved of in 18 Cal., 549; 23 Bom., 221; 21 Bom., 495; *See* also 9 C. L. J., 55; 2 C. W. N. 702.]

[17 Cal. 872]

CRIMINAL MOTION.

The 2nd June, 1890.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE MACPHERSON.

Raghoobuns Sahoy............Petitioner

versus

Kokil Singh *alias* Gopal Singh and another..........Opposite Party.*

Sanction to prosecution—"Court"—Collector—Appraisement proceedings—Criminal Procedure Code (Act X of 1882) s. 195., Bengal Tenancy Act (Act VIII of 1885), ss. 69 and 70.

The word "Court," used in s. 195 of the Criminal Procedure Code, without the previous sanction of which, offences therein referred to, committed before it, cannot be taken cognizance of, has a wider meaning than the words "Court of Justice" as defined in s. 20 of the Penal Code. It includes a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter, in order to enable it to arrive at a determination.

A Collector, acting in appraisement proceedings under ss. 69 and 70 of the Bengal Tenancy Act, is a Court within the meaning of the term as there used.

*** Criminal Motion No. 84 of 1890 against the order passed by G. E. Manisty, Esq., Joint Magistrate of Monghyr, dated the 6th of February 1890.**

Where therefore, in certain appraisement proceedings, some rent receipts, which were alleged to be forgeries, were filed by tenants before the Collector, and proceedings were subsequently taken against them before the Joint Magistrate charging them with offences under s. 465 and 471 of the Penal Code.—

***Held*, that the Joint-Magistrate could not take cognizance of the offences charged without the previous sanction of the Collector having been granted.**

THE facts which gave rise to this application were as follows:—

The petitioner, who was in the employment of the proprietor of mouzah Bhadones, in the district of Monghyr, applied to the Collector, under section 69 of the Bengal Tenancy Act, to appraise the crops on the lands of certain tenants, alleging that the rent was taken by appraisement. The tenants resisted the application on the ground that they paid a fixed money rent, and in support of their objection filed some rent receipts. The petitioner alleged [873] that these receipts were forgeries. The Collector, under the order of the Commissioner, proceeded to enquire whether the rent was or was not taken by appraisement; but the Board of Revenue, on the appeal of the tenants, held that he could not do so, and the appraisement proceedings were abandoned.

Meanwhile, however, the petitioner had asked for an enquiry under s. 476 of the Code of Criminal Procedure as to whether or not the receipts filed by the tenants were forged. The Collector directed a Deputy Collector to make this enquiry, but his order was eventually set aside by the Board on the appeal of the tenants.

In December 1889 the petitioner applied to the Collector, under s. 195 of the Code of Criminal Procedure, for sanction to prosecute the tenants in respect of the receipts alleged to be forged. The Collector refused this sanction, remarking, with regard to what had happened, that he was, as Collector, precluded from giving it, and that the petitioner should apply to the Board of Revenue.

In February 1890 the petitioner lodged a complaint in the Magistrate's Court charging the tenants with offences under ss. 465 and 471 of the Penal Code in connection with the rent receipts. The petition of complaint set out the facts above mentioned, and represented that under the circumstances sanction was not necessary. The Joint-Magistrate, before whom the complaint was preferred, refused to entertain it, holding that he could not take cognizance of it until proper sanction had been obtained for the prosecution of the persons charged. The petitioner then applied to the High Court, and obtained a rule, which was served on the Joint-Magistrate and the tenants concerned, calling on them to show cause why the Joint-Magistrate should not be directed to entertain the complaint This rule now came on to be heard.

Mr. *J. T. Woodroffe*, Baboo *Rajendro Nath Bose*, and Baboo *Srinath Banerjee* for the Petitioner.

Baboo *Umbica Churn Bose* and Baboo *Mahabir Sahai* for the Opposite party.

Baboo *Umbica Churn Bose* in showing cause contended that the order of the Joint-Magistrate was correct, and that a Collector, while acting under ss. 69 and 70 of the Bengal Tenancy Act, [874] is a "Court" within the meaning of that term as used in s. 195 of the Code of Criminal Procedure, and that consequently the prosecution could not be proceeded with until the necessary sanction as required by that section had been obtained.

Mr. *Woodroffe* for the Petitioner, in support of the rule, argued that the Collector acting under these sections could not be held to be a Court, and that his duties were of a ministerial nature; s. 70 in fact directing that the appraisement papers shall be filed in his "office." He also referred to the definition of

"Court of Justice" in s. 20 of the Penal Code and to the provisions of s. 4 of the Criminal Procedure Code, to the effect that all words and expressions not defined in that Code are to be deemed to have the meanings attributed to them by the Penal Code when they are therein defined. He further referred to s. 6 of the Criminal Procedure Code, and the classes of Courts there mentioned, and argued that the Court referred to in s. 195 could not include a Collector acting under ss. 69 and 70 of the Tenancy Act. Whenever the Criminal Procedure Code dealt with proceedings in Courts other than those clearly covered by the definition given in the Penal Code, it specifically mentioned such Courts, as for example in ss. 476, 478, 480, where proceedings before Revenue Courts are expressly referred to. He contended therefore that the Collector was not a "Court;" and that this was also manifest from the proceedings, where it appeared that his order directing the enquiry under s. 476 of the Criminal Procedure Code had been set aside by the Board of Revenue, which was certainly not a "Court." He contended, therefore, that he was entitled to the order asked for directing the Joint-Magistrate to entertain the complaint.

The **judgment** of the High Court (NORRIS and MACPHERSON, JJ.) was as follows:—

The question for determination is whether a Collector, acting under ss. 69 and 70 of the Bengal Tenancy Act, is a Court within the meaning of s. 195 of the Criminal Procedure Code.

It arises in this way. (Their Lordships set out the facts above mentioned and continued)—

[875] It is contended in showing cause that the order is right, that the Collector acting under the sections referred to is a "Court" within the meaning of section 195 of the Procedure Code, and that sanction for the prosecution is necessary.

The word "Court" is not defined in the Criminal Procedure Code, and it certainly has a wider meaning than a Court of Justice as defined in the Penal Code. Having regard to the obvious purpose for which section 195 was enacted, we think that the widest possible meaning should be given to the word "Court" as therein mentioned, and that it would include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination.

In the sections of the Tenancy Act referred to, the Collector is empowered to do certain things, some of which may involve the determination of the proportion in which the crop is to be divided, and his order is enforceable by a Civil Court as a decree. He is directed to give the parties an opportunity of being heard, and to make such enquiry (if any) as he thinks necessary. One mode of making an enquiry is certainly to take evidence. We think therefore that he is authorised to take evidence and come to a decision on the matters with which he is empowered to deal, that this brings him within the broad definition of a Court; and that sanction for the prosecution was necessary.

The rule is therefore discharged.

H. T. H. *Rule discharged.*

NOTES.

[*See* also 15 All., 141; 12 Bom., 36; 39 Cal., 958 P.C., 24 Mad., 121, 14 C. W. N., 132.]

[17 Cal. 875]

PRIVY COUNCIL.

The 25th February, 1890.

PRESENT:

LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Hemanta Kumari Debi............Plaintiff

versus

Brojendro Kishore Roy Chowdhry.......... .Defendant.

[On appeal from the High Court at Calcutta].

Second appeal—Ground of second appeal—Civil Procedure Code. s. 584—Substantial error in a First Appellate Court's finding without any evidence to support it.

The Court of First Instance dismissed the suit upon the ground that the right, which it was brought to establish, had been taken away by a [876] compromise, entered into by a guardian on behalf of an infant, party to former proceedings. This was reversed by the First Appellate Court, which decreed the claim, holding it unaffected by the compromise, on the ground that the latter was, in fact, contrary to the interests of the infant. The High Court, on a second appeal, set aside this finding, there having been no proof that the compromise was to the infant's detriment, and affirmed the decree of the first Court.

Held, that the High Court rightly reversed the decree of the First Appellate Court; the above finding, without any evidence to support it, being a substantial error in the proceedings, and good ground of second appeal within the meaning of s. 584, sub-section (c), of the Civil Procedure Code.

APPEAL from a decree (6th August 1886), of the High Court, reversing a decree (30th March 1885) of the Subordinate Judge of Mymensingh.

The suit out of which this appeal arose was brought by the appellant's late husband, Rajah Jotendra Narain Roy, who died pending this litigation, through his late mother Maharani Surat Sunderi Debi, who died in 1888. He claimed enhancement of the rent, upon notice duly given, of a taluk within his zemindari, Pukhoria Jainsahi; and the question was whether he was not precluded from enhancing the rent by the effect of a *raffanama* or deed of compromise, entered into in August 1825 between his great-grandmother, Rani Bhubanmoyi Debi, and the defendant's predecessors in estate.

The Court of First Instance having held that the compromise barred enhancement, the First Appellate Court held that it did not, inasmuch as it had been entered into, as the Court found, against the interests of the infant in regard to enhancement. But this finding, on a second appeal to the High Court, was not maintained, and the decision of the First Appellate Court was reversed. The question on this appeal was whether this was correct.

The circumstances under which the deed of compromise of 1825 was executed are stated in their Lordships' judgment.

The Divisional Bench of the High Court (MITTER and GRANT, JJ.) reversed the decree of the District Judge, and dismissed the plaintiff's suit, holding that it had been finally decided by the Sudder Court in 1856 in previous litigation between the plaintiff's grandfather, Harendra Narain Roy, who sued after the [877] death of his adoptive mother, Rani Bhubanmoyi, to set aside the *raffanama* in question, and the present respondent's predecessors, that Rani

Bhubanmoyi had executed it as his guardian, and that the District Judge should not have allowed that question to be re-opened. They concluded as follows:—
"We are of opinion that although the dismissal of the suit of Harendra Narain Roy, under s. 1, Act XXIX of 1841, did not preclude a fresh suit, still if any such suit be brought, the parties would be bound by the decision of the Sudder Dewani Adawlut so far as it decided any material issue. It was decided by that Court that this *raffanama* was executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. That decision is final. The District Judge in this case is in error in re-opening that question. We must, therefore, take it that the *raffanama* was executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. We find, also, that the same rent fixed by the *raffanama* has been received by successive owners of the zemindari for about fifty-seven years. We further find that since the last suit for enhancement was dismissed in 1858, no attempt was made to repudiate the *raffanama* till 1882. Under these circumstances, following the principle laid down in the case of *Hunooman Pershad Pandey* v. *Munraj Koonweree* (6 Moore's I. A., 393), we think that, having regard to the circumstances set forth above, a very heavy onus lies upon the plaintiff to establish that the *raffanama* in the language of the Sudder Dewani Adawlut used in their judgment of the year 1856, was "clearly and unmistakably" to the detriment of Harendra Narain Roy. But this onus has not been discharged by the plaintiff. The District Judge upon this point refers only to the decree of 1851, passed in favour of the owner of the 4 annas share of the zemindari. But that decree, which was passed in 1851, has no bearing upon the question whether the *raffanama* executed in the year 1825 was clearly and unmistakably to the detriment of Harendra Narain Roy. Being, therefore, of opinion that the *raffanama* is binding upon the plaintiff, we reverse the decrees of the Lower Appellate Court in all these cases, and dismiss the plaintiff's suit with costs in all the Courts."

[878] Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the *raffanama*, as converting into a permanent lease with rent never to be raised, a tenure which was till then subject to an enhanceable rent, was on the face of it contrary to the interests of the infant Harendra Narain Roy. It deprived him of his statutory right to enhance, and was not binding upon him or upon his successor, the present plaintiff. The District Judge's judgment to this effect had regard to the evidence generally. As to the guardian's power they referred to—*Hunooman Pershad Pandey* v. *Munraj Koonweree* (6 Moore's I. A., 393,) *Lalla Bunseedur* v. *Bindesseree Dut Singh* (10 Moore's I. A., 454 at p. 459), As to the right of enhancement, reference was made to *Bamasoonderee Dossee* v. *Radhika Chowdhrain* (13 Moore's I. A., 248; 4 B. L. R., P. C., 8).

Mr. *J. H. A. Branson* and Mr. *W. A. Hunter*, for the respondent, supported the judgment of the High Court. It had not been shown to be beyond the powers of Bhubaneswari as guardian, or to be detrimental to the minor's interests, in the then existing circumstances, for her to have compromised the litigation in 1825. Also the predecessors in title of the appellant, by receiving rent in accordance with the compromise from the time when it was executed down to 1882, showed that they acquiesced in it. That the plaintiff had not discharged the onus upon him had not been rightly found.

In regard to the widow's powers as guardian, they referred to *Watson & Co.* v. *Shamlal Mitter* (L. R., 14 I. A., 178; I. L. R., 15 Cal., 8), *Hari Saran Moitra* v. *Bhubaneswari Debi* (L. R., 15 I. A, 195; I. L. R., 16 Cal., 40). On the right to enhance—*Hurronath Roy* v. *Gobind Chunder Dutt* (L. R., 2 I. A., 193; 15 B. L. R., 120).

Mr. *R. V. Doyne* replied.

Their Lordships' **judgment** was delivered by

Sir R. Couch.—This is an appeal from a decree of the High Court at Calcutta in a suit for enhancement of the rent of a taluk which was instituted in July 1882. The plaintiff is entitled to a 10-annas share of the zemindari on which the taluk was dependent; and another person is entitled to a 4-annas share.

[879] The only ground of defence which it is necessary now to notice is that a deed of compromise was executed in August 1825, by virtue of which the defendants allege that the rent of the taluk was permanently settled. That deed was executed by Rani Bhubanmoyi Debi, who was the widow of Raja Juggut Narain, to whom the property had belonged, and who had adopted, before the execution of the deed, Harendra Narain Roy, the grandfather of the plaintiff.

The circumstances under which this deed of compromise was executed are these. Some time before March 1823, a suit was brought by Rani Bhubanmoyi Debi and Krishen Indra Narain Rai, the owner of the other 4-annas of the zemindari, for enhancement of the rent of the taluk; and the defence set up to that suit by the ancestors of the present defendants was that the mouzahs had been granted to them in permanent mokurari, and that the rent was not liable to be enhanced. The suit was brought in the zillah Court, and a decree was made in favour of the plaintiffs, deciding that the rent was liable to be enhanced, and that if the defendants did not pay the rent demanded, the mehals in dispute should be measured according to the *hastbud jarib* stated by the plaintiffs, and the jumma be assessed thereon. An appeal from this decree to the Civil Appellate Court was dismissed on the 11th May 1824. In that state of things the deed of compromise was made in August 1825. It was addressed to Joygobind Mozumdar, the ancestor of the defendants, and was executed by Rani Bhubanmoyi; it states that the defendants were paying the annual *istimrari* rent of Rs. 399 odd, with progressive increase added; that, on appeal to the Court of the zillah, and the Provincial Court at Jehangirnuggur, a decree was passed for measurement and ascertainment of gross rents, and that for amicably settling with the defendants for an increase in the rent, the rent was fixed at sicca Rs. 600 including the old rent. The balance payable by the defendants after certain named deductions on account of their share was fixed in perpetuity. The defendants also presented a petition to the Court, saying that they assented to that compromise.

Nothing more appears to have taken place, except that the rent was regularly paid according to the compromise, until about 1854, **[880]** and then a suit was again brought for enhancement of rent. That passed through various stages of appeal until it reached the Sudder Court. In the judgment of two of the Judges of the Sudder Court (three being present) it is stated that Rani Bhubanmoyi executed a deed of compromise, and from that time up to the period of the adopted son Harendra Narain Roy attaining his majority, the rent was collected according to the deed of compromise, and after that time until the institution of that suit in 1853. They then say :—" Under these circumstances we are of opinion that the Rajah is bound by the act of his mother done in 1232 as his guardian, and acquiesced in by him since he reached his majority, unless he can show that it was done in contravention of her duty to him as his guardian : in other words until he can show with reference to the circumstances under which, and to the then capabilities of the tenure regarding which, the compromise was made, that such compromise was clearly and unmistakably to his detriment." There is a clear finding by the Sudder Court upon the

question whether Rani Bhubanmoyi was acting as guardian when she signed this deed of compromise that she was so acting. It must therefore now be taken that she did it as guardian.

The circumstances existing at the time of the compromise must next be considered. The parties were litigating not merely as to whether the rent was of the proper amount, or ought to be enhanced, but the defendants were contending that they had a perpetual tenure at a then fixed rent, and this was a settlement which was to put an end to the litigation, and which would also prevent the expense and delay, and the uncertainty of the result which was dependent upon the investigation that the Court had ordered to decide what the amount of rent, if it were to be enhanced, should be. Apparently it is a compromise which it cannot be said would not be beneficial to the infant, the adopted son, but is one which might fairly and naturally be come to as putting an end to the litigation and deciding once for all the matter which was in dispute between the parties; because it must not be forgotten that although there had been a decree affirmed on appeal that the rent was liable to be enhanced, that was subject to a further appeal, and the case might have been [881] carried further by the defendants if this compromise had not been entered into.

The first Court before which the present suit came held that the compromise was binding and dismissed the suit. It then went by appeal to the District Judge, who reversed that decree and held that the compromise was not binding; it then came before the High Court by what is called a second appeal, or an appeal from an appellate decree, and as the High Court in its judgment states what the judgment of the District Judge was it will be convenient to refer to the judgment of the High Court. They say, "We are of opinion that although the dismissal of the suit of Harendra Narain Roy, under s. 1, Act XXIX of 1841" (meaning the dismissal of the suit which was brought in 1854, and which was finally dismissed, after being remanded to the lower Courts for further hearing, on account of the non-appearance of both of the parties) "did not preclude a fresh suit, still if any such suit be brought, the parties would be bound by the decision of the Sudder Dewani Adawlut so far as it decided any material issue. The District Judge in this case is in error in re-opening that question. We must therefore take it that the *raffanama* (deed of compromise) was executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. We find also that the same rent fixed by the *raffanama* has been received by successive owners of the zemindari for about 57 years. We further find that since the last suit for enhancement was dismissed in 1858, no attempt was made to repudiate the *raffanama* till 1882." Then they speak of the principle laid down in the case of *Hunooman Pershad Pandey* v. *Munraj Koonweree* (6 Moore's I. A., 393); and go on to say that the District Judge upon the question whether the compromise was beneficial or not to the adopted son "refers only to the decree of 1851 passed in favour of the owner of the 4-annas share of the zemindari. But that decree which was passed in 1851 has no bearing upon the question whether the *raffanama* executed in the year 1825 was clearly and unmistakably to the detriment of Harendra Narain Roy." Now the decree in 1851 was obtained by the Government, after there had been a purchase at a sale for [882] arrears of revenue not paid by the owner of the 4-annas share, and the District Judge appears to have been in error in treating that as a decree passed in favour of the owner of the 4-annas share. The Government was in a different position from that in which the owner of the 4-annas share would be, and there is no evidence in the case upon which the District Judge could found his judgment reversing the decree of the first Court, and deciding that this compromise was not beneficial to the adopted son, an infant at the time

it was made. When the judgments come to be looked at, it appears that he has reversed the decree of the first Court in the absence of any evidence—certainly in the absence of any evidence upon which he might reasonably come to the conclusion that the deed of compromise was not for the benefit of the adopted son. This appears to be a case in which under the provision of the law that there is a second appeal where there has been a substantial error or defect in the procedure of the lower Court, the High Court was right in reversing the decree of the District Judge and leaving, as it did, the decree of the first Court —which held that the deed of compromise was a binding one, and therefore the suit for the enhancement of rent ought to be dismissed—to stand.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal, and to affirm the decree of the High Court. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondent: Messrs. *Neish and Howell.*

C. B.

NOTES.

[This was followed in (1906) 4 C.L.J., 198; (1891) 15 Bom., 670. *See* also (1898) 26 Cal., 53.]

[17 Cal. 882]

PRIVY COUNCIL.

The 12th and 13th March, 1890.

PRESENT:

LORD MACNAGHTEN, SIR B. PEACOCK, AND SIR R. COUCH.

Ram Lall............Plaintiff

versus

Mehdi Husein and others............Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Privy Council, practice of—Findings of fact—Concurrent findings by two Courts.

The usual course of not disturbing concurrent findings of fact may be followed, notwithstanding that a part of the evidence in the suit has not **[883]** been considered by the lower Court, when both Courts have arrived at the same result.*

In this case, however, the whole of the evidence having been brought to their notice, the Judicial Committee expressed their opinion that the Appellate Court below could not have decided otherwise than as it had decided.

APPEAL from two decrees (13th April 1886) of the Judicial Commissioner varying, upon cross appeals, a decree (18th March 1885) of the District Judge of Lucknow.

This suit was brought by the appellant to obtain a decree against the first respondent, Ram Lal, and the second respondent, the Nawab Kulsuman Nissa

* As to the rule regarding such a concurrence, *see* *Krishnan* v. *Sridevi*, I. L. R., 12 Mad., 512.

Begum, deceased, pending these proceedings, and now represented on this, record by Ashgar Husain and by Aga Jani, a minor under the guardianship of the latter. The claim was for Rs.41,043, made up, in part, of principal Rs.25,000, and interest due on a bond dated 13th September 1883 (alleged to have been advanced for the Begum to her agent Saiyid Mehdi Husain), and in part of a sum of Rs. 9,020 consisting of advances alleged to have been made at different times between 25th September 1883 and 25th December 1883. Part of the evidence relating to the latter sum, to which alone this appeal related was a receipt said to have been signed by the Saiyid on 26th December 1883. The Judicial Commissioner made a decree against both the defendants for Rs. 25,734.

Mr. *J. D. Mayne* for the Appellant.

Mr. *R. V. Doyne* and Mr. *A. J. David* for the respondent, Saiyid Mehdi Husain.

Mr. *T. H. Cowie*, JJ., and Mr. *J. H. A. Branson* for the Respondents, Ashgar Husain and Aga Jani.

For the appellant it was argued that upon the evidence the decree should have been for the amount claimed.

For the respondents, both the agent and the representatives of the principal, Counsel argued in support of the judgment of the Appellate Court below.

Mr. *J. D. Mayne* was heard in reply.

Their Lordships' **judgment** was delivered by

Lord Macnaghten :—The suit in which this appeal is brought was instituted by the appellant, Ram Lal, as plaintiff, to recover **[884]** moneys alleged to have been advanced by him to the first respondent, Saiyid Mehdi Husain, as agent for a lady who has died during the progress of the litigation, and who is now represented by the last two respondents. A sum of about Rs. 30,000 was claimed as due on a bond dated the 13th and registered on the 19th September 1883. A further sum of about Rs. 9,000 was claimed as having been advanced in various amounts between the 20th September 1883 and the 25th December in that year.

The lower Court allowed the whole amount claimed as due on the bond. The Judicial Commissioner disallowed Rs. 4,000. That disallowance forms one of the grounds of appeal.

In support of his claim to the Rs. 9,000 the appellant relied, first, on oral evidence of a promise to repay the amount , both Courts rejected this evidence. Secondly, he relied on certain accounts which he produced ; both Courts rejected those accounts. Thirdly, he relied on an alleged receipt purporting to be signed by Mehdi Husain, and to be dated the 26th December 1883. The respondent on oath denied that the signature was his. The lower Court rejected this receipt for want of a stamp The Judicial Commissioner remanded the case for further evidence as to the genuineness of the document. When the case came back he rejected the alleged receipt on the merits. And so the claim failed in both Courts.

It was contended by the learned Counsel for the appellant that the case as regards the Rs. 9,000 does not fall within the ordinary rule applicable to two concurrent findings of fact, because the lower Court had not an opportunity of considering, and did not consider, the evidence as to the genuineness of the receipt of the 26th December 1883. Their Lordships are not prepared to hold either in this particular case or as a general rule, that the mere fact that a part of the evidence in the suit has not been considered by the lower Court prevents the ordinary rule from applying when both Courts have arrived at the

same result. In the present case, however, as the whole of the evidence has been brought to their Lordships' notice, they think it right to add that in their opinion the Judicial Commissioner could not have come to any other conclusion.

[885] When the case was remanded the appellant did not think proper or was unable to produce any evidence as to the genuineness of the receipt on which he relied ; but for some reason or other the respondent, Mehdi Husain, called the appellant, and in cross-examination by his own pleader the appellant said that the receipt was signed by Mehdi Husain. There was no corroborative evidence on the point. The appellant, in regard to other statements of his, was held to be a person on whose uncorroborated testimony the Court could not safely depend. Under these circumstances, though it would have been more satisfactory if the Judicial Commissioner had referred to the appellant's assertion, their Lordships cannot say he was wrong in treating it as unworthy of notice.

As regards the Rs. 4,000, there are not two concurrent findings of fact. Here the position of the parties is reversed. The respondent, Mehdi Husain, relies on an acknowledgment or *rukka* which the appellant says is not genuine. The Judge of the lower Court decided against Mehdi Husain principally on two grounds. One was that the *rukha*, if genuine, ought to have been mentioned to the Registrar when the bond was registered ; the other was that the respondent in another suit had made a statement with regard to the advance of the money which the learned Judge considered, "if not false, certainly to be misleading" Their Lordships cannot attach any significance either to the fact that the *rukka* was not mentioned to the Registrar, or to the statement in the other suit which appears to their Lordships not to be inconsistent with the respondent's present case.

Having listened to the evidence, their Lordships find themselves unable to dissent from the finding of the Judicial Commissioner. There is very great difficulty in determining, if it is possible to determine, on which side the truth lies in this part of the case ; and the learned Counsel for the appellant has not satisfied them that the Judicial Commissioner was wrong.

In the result their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed , the appellant will pay the costs of the appeal, but there will be only one set of costs between the respondents.

Appeal dismissed.

[886] Solicitors for the Appellant Messrs *Barrow and Rogers.*

Solicitors for the Respondent, Saiyid Mehdi Husain : Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents Ashgar Husain and Aga Jani : Messrs. *Hore and Pattison.*

C. B.

[17 Cal. 886]

APPELLATE CIVIL.

The 28th March, 1890.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE O'KINEALY.

Debendra Coomar Roy Chowdhry
and another............Defendants Nos. 1 and 2
versus
Brojendra Coomar Roy Chowdhry
Plaintiff and another Defendant No. 3.*

Prosunnomoyi Dasi............Defendant No. 3
versus
Brojendra Coomar Roy Chowdhry Plaintiff
and others, Defendants Nos 1 and 2.

Hindu Law—Will—Widow's share on partition—Right to deprive by Will a widow of her share on partition.

Under the Hindu Law in Bengal a person has the right to dispose of his property by will so as to deprive his widow of her share on partition.

Bhobunmoyee Debea Chowdhrani v. *Ramkishore Acharj Chowdhry* (S. D. A. Rep., 1860 p. 485) followed.

RAJ COOMAR ROY CHOWDHRY by his will dated 9th Magh 1281 (21st January 1875) gave, devised and bequeathed, subject to a provision for the maintenance of the worship of an idol and the performance of the Doorga Pooja and certain specific bequests therein mentioned, all his immoveable and moveable properties by the 4th clause in the following terms :—"My third son, Debendra Coomar, and my youngest son, Brojendra Coomar, and my two grandsons, Surendra Coomar and Jotindra Coomar, these four persons, shall be the real heirs to my moveable and immoveable properties, the moneys advanced as loans, the conveyances and horses, and all the properties and goods and chattels that I have." The testator appointed his sons Debendra Coomar and Brojendra Coomar executors of his will, and left the entire management of his estate in their hands during their lifetime. The name of his [887] widow Prosunnomoyi Dasi (defendant No. 3) was nowhere mentioned in the will, nor was there in it any provision regarding her maintenance or residence in the testator's dwelling-house, called Barakuti, or elsewhere Raj Coomar Roy Chowdhry died on 14th Magh 1281 (26th January 1875), leaving him survinvig a widow, Prosunnomoyi Dasi (defendant No. 3), three sons, Rajendra Coomar Roy Chowdhry, the eldest, Debendra Coomar Roy Chowdhry, the third (defendant No. 1), and Brojendra Coomar Roy Chowdhry, the youngest (plaintiff), and two grandsons Surendra Coomar Roy Chowdhry (the son of Rajendra) and Jotindra Coomar Roy Chowdhry (defendant No. 2), who was the son of the testator's predeceased second son Norendra Coomar.

* Appeals from original decrees Nos. 171 and 231 of 1888, against the decrees of Baboo Krishna Chunder Chatterjee, Subordinate Judge of 24-Pergunnahs, dated the 20th of July 1888.

On 22nd April 1875 probate of the will was granted to the executors, Debendra Coomar and Rajendra Coomar, by the District Judge of the 24-Pergunnahs.

On 11th Bhadro 1282 (26th August 1875) Surendra Coomar died unmarried; and the 4 annas which he took under the will descended to his father Rajendra Coomar, who conveyed the same in equal shares to the plaintiff Brojendro Coomar and to the defendant Debendra Coomar by an *ikrar*, dated 17th Bhadro (1st September 1875). Brojendra and Debendra thus became entitled to a 6-annas share each of the testator's properties. Rajendra died in Aughran 1282 (November-December 1875).

On 2nd Magh 1291 (14th January 1884) the plaintiff Brojendra Coomar and Debendra Coomar and Jotindra Coomar (defendants Nos. 1 and 2) separated in mess, when some moveable property and Government securities forming part of the testator's estate were partitioned among them.

An attempt at an amicable partition according to the above shares of the Barakuti residence and the unpartitioned portion of the testator's estate fell through by reason of Prosunnomoyi Dasi (defendant No. 3) insisting upon being made a party to the partition proceedings.

On 14th September 1887 the plaintiff brought this suit for a declaration of his rights and those of Debendra and Jotindra (defendants Nos. 1 and 2) and also for a declaration whether the widow Prosunnomoyi Dasi (defendant No. 3) was upon partition entitled to any share of her husband's estate and for partition of the same.

[888] In this plaint the plaintiff set forth the above facts, and further stated that Debendra and Jotindra (defendants No. 1 and 2) admitted that the widow was entitled to maintenance and to suitable accommodation for her residence in the Barakuti house; but denied that she had any right upon partition to a share of the testator's properties. The plaintiff submitted that upon partition the widow took a Hindu mother's share and claimed a 6-annas share himself. The widow Prosunnomoyi Dasi (defendant No. 3) contended that, notwithstanding the will, she was entitled to a fifth share for the estate of a Hindu mother upon partition of her deceased husband's estate; that upon a true construction of the will she was entitled to the same share; and that in any event she was entitled to maintenance and suitable accommodation for her residence in the Barakuti house.

The defendants Debendra and Jotindra alleged that they had always been and were still agreeable to an amicable partition of the Barakuti house and the unpartitioned portion of the testator's properties, and that the proposal for an amicable partition mentioned in the plaint fell through by reason of the conduct of the plaintiff who was instigating the widow (defendant No. 3) to claim a mother's share in order that he might thereby decrease the shares of the defendants and augment his own by participating in the proceeds of the widow's share, and that the plaintiff had brought this suit with that object. They submitted that the defendant Debendra Coomar and the plaintiff were each entitled to a 4-annas share under the will and a 2-annas share under the *ikrar* of 17th Bhadro 1282 (1st September 1875) executed by Rajendra Coomar and that the defendant Jotindra was entitled to the remaining 4 annas share, under the will. They further submitted that the widow (defendant No. 3) took nothing under the will, and that inasmuch as the heirs of the testator took not by right of inheritance, but by devise, his widow was not entitled to a Hindu mother's share, as she would otherwise have been under the Hindu Law. They repeated their offer to the widow of suitable maintenance and accommodation for her residence in the Barakuti house.

The Subordinate Judge was of opinion that the intention of the testator was to disinherit his eldest son Rajendra Coomar, and the words in the 2nd clause of the will "My eldest son Rajendra [889] Coomar will have no hand in the management of my zemindaries, but his son Surendra Coomar, who is my elder grandson, will be his heir and will enjoy his (Rajendra Coomar's) proper share, and Jotindra Coomar, who is the son and heir to my second son, deceased, is to be regarded as being entitled to a share of my assets equal to that of his father, and will have a right to enjoy it accordingly," clearly showed that the testator did not make any bequest to Jotindra, but simply recognized what rights he had under the Hindu law, and that as Surendra was not his heir, and therefore not entitled to a share of his estate, the testator took care to clothe him with the character of a donee and to give him Rajendra's one-fourth share. The Subordinate Judge was also of opinion that Debendra, Brojendra, and Jotindra being heirs, the 4th clause of the will did not confer on them any special rights, but was a mere recognition of existing rights; that there was no actual gift to them, any rate it was not expressed in clear and unequivocal terms; that there was nothing in the will nor was any circumstances proved by evidence that went to show that the intention of the testator was to deprive his widow of her rights upon the partition of his properties by his sons and grandsons; that there was no allegation or proof that he disliked his wife, and the presumption was that he loved her and would have made some provision for her if he had willed away his properties; and that the absence of some such provision and the intention of the testator which was to be gathered from all these circumstances favoured the widow's contention. Accordingly the Subordinate Judge held that the provision for the maintenance of the worship of the idol and the performance of the Doorga Poojah and all the bequests, including the bequest of the Barakuti house, were valid, and that the will operated to exclude the widow from any share therein. The Subordinate Judge further held that under the 4th clause of the will Surendra took a 4-annas share of the residue of the testator's properties; but that as regards the remaining 12-annas share which were claimed by Debendra, Brojendra, and Jotindra, the testator had died intestate, and that the partition being among two sons and one grandson, the widow was entitled to a fourth or 3-annas share therein.

The defendants, Debendra Coomar and Jotindra Coomar, appealed to the High Court from this decision of the Subordinate Judge in [890] so far as he held upon the construction of the 4th clause of the will that the testator had died intestate as to the 12-annas share of the residue of his estate, and that his widow Prosunnomoyi Dasi was entitled to a fourth share thereof.

Prosunnomoyi Dasi (defendant No. 3) also appealed to the High Court against this decision in so far as it excluded her from the Barakuti dwelling-house and from the remaining one-fourth share.

The two appeals were heard together.

Mr. *J. T. Woodroffe*, Dr. *Rash Behary Ghose*, and Baboo *Jogesh Chunder Dey* for the Appellants, Debendra Coomar and Jotindra Coomar (defendants Nos. 1 and 2).

Mr. *Evans* and Baboo *Kamini Kumar Guho* for the Plaintiff-respondent, Brojendra Coomar.

The Advocate-General (Sir *G. C. Paul*), Baboo *Nilmadhub Bose* and Baboo *Bepin Behari Ghose* for the Respondent Prosunnomoyi Dasi (defendant No. 3).

Mr. *Woodroffe*.—The testator's sole intention was not the exclusion of Rajendra, though it may have been the prominent reason for his making the will

he did. Nor do the other provisions of the will flow out of this intention. The view taken by the lower Court, that the sole object of the testator was to exclude his eldest son Rajendra, and that the will merely provided for his exclusion and did not contain any disposition of his estate, is ill-founded. The will, besides excluding Rajendra, does in fact dispose of the estate, and gives interest to persons, the beneficiaries thereunder, other and different from that which they would have taken under Hindu law. A husband has, subject to his wife's right to maintenance only, full power to dispose of all his property—*Sorolah Dassi* v. *Bhoobun Mohun Neoghy* (I.L.R., 15 Cal., 292). I rely upon *Comulmonee Dossee's case*, which, together with other suits and proceedings which arose out of the will of one Muddun Mohun Bysack, is reported by Sir Francis Macnaghten in his Considerations of the Hindu Law, original edition, pp. 77-93. In that case, as pointed out by Sir Francis Macnaghten, Comulmonee's claim to a share upon [891] partition was defeated by the will of Muddun Mohun, which the Court construed into an intention of the testator that upon a partition by his sons his widow should not be entitled to participate as she would otherwise have been under the Hindu law. By his will, Muddun Mohun did in effect himself make a partition of his property among his sons, and the will operated so as to make the shares allotted to them as if it were their self-acquired property, as in the case of *Jugmohundas Mangaldas* v. *Mangaldas Nathuboy* (I. L. R., 10 Bom., 528), where the Bombay Court held that property devised to a son was the self-acquired property of the son. There being no property left to partition, the ordinary rule of Hindu law, by which a mother is entitled to a share upon partition, did not apply in *Comulmonee's case*. Clearly then it follows from that case that a husband can by will deprive his widow of her right to have a share upon partition between her sons.

The case of *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (I. L. R., 12 Cal., 165), on which the other side will most probably rely, is distinguishable from *Comulmonee's case* and also from the present case. There the Court held the widow was entitled to a share only because there was in that case no bequest to the sons in the will.

As to the term "heirs" used in the 4th clause of the will: —The term "heirs" is not a mere statement that the person would be entitled to succeed as in case of intestacy: so to read it would bring in a grandson as an heir to supersede his father. The word "heirs" has been construed frequently as a word of purchase -*Kooldebnarain Sahoo* v. *Wooma Coomaree* (1 Marsh., 357), *Nance Tara Naikin* v. *Allarakhia Soomar* (I.L.R., 4 Bom., 573), *Jugmohandas Mangaldas* v. *Mangaldas Nathuboy* (I. L. R., 10 Bom., 528), *Brickley* v. *Brickley* (L. R., 4 Eq., 216), *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore* (9 B L. R., 377; L. R., I. A., Sup. Vol., 47), Jarman on Wills, pp. 74-76. The lower Court is wrong in holding that, Debendra and Jotindra being heirs, the will does not give them any special rights, and therefore they take by descent. Jotindra also gets a share subject [892] to certain conditions, which, whether void or not, show the intention of the testator.

The lower Court is entirely wrong in holding that the testator died intestate as regards the 12-annas share, because if the true construction of the 4th clause be that there is no bequest and it is set aside or struck out, Rajendra would come in and claim a share out of the 12 annas. Then the sole intention (as the lower Court calls it) of the testator of excluding Rajendra, the eldest son, would be defeated. The will contains no express words disinheriting him, and an heir at law cannot be disinherited by negative words [*Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore* (9 B. L. R., 377; L. R, I. A., Sup. Vol., 47)], and so if there be an intestacy with regard to any portion of the estate, Rajendra

would not be excluded. Debendra and Jotindra never refused the widow suitable maintenance and accommodation, and are even now willing that her maintenance should be fixed by the Court in the most liberal way it thinks fit. The plaintiff Brojendra is supporting the mother with a view to get an additional share, because if the mother should get a share it would mean that so long as she lived he would enjoy two shares at the expense of Debendra and Jotindra. As regards the widow's appeal for residence in the Barakuti dwelling-house, my clients do not contest it, but reiterate that assent which they all along have given.

Mr. *Evans* for the respondent Brojendra Coomar.—A widow can claim a share unless excluded. In this will there is no provision for excluding her from maintenance, and if the right to maintenance remains, all the rights incidental thereto must remain. The widow is entitled to a share in lieu of maintenance when the sons inherit her husband's properties and partition among themselves. Dayabhaga, Chap. 3, s. 2, verse 29.

The *Advocate-General* for the respondent Prosunnomoyi Dossee also contended that the widow was entitled to her share; and proceeded to argue on behalf of the widow's right of residence, but was stopped by the Court, as this right had not been contested by Debendra and Jotindra.

Dr. *Rash Behary Ghose* in reply.—The Dayabhaga, Chap. 3, s. 2, verse 29, says that in a partition between sons of ancestral property, the mother is entitled to a share equal to a son, but it is silent as **[893]** to what her share should be when the father has given his property to his sons by will. The Dayabhaga only provides for the mother's share upon partition in the case of an intestacy, when the sons take by descent; but it nowhere contemplates a case like the present, where the testaor has in effect partitioned his property among his sons and grandsons, and so left no property to be partitioned.

The **judgment** of the High Court (TOTTENHAM and O'KINEALY, JJ.) was as follows:—

These two appeals have been instituted by the three defendants in the original suit which was brought against them all by the plaintiff for the partition of family property left by his father, who died in January 1875.

The father was Raj Coomar Roy Chowdhry: the plaintiff is the youngest son: defendant No. 1 was the third son; defendant No. 2 is the son of Raj Coomar's second son, who predeceased him; and defendant No. 3 is Raj Coomar's widow. The eldest son and his son are both dead.

The matter now in dispute arises out of the provisions of the will of Raj Coomar, and the question is whether the widow, defendant No. 3, is entitled to any share of the estate on the partition now sought. The plaintiff in his plaint did not question her claim to a share, but alleged that the defendants Nos. 1 and 2 disputed it. And these defendants have contested it throughout the suit and appeal, while they do not deny her right to maintenance.

The widow herself claims a share of the estate.

The defendants Nos. 1 and 2 objected to the suit on the ground that the plaintiff had not included the whole of the property in which they and himself were interested. This objection, overruled by the lower Court, has been put forward again in appeal, but has not been seriously pressed.

As to the substantial matter in dispute, the Court below held that, as regards one-fourth of the estate and as to the whole of the family residence of Raj Coomar Roy Chowdhry, the will operated to exclude the widow from any share on partition; but that as regards the remaining three-fourths of the estate Raj Coomar died intestate, and that the widow was therefore entitled on this partition to have 3 annas out of the 12 annas.

[894] In one of the appeals before us her right to this share is contested; and in the other appeal the widow objects to being excluded from the other quarter share of the estate and to being excluded from the family residence called the Barakuti.

Probate of Raj Coomar's will was granted to plaintiff and defendant No. 1, two of his sons. We have to determine the meaning and effect of that document. It first recites the properties of the testator; then it recites that he had four sons, whose names are mentioned, and that the second son was dead, and his son a minor. It proceeds to state that the eldest son being addicted to vice and having left the paternal house, it was inadvisable to place any of the property in his hands; and this fact is given as the reason which rendered it necessary to make a will. The testator next dedicates a portion of this property for the worship of an idol and for the performance of the Doorga Pooja; and then he specifically bequeathes to his third and fourth sons and to his two grandsons, the children of the eldest and second sons, the whole of his Barakuti residence with the land pertaining thereto, and to his oldest son he gives his own share in an ancestral dwelling-house. To this son he further bequeathes a monthly allowance of Rs. 75, but he gives the share of the estate, which would otherwise have been his, to his son Surendra Coomar. And he wills that his third and fourth sons and the two grandsons shall be the real heirs of all his property, the management remaining in the hands of the two sons during their life-time.

We do not agree with the conclusion arrived at by the Subordinate Judge that there is any case of intestacy arising upon this will. The object that the testator had before his mind was to deprive his eldest son of his inheritance, and if, as the Subordinate Judge says, there is no bequest in the 4th paragraph of the will, the result would be that the desire of the testator to deprive his eldest son of the property would have failed. We think that the plain reading of that paragraph is that the third son. Debendra Coomar, and the youngest son, Brojendra Coomar, and the two grandsons, Surendra Coomar and Jotindra Coomar, shall be his successors to all his moveable and immoveable properties, and that no intestacy has ensued.

[895] In regard to the other question, viz., whether the lady has a right to a share on partition, we are inclined to think that the opinion expressed by the Judge in the Court below in regard to the other share is correct.

In the case of *Bhoobunmoyee Dabea Chowdhrani* v. *Ramkissore Acharj Chowdhry* (S. D. A. Rep., 1860, p. 485), the right of a Hindu in Bengal to make a will affecting his property was discussed, and it was decided, in conformity with the reference from the Judges of the Supreme Court in 1836, that in Bengal a widow has no indefeasible vested right in the property left by her husband, though she has by virtue of her marriage a right, if all the property be willed away, to maintenance.

It therefore appears clear to us, following that decision, that if the testator in this case intended to will away his property so as to deprive the widow of her share on partition, he had perfect power to do so.

The intention of the testator is to be gathered from the will, and in that he gave Debendra Coomar and Brojendra Coomar, who are his heirs, the same interest as he gave to Surendra Coomar and Jotindra Coomar, who could not succeed by the will to any interest in the property. We think, therefore, that the estate or interest given to each of these was the same, and that the interest was an out-and-out interest unclogged and unfettered by any other devise.

The conclusion that we arrive at, therefore, is that as regards this property the lady is not in a position to claim, as of right, under the Hindu law a share

in the partition of this property. If that were so, the grandsons, Surendra Coomar and Jotindra Coomar, instead of receiving one-fourth of the property devised, would be only entitled to one-fifth. This, we think, is clearly opposed to the intention of the testator as portrayed in the will. But though we are unable to give the widow-appellant the relief she asks, we can and do declare that she is entitled to suitable accommodation in her late husband's dwelling-house, the Barakuti. And this must be provided for her when the partition is made.

All parties admit that she is entitled to maintenance, and it will be for them to consider whether this should take the form of a **[896]** money allowance, or whether a portion of the landed property be assigned to her for her life in lieu of maintenance.

The result is that the appeal of the defendants Nos. 1 and 2 succeeds to the extent of reversing the lower Court's finding that as to three-fourths of the estate of Raj Coomar Chowdhry there was intestacy, and its order that the widow obtain 3-16ths share on partition be set aside.

The widow's appeal must be dismissed, excepting only that she is to get suitable accommodation assigned to her in the Barakuti.

The plaintiff-respondent will pay the costs of appellants.

Appeal 171 allowed in part.

C. D. P. *Appeal 231 dismissed.*

NOTES.

[The right on *partition* might be defeated by bequest to others, (1908) 36 Cal., 75 = 12 C.W.N., 1002; but not the right of *maintenance*., (1908) 12 C.W.N., 808; (1900) 2 Bom. L.R., 1082; (1900) 23 All., 86.]

[17 Cal. 896]

APPELLATE CIVIL.

The 8th May, 1890.

PRESENT:

MR. JUSTICE PRINSEP AND MR JUSTICE RAMPINI.

Radha Shyam Sircar............Plaintiff No. 1

versus

Joy Ram Senapati and others, (defendants) and others.........Plaintiffs Nos. 2 and 3.*

Hindu Law—Alienation—Alienation by Hindu widow of a portion of her estate with consent of some of the reversioners—suit by other reversioners to set aside alienation.

The principle enunciated by the Full Bench in the case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (I. L. R., 10 Cal., 1102) is not applicable to a case where some only of the reversioners have consented to an alienation by the widow, and where therefore only a portion of the widow's estate has been alienated.

IN this case the plaintiffs alleged that the zemindari of mouzah Pandia belonged to one Joy Narain Ghose who died, leaving a widow, named

* Appeal from Appellate Decree No. 259 of 1889, aginst the decree of J. B. Worgan, Esq., Judge of Cuttack, dated the 18th of December 1888, affirming the decree of Baboo Radha Krishno Sen, Subordinate Judge of Cuttack, dated the 5th of January 1887.

Avimani Dasi, and that Avimani Dasi succeeded to the property as his heiress, and remained in possession thereof till the 18th November 1884, when her death took place; that the defendants Nos. 2, 3, 4, and 5 were at the time of her death the only reversionary heirs of her husband alive, and as [897] such, they became entitled to the property, the share of the defendants Nos. 2 and 3 being 8 annas, and that of the defendants Nos. 4 and 5 also 8 annas; that the defendants Nos. 4 and 5 sold their share to the plaintiffs by a kobala executed on the 23rd April 1885 for a consideration of Rs. 1,975, and accordingly the plaintiffs applied for the registration of their names under Bengal Act VII of 1876, and also demanded rents from the ryots of the zemindari; and that the defendant No. 1, acting in collusion with the defendants Nos. 2 and 3, induced the ryots not to pay rent to the plaintiffs, alleging that he had purchased an 8-annas share of the zemindari from Avimani Dasi on the 8th June 1880. The plaintiffs impeached this sale as being beyond the power of Avimani Dasi, who, they alleged, was in possession of the property as a life-tenant only, and on the ground that there was no legal necessity which justified her in making the alienation. They therefore sued to set it aside and to recover possession of an 8-annas share of the zemindari with mesne profits from the date of their purchase.

The defendants Nos. 4 and 5 admitted that they had sold an 8-annas share of the zemindari to the plaintiffs on the date and for the consideration alleged by the plaintiffs.

The defendant No. 1 alleged that the purchase set up by the plaintiffs was not a *bonâ fide* transaction, but one made in collusion with the defendants Nos. 4 and 5, who were, moreover, never in possession of the property; that Avimani Dasi executed a kobala of an 8-annas share of the zemindari in his favour on the 8th June 1880; that the kobala was executed to enable Avimani to meet certain necessary expenses as maintenance, religious rites, Government revenue, etc., and was therefore made for legal necessity; that to this kobala defendants Nos. 4 and 5 were subscribing witnesses and therefore consented to it, and they had also signed their names as witnesses to a petition filed by Avimani Dasi before the Sub-divisional Officer of Kendrapara, in which she consented that the name of the defendant No. 1 should be registered in respect of the 8-annas share of the zemindari sold to him. This defendant submitted that the defendants Nos. 4 and 5 were estopped by their conduct from setting up any right to the property in dispute, and that their sale to the plaintiffs was of no effect against his purchase.

[898] The defendants Nos. 2 and 3 relied on the collusive nature of the purchase set up by the plaintiffs on the same grounds as the defendant No. 1. They admitted the execution of the kobala by Avimani Dasi, though they denied that there was any legal necessity for the alienation. They, as well as the defendant No. 1, denied any obstruction of the plaintiffs in realizing rent, and that there was any cause of action against them.

The issues material to this report were :—

1. Were the defendants Nos. 4 and 5 in possession of an 8-annas share of the zemindari, and did the plaintiffs purchase the same from them in good faith by a kobala dated 23rd April 1885 for a consideration of Rs 1,975?

5. Did Avimani Dasi convey an 8-annas share of the property in dispute to the defendant No. 1 by a kobala dated the 8th June 1880 for legal necessity?

6. Did the defendants Nos. 4 and 5 record their assent to the said sale, and are they and the plaintiffs estopped from disputing it?

A supplemental issue raised the question—"Are the plaintiffs entitled to an 8-annas share or any part of the property in dispute under the purchase set up by them?"

The Subordinate Judge found that the defendants Nos. 4 and 5 were not in possession of the 8-annas share when they purported to sell it to the plaintiffs, and that the plaintiffs' alleged purchase was a collusive transaction. On the 5th and 6th issues he found that the defendants Nos. 4 and 5 did consent to the kobala given by Avimani Dasi to the defendant No. 1 of the 8th June 1880, and he upheld that deed, and made a decree dismissing the suit.

On appeal the Judge confirmed this decision. There was no finding by either Court as to whether or not there was any legal necessity for the alienation by Avimani Dasi.

The plaintiffs appealed to the High Court.

Dr. *Rash Behary Ghose* and Baboo *Monomotho Nath Mitter* for the Appellants.

Dr. *Trailokya Nath Mitter* for the Respondent, Defendant No. 1.

Baboo *Mon Mohun Dutt* for the Respondents, Defendants Nos. 2 and 3.

[899] The **judgment** of the Court (PRINSEP and RAMPINI, JJ.) was as follows:—

The plaintiffs are the purchasers of an 8 annas share in certain property from the defendants Nos. 4 and 5, who, together with the defendants Nos. 2 and 3, inherited the entire property as heirs of Joy Narain Ghose on the death of his widow Avimani Dasi.

It appears that Avimani Dasi sold an 8-annas share to the defendant No. 1. The plaintiffs' vendors, who ordinarily would inherit an 8-annas share of the estate of Joy Narain Ghose, are found by both the lower Courts to have never been in possession of their share. Since Avimani's death it has been held by defendant No. 1 in respect of the half-share bought by him, and by defendants Nos 2 and 3 in respect of the remainder by right of inheritance. The plaintiffs now sue to recover possession as against the defendant No. 1, the purchaser from Avimani, and the defendants Nos. 2 and 3, who were co-heirs with their vendors, and are charged with having colluded with the defendant No. 1 in keeping the plaintiffs out of possession. The primary object of the suit undoubtedly was to have it declared that the sale by Avimani was not a sale of an absolute title in consequence of her having only a life-interest as a Hindu widow. But as we regard the suit, its object was also to obtain, by reason of the purchase from two out of the heirs of Joy Narain Ghose, whatever share in his estate up to a half share was inherited by the vendors of the plaintiffs. If there were any doubt as to this being the object of the suit, it is set at rest by the supplementary issue which has been drawn up in the course of the trial by the Subordinate Judge.

Neither of the Courts has found whether the sale by Avimani of an 8-annas of the property in dispute was a valid sale for legal necessity in accordance with Hindu law. The Courts concurrently have found against the purchase by the plaintiffs, holding that no consideration passed, and that in fact it was not a real transaction; and this finding has been arrived at notwihstanding that the vendors have themselves admitted the receipt of consideration.

We are of opinion that, having regard to the nature of the suit and the admission of the vendors, this point did not properly arise. The Subordinate Judge seems to have attached undue weight to the fact that the vendors of the plaintiffs were out of possession, and [900] to have considered with this fact the nature of the transaction. But such purchases are not uncommon and are recognized by law, which has provided in the law of limitation a special

limitation for a suit by a private purchaser to recover possession of immoveable property sold when the vendor was out of possession.

Both the Courts have found that the defendants Nos. 4 and 5 consented to the sale by Avimani, and that as they were some of the reversioners who have subsequently inherited a share of the estate, representing the share so conveyed, the title of the defendant No. 1 was a good title as against them. This conclusion has been arrived at principally with regard to the rule laid down by a Full Bench in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (I.L.R., 10 Cal., 1102); but in our opinion the principle enunciated by the Full Bench cannot be carried to this length, and cannot be applied to an alienation of only a portion of the widow's estate.*

* The same was decided in *Sristidhur Churamoni Bhuttacharjee* v. *Brojo Mohun Biddyaruton Bhuttacharjee*, appeal from Appellate Decree No. 881 of 1889 decided by PRINSEP and RAMPINI, JJ., on the 26th May 1890, in which the judgment was as follows :—This is a suit brought by one claiming, on the death of Bhagiruthi, a Hindu widow, as heir, the estate of her husband, Sarthukram, to set aside two alienations made by her to the respondents. It appears that in respect of one of these alienations, one of the then reversionary heirs, Kanhai, signified his assent, not as a witness, but by affixing his name with the words "*memsoor shud*" which, we understand, mean '*approved.*' The other alienation is similarly subscribed by both the then reversionary heirs, Kanhai and his elder brother Narain, these two being sons of Jugdumba, daughter of Sarthukram and Bhagiruthi. It has been contended, on the authority of the judgment of the Full Bench in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (I. L. R., 10 Cal., 1102), that these alienations are valid. Both the reversioners who signified their assent to the alienations predeceased the widow, their maternal grand-mother. One of them, Kanhai, who was the only assenting party to one of the alienations, it has been found, died a minor. The age of Narain, the older, has not been found by the lower Courts, and therefore if it were necessary for a decision of the case as to the title of the defendants, we should be bound to remand the suit for a proper finding. But as the case now stands, we think that without a finding on this point the plaintiff should obtain a decree in full of his claim.

In the first place, we are of opinion that Kanhai being a minor, his consent would not make the alienation a valid alienation. It has been found by the Lower Appellate Court that there was no legal necessity for this alienation, and, as this is a finding of fact, we are unable to question its correctness. As we have already stated in a judgment delivered in second appeal 259 of 1889, *Radha Shyam Sircar* v. *Joy Ram Senapati* (*Ante*, p. 896) on the 8th instant, we are not inclined to extend the terms of the judgment of the Full Bench in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (I. L. R., 10 Cal., 1102) to an alienation made by a Hindu widow with the consent of only some of the reversionary heirs so as to bind their share in the ancestral estate.

The consent of the reversioners contemplated by the Full Bench is, in our opinion, such a consent as would be a valid consent, being given by persons themselves competent to execute a valid conveyance. Kanhai being a minor cannot be regarded as a competent person, and his death before the estate had fallen in by the death of his grandmother, a widow having only a life-interest, and before he had attained his majority, would prevent that alienation becoming absolute as against the heirs of Sarthukram at the death of the widow. The conveyance might be only voidable on his attaining majority, but his consent as a minor could not operate as against the heirs of Sarthukram's estate. No doubt, as has been pointed out by the respondent's pleader, the plaintiff-appellant could not be the heir of Kanha and Narain, who up to their deaths were the reversionary heirs to Sarthukram's estate, and therefore he might not be one who as Kanhai's heir should represent him in any matter relating to his own estate, but we cannot admit that in a matter concerning Sarthukram's estate any right flowing from the reversionary interest which was only inchoate and never arrived at maturity should pass away from the actual heirs of Sarthukram to one who could never succeed by inheritance to that estate. The consent given by Kanhai as a minor would not operate so as to exclude the plaintiff from the inheritance and pass Sarthukram's estate on the death of Kanhai, the survivor of the two brothers, to his heir and away from Sarthukram's family so as to give Kanhai's heir the power of avoiding or ratifying the alienation. He would not be in a position to exercise his option for the benefit of Sarthukram's estate, because if he avoided the alienation the property would pass to the plaintiff. This shows that it would be impossible to extend to this case the principle upon which the Full Bench proceeded. The alienation, therefore, to which the minor, Kanhai, alone signified his approval is, in our opinion, invalid as against the plaintiff.

[901] Numerous complications, which it is unnecessary to describe, would arise if it were possible that a Hindu widow having a life-interest could, during her life-time, convey a portion of the estate to some of the reversioners so as to give them a valid title and thus enable them to re-convey. It would be impossible for a widow to predicate who would at her death succeed to her husband's estate as his heirs so as practically to make a partition during her life-time, and retain a portion herself. The judgment of the Full Bench proceeded on the ground that by alienating property with the consent of all the reversioners she would be relinquishing in their favour, and thus accelerate the succession so as to enable them to convey, and that this would be the real effect of a conveyance by her with their consent. This principle would not apply to a case like that now before us.

It is open to some doubt whether the facts found by the District Judge would amount to a consent such as would confer an absolute **[902]** title on the vendee, even if defendants Nos. 4 and 5 represented the entire reversionary interest. We observe that the District Judge has not found, as the Subordinate Judge has found, that the defendants Nos. 4 and 5 participated in the consideration money paid by the defendant No. 1. Moreover, it has not been found, nor does it appear that the vendee, defendant No. 1, bought solely on the assurance of their consent so as to estop them; for the deed itself recites what was considered to be a legal necessity under the Hindu law and a sufficient cause for the alienation, and therefore to establish any title as against the heirs the vendee would be bound to prove that.

The case therefore depends upon the character of the sale by Avimani to the defendant No. 1. Both the Courts have overlooked the main point necessary for the consideration of this issue, that **[903]** is to say, they have omitted to find whether the alienation was for legal necessity. The case must therefore be remanded to the Lower Appellate Court in order that this point may be determined; and the District Judge will deal with it according to law, either deciding the case on the evidence on the record, or remitting it to the first Court. Should it be found that the sale by Avimani to the defendant No. 1 conveyed an absolute title in an 8-annas share, then it will be for the Court to consider whether the plaintiffs on the supplemental issue should receive a decree for a 4-annas share of the estate, which would represent the share inherited by their vendors. On the other hand, should it be found that the sale by Avimani conveyed only the life-interest of a Hindu widow, the plaintiffs will be entitled to a decree to recover the share now held by the defendant No 1. Costs to abide the result.

J. V. W. *Case remanded.*

NOTES.

[Since this decision there have been the important decisions of **(1907) 30 All., 1 P.C.** and of **(1913) 40 Cal., 721 F B.** It was held in the latter case on an exhaustive review of the

It has been next contended that although on this ground the alienation in respect of any share to which Kanhai might have a reversionary interest might be invalid in respect of that particular share, the share inherited by Narain would be bound by such alienation. This would of course depend upon his status as a major when he signified his consent. But, as has already been remarked, the lower Appellate Court has omitted to come to any finding in this respect. However, if for purposes of agrument we assume that he was a major, the alienations even as to the share to which he was one of the reversionary heirs at that time, cannot be affirmed. We have already held to this effect in second appeal No. 259. The result therefore is that the alienations in this suit are, in our opinion, absolutely void after the death of Bhagiruthi, and the plaintiff is entitled to a decree with costs throughout, the decrees of the lower Courts being varied.

authorities that where there is no complete surrender as a basis for the theory of acceleration' consent of the next reversioner furnishes a *primâ facie* but *rebuttable* evidence of justifying circumstances;

A similar view was taken in Madras in *Nachiyappa* v. *Rangasami* (1914) 28 M. L. J. 1 F. B. *See* also 31 Mad., 366; 25 Bom. 129; 4 C.L.J., 334.]

[17 Cal. 903]

APPELLATE CIVIL.

The 14th May 1890.

PRESENT:

MR. JUSTICE PIGOT AND MR. JUSTICE GORDON.

Salimatul-Fatima *alias* Bibi Hossaini............one of the Defendants

versus

Koylashpoti Narain Singh............Plaintiff and others (remaining Defendants).*

Registration—Registered document, proof of.

Mere registration of a document is not in itself sufficient proof of its execution.

Kristo Nath Koondoo v. *Brown* (I. L. R., 14 Cal., 176. at p. 180) dissented from.

THIS was a suit to recover the sum of Rs. 2,431-10 for principal and interest due upon a mortgage-bond dated 6th Sraban 1288 F. S. (17th July 1881). The bond purported to have been executed in favour of the plaintiff Koylashpoti Narain Singh by one Ahmud Hosain as general agent of the defendant Salimatul-Fatima; and from the endorsement of registration, it appeared that it had been registered by Ahmud Hosain under a general power of attorney dated 19th August 1878. Salimatul-Fatima, who was a purda-nashin lady, in her defence pleaded that [904] Ahmud Hosain was not her general agent, and had no authority to raise any loan on her behalf; that she did not execute the power of attorney of 9th August 1878; that the mortgage bond was not executed with her knowledge or consent; and that she had received no part of the consideration money, nor was any portion of it expended on her behalf. Ahmud Hosain died during the pendency of the suit, and his heirs, who were made parties, contended that the bond was executed by Ahmud Hosain on behalf of Salimatul-Fatima, and that the money was borrowed for her benefit.

The Subordinate Judge found that Ahmud Hosain had executed the mortgage-bond and received the consideration money. He also found that Ahmud Hosain had acted for Salimatul-Fatima as her agent on various occasions; that the power of attorney of 9th August 1878 had been returned to the husband of Salimatul-Fatima at the time of the death of Ahmud Hosain; and that Ahmud Hosain had under that power of attorney executed a deed of sale on behalf of Salimatul-Fatima. Although it had not been proved that Salimatul-Fatima had executed the power of attorney, the Subordinate Judge admitted secondary evidence of its contents apparently on the grounds that it had been proved that the document was in the possession of the husband of Salimatul-Fatima and had not been produced when called for by the plaintiff after notice to produce had been given; and upon such secondary evidence he came to the conclusion that it had been satisfactorily proved that Ahmud Hosain had authority from Salimatul-Fatima to take loans and execute mortgages on her behalf.

---

* Appeal from appellate decree No. 1666 of 1888, against the decree of J. F. Stevens, Esq., Judge of Gya, dated the 21st May 1888, affirming the decree of Baboo Kali Prosunno Mukerjee, Subordinate Judge of Gya, dated the 13th of September 1887.

Accordingly he held that she was liable under the mortgage-bond of the 6th Sraban 1288 F. S., and gave the plaintiff a decree against her.

This decision was affirmed by the District Judge of Gya, who dismissed Salimatul-Fatima's appeal with the following remarks:— "The Subordinate Judge, who has gone very carefully into the matter, has found that the document was executed by the appellant's husband's elder brother, under a general power of attorney, authorizing him to do such things. The power of attorney itself is not forthcoming. It is proved to have been returned to the appellant's husband. Every effort has been made by the other side to get it before the Court, but in vain; so secondary [903] evidence has been adduced of its contents, and evidence had been brought to prove that the same person, who is said to have acted for the appellant in the matter in question, has acted for her on other occasions also, the transactions having resulted in the actual transfer of property, of which the appellant cannot fail to have been cognizant. The endorsement of the registering officer on the mortgage-bond shows that it was presented with a general power-of-attorney from the appellant, duly registered, and I agree with the lower Court in being satisfied on the evidence that the executant of the bond did hold such a power authorizing him to enter into transactions of this kind * * * * It has been urged that the actual execution of the power-of-attorney has not been proved, and that the attesting witnesses ought to have been examined. It seems to me that the plaintiff has done all that he as a stranger could be expected to do. He is not supposed to know who the attesting witnesses were, and it is on the face of it improbable that if he did know, he could induce them to give evidence in his favour. There was a power-of-attorney duly registered which under the ruling in *Kristo Nath Koondoo* v. *Brown* (I. L. R, 14 Cal., 176, at p. 180) might have been received without proof. The plaintiff has done his best, as I have said, to get it produced before the Court; and having failed to do so, he has, I think, done sufficient in adducing evidence as to its contents."

Baboo *Umbica Churn Bose* and Baboo *Jogendro Chunder Ghose* for the Appellant.

The Advocate-General (Sir *Charles Paul*) and Baboo *Mohabir Sahoy* for the Respondents.

The **judgment** of the Court (PIGOT and GORDON, JJ.) was as follows:—

Upon the question raised as to the proof of the execution of the power-of-attorney, it is clear, and is indeed admitted, that the respondents' case rests alone upon the fact of registration. There is no proof unless that be proof. And as to the sufficiency of this, a note in the case of *Kristo Nath Koondoo* v. *Brown* (I.L R., 14 Cal., 176, at p. 180), a ruling by TREVELYAN, J., is relied on, as showing that registration of such a document is enough without further proof [906] of execution. It is relied on very properly in the judgment of the District Judge, and was referred to, but without any argument or attempt to explain it, by the learned Counsel for the respondents. It is unnecessary to say that a reported decision of the learned Judge on the Original Side after argument must be treated as an authority of importance. But we do not think that the note in question is one by which we should be guided. There is no report of either argument or judgment; as the note appears, it would be to the effect that mere registration of a document is in itself sufficient proof of its execution. We think that there must have been some misapprehension as to the grounds on which the document was admitted in evidence by the learned Judge. We think we should not treat this note as an authority for the proposition above mentioned, which we think could not be accepted. We must hold that

in this case there is no proof that the lady ever executed the document under which it is sought to bind her. That being so, it is impossible to support the decision of the District Court, and the appeal must be allowed with costs.

C. D. P. *Appeal allowed.*

NOTES.

[The registration is *prima facie* evidence, 38 Cal., 537; see also (1907) 9 Bom. L.R., 401; 1192.]

[17 Cal. 906]

APPELLATE CIVIL.

The 21st June, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Kali Kanta Surma and others........... Defendants

versus

Gouri Prosad Surma Bardeuri and others............Plaintiffs.*

Right of suit—Suit to establish right to offerings—Emoluments—Defect of parties—Code of Civil Procedure (Act XIV of 1882), ss. 11, e pl. 30.

A suit claiming a right to the regular offerings made out of the funds of a temple which are of a substantial value as emoluments is a suit of a civil nature within the meaning of the explanation to s. 11† of the Code of Civil Procedure.

Krishnama v. *Krishnasami* (I. L. R., 2 Mad., 62) referred to; *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (I. L. R., 10 Bom., 233) distinguished.

*[907] The plaintiffs based their claim to a goat sacrificed on the 4th day of each month on an alleged custom by which each of five families took certain goats in each month, and sued to establish their right without making the other families parties. *Held*, that to make any declaration in a suit to which they were not parties would be in effect to partition joint property, and to define the share of each without all the shares being before the Court—*Prahlad Singh* v. *Luchmunbutty* (12 W. R., 256).

THIS was a suit for the establishment of title to the goats sacrificed on the 4th day of every month in the temple of the goddess Kamakhya on the Nilachal hills in Kamrup, and to recover the price of 15 goats. The plaintiffs alleged that in very ancient times five Brahmins had been imported for purposes of

---

*Appeal from Appellate decree No. 1088 of 1889, against the decree of C. J. Lyall, Esq., Judge of Assam Valley Districts, dated the 11 of March 1889, affirming the decree of Baboo Shiva Prosad Chuckerbutti, Munsif of Gouhati, dated the 23rd of March 1888.

Courts to try all civil suits unless specially barred.

†[Sec. 11:—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.]

worship called respectively *Deka Bardeuri*, *Bura Bardeuri*, *Hala*, *Brahma*, and *Bidhipathak*, and they claimed as the descendants of the *Deka Bardeuri*. They further stated that the descendants of the five Brahmins, known as the five houses or families of *Bardeuris* (officiating priests), had since the time of their first employment performed in succession the daily worship of the goddess; that two of them were generally elected by the rest as *Kartas* or managers of the temple for the supervision of the ceremonies; that the two persons thus elected were called *Dalois*; that in addition to the *Bardeuri* families a number of Sudras were also employed in the temple; that there were other temples subordinate to the *Kamakhya* temple to which Brahmins were also attached, and these Brahmins were also known as *Dalois*; that some of those Brahmins known as cooks or *supakars* prepared the sacrificial offerings to the goddess; that the offerings (including certain goats sacrificed daily) were divided, according to an ancient custom, among the *Dalois*, the *Bardeuri* Brahmins, the *Dewalia* Brahmins, or Brahmins attached to the various temples, the cook Brahmins and the Sudras; and that the goat offerings made on five days in each month were divided among the five Bardeuris as their *marjada* (honorarium). The plaintiffs as the descendants of the *Deka Bardeuri* brought this suit against 16 *Dewalia* Brahmins and 12 Sudras attached to the various temples, alleging that disputes had arisen, and the latter had from the month of Assin 1293 by force withheld the goats which the *Deka Bardeuri* used to receive on the 4th day of each month, 15 goats in all.

[908] The defendants denied the right of the plaintiffs to the goats sacrificed on the 4th day of every month.

The family of one of the five Brahmins had become extinct. The objection was taken that the representatives of the other three *Bardeuris* had not been made parties to the suit.

The Munsif found in favour of the plaintiffs on the ground that it was reasonable to suppose from the evidence, and in particular from a document called a *sidhanta-patra* setting forth the customs of the temple, that the *Bardeuris* as managers of the temple would receive a larger share of the offerings than two goats per month as admitted by the defendants. The lower Appellate Court held that it was impossible to decide the case solely with reference to the *sidhanta-parta*, and that the probabilities of the case inclined rather to the side of the defendants, but that on a mere balance of probabilities the Munsif's decision should not be interfered with. The judgment of the Court of First Instance was therefore affirmed.

The defendants appealed to the High Court.

Mr. *Woodroffe* (with him Dr. *Rash Behari Ghose* and Baboo *Baikant Nath Das*) for the Appellants.

Mr. *P. O'Kinealy* and Baboo *Jasoda Nundun Poramanick* for the Respondents.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

Banerjee, J.—The plaintiffs state that they are the representatives of one of five Brahmins, who were brought from Kunoj by an ancient Hindu monarch to worship in the temple of Kamakhya in Kamrup, and that down to the present time the *Dalois* or managers of the temple have been always elected from among the representatives of the five Brahmins. They say that there are some smaller temples subordinate to the main temple in which the worship is conducted by other Brahmins, and that there are also a number of Sudras employed about all the temples. The defendants are the Brahmins employed

about the temples other than those who are descendants of the five imported persons and the Sudras. The family of one of the five Brahmins is become extinct, that of another is represented by the plaintiffs; but descendants of the remaining three persons who are admitted to be living, and who are said to claim the same rights as those claimed by the plaintiffs, are [909] no parties to this action. It is alleged that a goat is sacrificed in the temple each day, and this action is brought to obtain a declaration that the plaintiffs as representing the house of one of the five imported Brahmins are by the custom of the temple entitled to the whole of the goat which is sacrificed in the temple on the 4th of each month. The defendants object that the action cannot be maintained without the presence of the representatives of the other families of imported Brahmins and of certain other Brahmins and certain Sudras connected with the temple, and also contend that the five families between them are only entitled by custom to two goats in each month and not to the number alleged by the plaintiffs. The Courts below have found for the plaintiffs and given them a decree

In second appeal it is contended for the defendants, *first*, that the Courts below were wrong in entertaining the suit, which was substantially one for dignity in a Hindu temple unconnected with any profit; *secondly*, that the suit must fail for defect of parties; *thirdly*, that there is no legal evidence to establish the customary right set up by the plaintiffs, and that such right can be enforced only if it is in accordance with the original conditions of the endowment; *fourthly*, that the *sidhanta-patra* has been misconstrued by the Courts below; and *fifthly*, that the learned Judge below was wrong in affirming the decision of the first Court when he disagreed with the Munsif as to his estimate of the evidence.

We do not think there is much in the first contention of the appellants. In the case of *Krishnama* v. *Krishnasami* (I. L R., 2 Mad., 62) which was decided under the Civil Procedure Code of 1859, the Privy Council held that a claim to pecuniary benefits in respect of the performance of religious services was triable by the Civil Courts. Moreover s. 11 of the present Code, which enacts that the Courts shall try all suits of a civil nature, has an explanation added to it which provides that a suit in which a right to property is contested is a suit of a civil nature, notwithstanding that such right may depend on the decision of questions as to religious rites. Now in the present case, the right claimed is a right to certain offerings, that is, goats sacrificed on certain days, which, it is admitted, are not the voluntary offerings made by pilgrims, but are the regular [910] offerings made out of the temple funds, and which being articles of food are clearly property. The suit therefore is one of a civil nature as explained in s. 11, and is triable by the Civil Court. We may add that the offerings claimed are of substantial value as emoluments, and are not mere tokens of dignity, though the customary right to them might have been based originally upon considerations as to the position of the plaintiffs, and that the present case is distinguishable on this ground from the case of *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (I. L. R., 10 Bom., 233).

The second objection is however, in our opinion, fatal to the maintenance of the suit. The plaintiffs base their claim to the goat sacrificed on the 4th of each month on an alleged custom under which they say that each of the five families took certain goats in each month, and they bring this suit to have their right to the goat killed on the 4th declared without making the other four families parties. We do not think that such a declaration could in any case be made in their absence, or in the absence of the other Brahmins and Sudras

attached to the temple and interested in the offerings. It is part of the plaintiffs' case that they are interested in the offerings, and to make any declaration in a suit to which they are not parties would be in effect to partition joint property, and to define the share of each without all the shares being before the Court, which manifestly cannot be done—see *Prahlad Singh* v. *Luchmunbutty* (12 W. R., 256). It was argued on behalf of the plaintiffs-respondents that the parties being numerous, the first Court followed the course laid down in s. 30 of the Code of Civil Procedure, and permitted some of each group of persons interested and who ought to have been made parties, to represent the rest. We have heard the order of the first Court read out to us, and though that order purports to have been passed under s. 30, it is clear that the provisions of that section have not at all been properly carried out. Section 30, as we understand it, requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the Court to give to the persons interested notice of the institution [911] of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them. Now in the present case no such thing was done. In the first place the Court did not give permission to any definitely named persons among those interested to represent the rest; and in the second place the notice issued by the Court did not show who the persons were that had been selected to represent the remaining persons interested. That being so, we think that the persons interested in the result of the suit who are necessary parties have not been properly made parties to it, and that the suit must fail by reason of defect of parties. In this view of the case it is not necessary to consider the remaining points raised in the case. The result is that the decrees of the Courts below willbe reversed, and the suit dismissed for defect of parties, with costs in all the Courts.

A. A. C.

Appeal allowed and suit dismissed.

NOTES.

[As regards suit for offerings, see also (1899) 27 Cal., 30;
As regards representative suits, see also (1903) 28 Bom., 209.]

APPELLATE CIVIL.

The 27th June, 1890.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE BANERJEE.

Huri Dayol Singh Sarmana and others ....Plaintiffs

versus

Grish Chunder Mukerjee and others............Defendants.*

Hindu Law --Stridhan—Stridhan inherited by daughter from mother—Preferential heirs on death of daughter.

Stridhan inherited by a daughter from her mother passes on the daughter's death to the person who would be the next heir to the mother's *stridhan*. Where *B* inherited *stridhan* from *A*, her mother, it was held to pass on the death of *B* to the sons of *A* in preference to the children of *B*.

THE only question material to this report was as to the succession on the death of a daughter to *stridhan* property which had been inherited by the daughter from her mother. For this question the facts and arguments are sufficiently stated in the judgment.

[912] Baboo *Mohini Mohun Roy* and Baboo *Baikant Nath Das* for the Appellants.

Baboo *Golap Chunder Sirkar*, Baboo *Chunder Kanto Sen*, and Baboo *Akshaya Cumar Banerjee* for the Respondents.

The **judgment** of the Court (MACPHERSON and BANERJEE, JJ.,) was as follows :—

This was a suit for money due on a bond. The plaintiffs alleged that money lent really belonged to them, but the bond was taken in the name of their mother : and they further alleged that they were the only heirs to their mother. The defendants denied having borrowed any money on the bond, and they also urged that as the bond, on the face of it, showed that the money belonged to the plaintiffs' mother, and as she left a daughter who had male issue, the plaintiffs were not entitled to the money, and that their claim was further untenable by reason of their not having obtained any certificate under Act XXVII of 1860.

The first Court found that the plaintiffs' allegations were proved, and it gave the plaintiffs a decree; but the Lower Appellate Court, whilst affirming the first Court's finding that the loan was proved, held that the money was not shown to have belonged to the plaintiffs; and as the plaintiffs had a sister who died in 1292, leaving male issue, the plaintiffs were not entitled to claim the money (which might have been obtained by their mother at the time of her marriage) as heirs to their mother; and it accordingly dismissed their suit In second appeal it was contended before us that the Court of Appeal below was wrong in throwing on the plaintiffs the burden of proving that the money in question had not been received by their mother at her marriage, when it ought to have held that it was for the defendants to make out that the money was that particular description of *stridhan* to which the daughter is the heir in preference to sons. The point was also raised, though not taken in the grounds

* Appeal from Appellate decree No. 1622 of 1889, against the decree of J. Whitmore, Esq., Judge of Beerbhoom, dated the 10th of June, 1889, reversing the decree of Babu Rajendro Kumar Bose, Subordinate Judge of Beerbhoom, dated the 7th of December, 1888.

of appeal, that upon the facts found, the plaintiffs were entitled to claim the money by right of inheritance, to whatever class of *stridhan* it might belong. As this is a pure question of law, and the facts found are sufficient for its disposal, we allowed it to be raised and argued.

There is no force in the first contention of the appellants. It being found that the money was their mother's property, and the [913] only right upon which they sought to recover it in that view of the case being their right by inheritance, it was clearly for the plaintiffs to make out that the property was that description of *stridhan* to which they were entitled in preference to other heirs.

On the second point, however, we think the appellants ought to succeed. The facts found by the lower Appellate Court are that the money in question belonged to the plaintiffs' mother as her *stridhan*, but it was not shown of what description it was; that the plaintiffs' mother died leaving two sons (the plaintiffs) and a daughter; and that the daughter died in 1292, that is about two years before the institution of this suit, leaving two sons and two daughters. Upon these facts, it is contended for the appellants that, assuming the money in question to have been their mother's *stridhan* of that description which the daughter inherits in preference to the son, their sister took it not as *stridhan*, but as inherited property, with the same limited interest that a female heir takes in property inherited from a male owner; and that on her death it passed not to her heirs, but to the next heirs to her mother's *stridhan*, that is to the plaintiffs, who thus became entitled to the money when this suit was brought. Let us examine how far these propositions are correct according to the Hindu law of the Bengal school which governs this case.

They are fairly deducible from the Dayabhaga, Chapter IV, section I, and Chapter XI, section II, paragraphs 30 and 31. From the discussion in the Dayabhaga, Chapter IV, section I, as to what constitutes *stridhan*, it is abundantly clear that, though the author does not admit any definite limit as to the number of kinds of *stridhan*, yet the only kinds of property that he has expressly considered to be *stridhan* are those obtained from relations by gift [which has been held to include a testamentary gift as well as one *inter vivos*, see *Judoonath Sircar* v. *Busunt Coomar Roy* (11 B. L. R., 286 ; 19 W. R., 264)], and there is not the slightest indication that inherited property in the author's opinion would rank as *stridhan*. In Chapter XI, section II, paragraphs 30, 31 of the same treatise, when treating of the daughter's succession to the father's property, the author says that the principle laid down in the case of the widow (Chapter XI, section I, s. 56), that on her death the inheritance passes to [914] the next heir of the last full owner, the husband, 'is applicable generally to the case of a woman's succession by inheritance' It is true that this is said in a chapter of the work relating to succession to the property of a male, but the language is quite general The passage runs thus:—" Or the word ' wife ' (in the text above quoted, Section I, s. 56) is employed with a general import; and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance " (paragraph 31). The correct inference from this is that in the author's opinion, whenever a woman succeeds to property by inheritance, the property on her death pases not to her heir, but to the next heir of the last full owner who would have succeeded in the first instance if she had not been in existence.

The Dayatathwa of Raghunandan is not very explicit on the point, but property obtained by gift from relations is all that appears to be considered as *stridhan* (see Golap Chandra Sarkar's Translation, Chapter IX).

The Dayakrama Sangraha of Srikrishna Tarkalankara, which is the next authority in point of time and importance in the Bengal school, is clearly in favour of the appellants' contention. In Chapter II, Section II, paragraph 12, Srikrishna says that heritable wealth does not form a woman's peculiar property, and in Chapter II, Section III, paragraph 6, in dealing with succession to the separate property of a woman when received by her at her nuptials (which is the description of *stridhan* under which the money in dispute comes according to the respondents), he observes :—" Here, however, on the death a maiden daughter or of one affianced in whom the succession had vested, and who having been subsequently married is ascertained to have been barren, or on the death of a widow who has not given birth to a son, the succession to the property which had passed from the mother to her daughters would devolve next on the sisters having and ikely to have male issue, and in their default on the barren and widowed daughters ; and not on the husband of such daughter above mentioned in whom the succession had vested, for the right of the husband is in relation to the 'woman's separate property,' and wealth which has in this way passed from one to another can no longer be considered as the 'woman's separate property. This [915] must be understood." This clearly shows that on the death of a daughter who inherited her mother's *stridhan*, the property passes not to her heirs, but to the next heirs of her mother. The learned vakeel for the respondents argued that the use of the words 'ascertained to have been barren,' and 'who has not given birth to a son,' in the above passage indicates that the other heirs of the mother can come in only if the daughter who succeeded first dies leaving no male issue. We do not consider this argument sound. The author expressly declares that wealth which has passed by inheritance can no longer be considered as *stridhan*, and he clearly indicates that the person entitled to take it on the demise of any female who took it by inheritance is not the heir of such female, but is the next heir of the female whose *stridhan* it was, that is, the next heir of the last full owner ; and the respondents' contention is clearly inconsistent with this view. It seems to us most probable that the words in question were used by the author to make it clear that the exclusion of the husband in the example given was due to the fact of the property inherited by the wife from her mother not being ranked as her *stridhan* ; for if the wife left a son, the husband would be excluded even if the property devolved as her *stridhan*.

Words somewhat similar to those referred to above, used by the same author in his commentary on a passage of the Dayabhaga relating to the daughter's succession to her father's property, were relied upon in the case of *Tinumani Dasi* v. *Nibaran Chandra Gupta* (I. L. R , 9 Cal., 154) as warranting an inference similar to the one sought to be drawn by the respondents' vakil, but the Full Bench overruled that contention, and held that the proper import of those words was such as we have indicated above. The Court observed:—"It is exceedingly probable that the annotator suggested the addition of the words 'without leaving issue,' thinking that the language of the author without these words would be open to the objection of want of precision. Because, on the death of a maiden daughter (in whom succession has vested, and who had been afterwards married) leaving issue, the estate would 'not become the property of her husband or other heirs,' even if the law regulating the [916] succession to a woman's peculiar property were applicable, because the husband would succeed only in default of issue."

Great reliance was placed on the side of the respondents upon the following passage in Colebrooke's Digest :—" A daughter may at pleasure give away to any person whomsoever the exclusive property of her mother which

has devolved on her; after her death, the daughter's son-in-law and the rest shall obtain that which has not been aliened. It should not be argued that a daughter is only permitted to enjoy for life the peculiar property of a woman which she has inherited like the estate left by a man to which she has succeeded. That has not been asserted by Jimutavahana: and no reasoning supports it." (Coleb. Dig., V, 515; Commentary, Mad. Ed., Vol. II, p. 628). No authority is cited in support of this proposition, and it rests entirely on the authority of Jagannath. Now speaking of him, his translator, Colebrooke, says:—" We have not here the same veneration for him when he speaks in his own name or steps beyond the strict limits of a compiler's duty" (Vyavastha Darpana, 2nd Ed., Pref. XXVI, note). Jagannath's opinion, though no doubt entitled to great weight as that of a learned lawyer of vast and noted erudition, would not in itself be sufficient authority for any proposition of law, especially when, as in the present instance, it is opposed to the doctrine expressly laid down by Srikrishna in the Dayakrama Sangraha, and evidently deducible from the Dayabhaga.

Of later text-writers, Macnaghten is in favour of the appellants' contention so far as it asserts that *stridhan* inherited by a female ceases to be ranked as such (Principles of Hindu Law, p. 38). As regards the rule of succession applicable to such property, he seems to have fallen into an error which has been pointed out by MITTER, J., in the case of *Bhoobun Mohun Banerjee* v. *Muddon Mohun Singh* (1 Shome's Rep., 3), to which we shall presently refer. The opinion of Shama Charan is clearly in favour of the appellants—see Vyavastha Darpana, Vyavastha 487, 2nd Ed., p. 730.

The appellants' position seems to us to be equally clear upon the authority of the decided cases bearing on the point. In *Pran Kissen Singh* v. *Bhagwatjee* (1 Sel. Rep., 4), it was decided that a daughter who [917] takes by inheritance from her mother takes a qualified estate, and on the daughter's death the heir of the mother succeeds.

In the case of *Bhoobun Mohun Banerjee* v. *Muddon Mohun Singh* (1 Shome's Rep., 3), MITTER, J., observed:—" That *stridhan* inherited by a woman does not become her *stridhan* is clear—see Dayakrama Sangraha, Chapter II, s. II, paragraph 12, and s. III, paragraph 6; Macnaghten's Hindu Law, p. 38; *Pran Kissen Singh* v. *Bhagwatee* (1 Sel. Rep., 4), *Srinath Gangopadhya* v. *Sarbamangala Debi* (2 B. L. R. A. C., 144), and *Sengamalathammal* v. *Valyuda-mudali* (3 Mad. H. C., 312). But it has been remarked by Mr. Macnaghten in the passage referred to above that upon the death of the woman who inherits to a *stridhan* property, it passes to her heirs, meaning evidently to persons who would inherit to her properties other than *stridhan*. With the greatest deference to that learned author it seems to me that this remark is founded upon some misconception of the provisions of the Hindu law upon the subject. According to Hindu law a woman can have only two kinds of properties, *viz.*, (1) *stridhan*, and (2) inherited properties. As to the first class, there is an exhaustive enumeration of the heirs, and as regards properties inherited from a man, it goes after her death to the heirs of the last owner, and it seems to me that the same rule holds good also as regards *stridhan* property inherited by a woman, *i.e.*, upon her death it goes to the heirs of the last owner. Dayakrama Sangraha, Chapter II, Section III, paragraph 6, already referred to, clearly establishes this proposition.

" It seems to me that the same rule is laid down in the Dayabhaga, Chapter XI, Section II, paragraph 30. The chapter in question, it is true, mainly deals with rules of succession to properties left by a deceased male owner, but the paragraph referred to above appears to me to lay down a rule

applicable generally to succession by women whether to the properties of a man or to *stridhan* of a woman. If it were not so there would be no provision in the Dayabhaga relating to succession to property inherited by a woman from a female ancestress who held it as *stridhan*. I do not think that this is probable. Having regard to this circumstance, and having regard to the language of the paragraph in question which [918] is very general, it seems to me that the rule there laid down is also applicable to *stridhan* property inherited by a woman." It is true that the question for decision in that case was whether a daughter inheriting her mother's *stridhan* takes it absolutely or with limited power of alienation, but the texts of the Dayabhaga, which were held applicable to the case, and on the application of which the alienation in question was set aside, are the very texts that contain the rule of succession relied upon by the appellants.

In *Prankissen Laha* v. *Noyanmoney Dassee* (I. L. R., 5 Cal., 222), WILSON, J., held that what a daughter inherits from a mother does not become her *stridhan*.

Upon a consideration of the foregoing authorities we think it established that *stridhan* inherited by a daughter from a mother passes on the daughter's death to the next heir to the mother's *stridhan*.

There remains now the only question whether on their sister's death the plaintiffs or their sister's children were the nearest heirs to their mother's *stridhan*. On this point there is no room for doubt. Whatever description of *stridhan* of their mother the money in dispute may have been, the plaintiffs as her sons are her heirs in preference to their sister's children, that is, her daughter's children. In fact, in the order of succession to *stridhan*, the position of the sons in the most unfavourable case for them is inferior only to that of the daughters--see Dayabhaga, Chapter IV, Section II. That being so, at the date of the institution of this suit, the plaintiffs were the only persons entitled to the money in question.

We ought to notice here two other points urged for the respondents. It was contended that the plaintiffs were not entitled to maintain this suit as they had not obtained any certificate under Act XXVII of 1860. This objection, though taken in the first Court, does not appear to have been urged before the Court of Appeal below. Moreover, considering the defence of the defendants, which was a denial of the debt altogether, it seems to us that the case comes under the exception in section 2 of Act XXVII of 1860, under which the Court may dispense with the necessity of a [919] certificate. It was also urged that interest ought not to be allowed at the stipulated rate after the due date mentioned in the bond. We do not think this argument is valid. The bond provides that interest should run at the rate stipulated until the money is actually paid off.

The result is that this appeal will be decreed, and the decree of the lower Appellate Court will be reversed and that of the first Court restored with costs in this Court and the Court below.

J. V. W. *Appeal allowed.*

NOTES.

[A similar ruling was given by the Privy Council in (1903) 25 All., 468, a case under the Mitakshara Law. See also 23 Mad., 1.]

[17 Cal. 919]

ORIGINAL CIVIL.

The 1st July, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP AND MR. JUSTICE PIGOT.

Cohen............Defendant

versus

Sutherland ....Plaintiff*

Contract—Specific performance—Vendor and purchaser—Approval of title by purchaser's solicitor—Evidence Act (I of 1872), ss. 91, 92.

In a suit for specific performance of a contract for the sale of a house, the entire contract being contained in letters which provided that entry was to be given to the purchaser by a fixed date, and that the title-deeds were to be sent to the purchaser's solicitors, and "on approval of the same the purchase money to be paid prompt."—

Held, that the carrying out of the contract was in no way conditional upon the approval of the solicitors, but that their approval was a condition precedent to the prompt payment of the purchase money without waiting for a conveyance, and that the title was to be investigated and approved in the ordinary way.

This case was distinguished from *Sreegopal Mullick* v. *Ram Churn Nusker* (I.L.R., 8 Cal., 856).

THIS was a suit for the specific performance of an agreement for the purchase by the defendant from the plaintiff of a house and premises No. 5, Chowringhee Lane, in the town of Calcutta, and the furniture and effects therein for the sum of Rs. 54,000. The agreement was embodied and contained in certain letters dated the 18th and 19th November 1888, and written respectively by the defendant to one F. Siddons, the plaintiff's agent, and by Messrs. [920] Dignam, Robinson, and Sparkes, the plaintiff's solicitors and agents, to the defendant. The first of these letters was as follows:—

"MEMORANDUM.

"From

AARON COHEN & CO., 219, Old China Bazar Street,

"To

F. SIDDONS, ESQ.

"DEAR SIR,

WITH reference to the telegram No. 413 from Mr. A. B. Sutherland—'Split difference. Accept 54,000. Reply' -I hereby agree to purchase the house No. 5, Chowringhee Lane, in the city of Calcutta, for the sum of Rupees fifty-four thousand, including the furniture and fittings as per list handed over to Major McArthur, you having the right to remove family pictures, books, and such articles as were presented to Mr. Sutherland (these articles not to be of much value).

"It is also agreed between us that I shall have entry during the first week of December and not later. The title-deeds to be sent to Messrs. Gregory

* Original Civil Appeal No. 7 of 1890, against the decree of Mr. Justice WILSON, dated the 7th of February 1890.

and Moses, and on approval of the same the purchase money to be paid prompt. I agree also to pay you a brokerage of 1 per cent. on the transaction.

18th November 1888.

Yours faithfully,

(Sd.) AARON COHEN.

"The telegram referred to is in my possession.

(Sd.) A. C."

On receipt of the above letter Messrs, Dignam, Robinson, and Sparkes wrote to the defendant accepting his offer on the terms mentioned in the letter of the 18th November. The defendant was let into possession on or about the 7th December 1888, pevious to which dated the deeds and documents of title relating to the premises had been forwarded by the plaintiff's solicitors to the defendant's solicitor. On the 22nd December 1888 Mr. Gregory, who had dissolved partnership with his former partner, Mr. Moses (on the 1st December). forwarded requisitions on title to the plaintiff's solicitors, who on the 2nd January 1889 made their replies thereto in writing.

[921] On the 8th January 1889 the defendant refused to carry out the agreement on the ground that the plaintiff had not made out a clear marketable title to the premises, and he alleged that the contract was subject to the title being approved by his solicitors, Messrs. Gregory and Moses, and contended that it was expressly agreed between Mr. F. Siddons, acting on behalf of the plaintiff, and the defendant that the decision of Messrs. Gregory and Moses on the title was to be conclusive.

The **judgment** of the lower Court (WILSON, J.) was as follows :—

"This is a suit brought to enforce specific performance of a contract for the sale of a house, No. 5, Chowringhee Lane, from the plaintiff to the defendant. The contract is embodied in two letters, of which the first is dated the 18th November 1888, addressed to the plaintiff's agent, Mr. Siddons, and signed by the defendant, and the second accepts the terms stated in the first. The essential parts of the first letter are, 'I hereby agree to purchase the house No. 5, Chowringhee Lane, in the City of Calcutta for the sum of Rs. 54,000, including the furniture and fittings as per list handed over to Major McArthur. Then there is an exception as to certain things which the plaintiff was to be at liberty to remove. Then the letter goes on—'It is also agreed between us that I shall have entry during the first week of December and not later. The title deeds to be sent to Messrs. Gregory and Moses, and on approval of the same the purchase money to be paid prompt.' Now the plaintiff claims specific performance of that agreement, and in the ordinary course of things, upon proof of the contract, there would be a reference to investigate the title. But by the defendant's written statement and the opening of his learned Counsel at the hearing, a question was raised, not only as to what was the effect of the written contract contained in the letters standing by itself, but also as to whether those letters really embodied the whole of the terms agreed upon by the parties. It was said that first by the words of the letters themselves, and secondly by reason of the evidence to be given, it had become a term of the contract that the whole carrying out of the contract was to be subject, as a condition precedent, to the approval of the title by the defendant's attorneys, Messrs. Gregory and Moses, or rather one of them ; and that inasmuch as that gentleman [922] rejected the title, that was conclusive, and the case could go no further. It was arranged that issues should be settled for the purpose of trying that matter now, and this was done.

"I have to say whether the view contended for is the true view of the contract. Oral evidence was given, and I admitted it because it was said that the effect of the oral evidence would be to show that the letters did not contain the whole of the contract between the parties. I may say at once that the oral evidence in my opinion conclusively shows that the letters contained the whole of the contract between the parties, and that the defendant himself, his attorney, and everybody else concerned in the case, acted on that view of the matter. That being so, all I have to do is to construe the written documents.

"In this case the contract is a very peculiar one. In the majority of cases a certain course is followed in sales of land. The title is investigated and is approved or rejected by the purchaser's solicitor. If the title is accepted, the conveyance is prepared and in due course executed, the purchase money is paid at the time of execution, and when all that has been done the purchaser is entitled to possession; but this particular contract reverses the order of things. First, it is an express bargain that entry is to be given by a fixed date irrespective of the question whether the investigation of title was completed by that date or not. Then come the words upon which reliance is placed—'The title deeds to be sent to Messrs. Gregory and Moses, and on approval of the same the purchase money to be paid prompt.' What is said in this sentence is that the prompt payment of the purchase money without waiting for conveyance is to take place upon the approval of the title. To give them a further extent than that, and to construe them so as to make the carrying out of the contract in any form conditional upon the approval of Messrs. Gregory and Moses, would certainly be making them mean more than they actually say. The words do not appear in that part of the contract in which the principal terms are contained. The purchaser does not say 'I hereby agree to take the house subject to the approval of the title by my solicitors.' There is not a word about approval anywhere except in this particular passage. I think, therefore, the meaning of the contract is that the approval of the solicitors is, as stated [923] in that sentence, a condition precedent to the prompt payment of the purchase money without waiting for a conveyance. The case differs from the class of cases which have been relied on for the defendant, that is to say, from such cases as *Hudson* v. *Buck* (L.R., 7 Ch. D., 683), in which the purchase was made 'subject to the approval of the title by the purchaser's solicitor,' and *Hussey* v. *Horne Payne* (L. R., 8 Ch. D., 670; L. R., 4 App. Ca., 311,) in which the bargain again is made 'subject to the title being approved by our solicitors.' And it differs from a case, in which I followed these two cases *Sreegopal Mullick* v. *Ram Churn Nuskar* (I.L.R., 8 Cal., 856), where again it was expressly said that the sale and purchase should be subject to the approval of the title by the purchaser's solicitors. I entertain no doubt as to the true construction of this contract. That being so, it is unnecessary to consider other questions which have been raised. Had I taken another view, I should have had to consider how far the clause which made anything subject to the approval of Messrs. Gregory and Moses could apply in the event that has happened, viz., the dissolution of the partnership between those two gentlemen. I should further have had to consider whether the subsequent communications between the parties removed any difficulty arising from this circumstance. And, further, it is admitted that, if this clause were to be construed in the way contended for by the defendant, still the rejection by his attorney must be *bonâ fide*, and his objections to the title reasonable; so that, if I had taken another view of the contract, I should have had to say whether, under the circumstances of this case, the objections were *bona fide* and not unreasonable. But under the

circumstances, and in the view I take, it is unnecessary for me to express any opinion on these points. The result is that there must be the usual reference to the Registrar as to title. The question of the costs will be reserved."

From this decision the defendant appealed.

Mr. *Evans* (with him Mr. *Bonnerjee* and Mr. *Acworth*) for the Appellant.—If there is a separate oral agreement apart from the agreement in writing, and not inconsistent with its terms, that may be proved; Evidence Act (I of 1872), s. 92, prov. (2).* The [924] defendant says that it was a term of the contract that the rejection of the title by his attorney should be conclusive. If this is so, the Court will not decree specific performance without a rectification of the contract in order that the real intention of the parties may be ascertained; Specific Relief Act (I of 1877), ss. 26 (*d*), 31 (2). The lower Court has treated these words "and an approval of the same, etc.," as fixing a *punctum temporis* for the payment of the purchase money. The question is, whether the defendant's evidence, partly corroborated by that of Mr. Siddons, can be accepted.

Mr. *Acworth* followed on the same side.

Mr. *Woodroffe* and Mr. *Sale* for the Respondent were not called upon.

The following authorities were referred to in the course of the arguments:—Fry on Specific Performance, 2nd ed., ss. 277 488; *Hudson* v. *Buck* (L.R., 7 Ch. D., 683); *Hussey* v. *Horne Payne* (L. R., 8 Ch. D., 670; L. R., 4 App. Ca., 311); *Sreegopal Mullick* v. *Ram Churn Nusker* (I.L.R., 8 Cal., 856); Evidence Act (I of 1872), ss. 91,92; Specific Relief Act (I of 1877), ss. 26 (*d*) 31.

The following **judgments** were delivered by the Court (PETHERAM, C.J. and PRINSEP and PIGOT. JJ.):—

Petheram, C. J. (PRINSEP, J., concurring).—This is a suit brought by the plaintiff against the defendant for the specific performance of a contract to purchase a house. The contract was in writing, and two points have been argued before us: first, that the defendant is entitled to give evidence to show that the written document does not accurately express what the contract between the parties was; secondly, that on the true construction of the written contract as it stands, the defendant was not liable to take the house unless his solicitors approve the title: that they had not done so, and consequently this action is not maintainable. The first point was taken before Mr. Justice WILSON, and he says:—"I may say at once that the oral evidence in my opinion conclusively shows that the letters contained the whole of the contract between the parties, and that the defendant himself, his attorney and everybody else concerned in the case acted on that view of the matter." [925] As to that, it is sufficient for me to say that I entirely agree with Mr. Justice WILSON in that view of the facts. The second question then resolves itself into one of the construction of the document, and on that question of construction there have been a variety of cases cited before us, which show that in a contract for the purchase of property where words such as "subject to the approval of our solicitor" are contained—that puts the solicitors in the position of persons who are to say whether the title is a good one or not. It is sufficient to say that this contract does not contain such words, and I do not

* *Proviso* (2) The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

think it is necessary for me to say anything more than that I agree with the view that Mr. Justice WILSON has taken of the contract. The result in my opinion is that the appeal must be dismissed with costs, and the case must go back to the Registrar for the ordinary enquiry as to title in accordance with the order of Mr. Justice WILSON.

Pigot, J.—I am of the same opinion. I think that the meaning of the contract, as unaffected by any of the considerations arising from the evidence which has been given, is that which has been attributed to it by the learned Judge in the original Court. If, on the other hand, the evidence in the case may be looked to upon the grounds argued by Mr. *Evans*, and having reference to the provisions of s. 92 of the Evidence Act and of the Specific Relief Act as referred to by him, then the safest guide we in that case could take would be, as it seems to me, the evidence of Mr. Siddons, who has stated the circumstances of the introduction into the contract of the interpolated words. It seems to me that, assuming the propriety of using that gentleman's evidence for this purpose, and giving to that evidence its fair and reasonable construction, and to the rest of the words of the document their fair meaning, the effect of the agreement certainly could not be carried further than is expressed in the words of Lord Justice CAIRNS in *Hussey* v. *Horne Payne* in L. R. 4, Appeal Cases, page 322, where he says:— "I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser." In no way in which the case is to be looked at can it, I think, be properly held that it was the intention **[926]** of the parties, or of either of them, that the bargain was to depend upon the unfettered discretion of Mr. Gregory.

I agree with the Chief Justice that this appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Gregory and Jones.*

Attorneys for the Respondent: Messrs. *Dignam, Robinson and Sparkes.*

A. A. C.

[17 Cal. 926]

APPELLATE CIVIL.

The 27th June, 1890.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE GHOSE.

Ramdhan Bhadra and another............Defendants

versus

Ram Kumar Dey and another............Plaintiffs.*

Limitation—Bengal Tenancy Act (VIII of 1885), s. 184, Sch. III, Art. 3—Suit for possession by an occupancy ryot.

Having regard to the provisions of section 184 of the Bengal Tenancy Act, 1885, the period of limitation for a suit for the recovery of land by an occupancy ryot is two years, as prescribed by Article 3, Sch. III of the Act.

Saraswati Dasi v. *Horitarun Chuckerbutti* (I .L. R., 16 Cal., 741) followed.

IN this appeal the question was raised whether the period of limitation for a suit for the recovery of possession of land by a person claiming as an occupancy ryot was two years, as provided by Article 3, Schedule III of the Bengal Tenancy Act, 1885, or 12 years under the Limitation Act, 1877. For the purposes of this report the facts of the case and the arguments are sufficiently stated in the judgment of GHOSE, J.

Baboo *Grish Chunder Chowdhury* for the Appellants.

Baboo *Dwarka Nath Chuckerbati* for the Respondents.

The following **judgments** were delivered by the Court (NORRIS and GHOSE, JJ.) :—

Ghose, J.—This is a suit to recover possession of certain lands under a *jote* right. The plaintiff's allegation is that he acquired a **[927]** right of occupancy in the lands by holding as a tenant for a long time, but that the defendants wrongfully dispossessed him therefrom on the 28th of Assin 1291, corresponding to the 13th October 1884; and the plaint asks that possession may be awarded to the plaintiffs by establishing his *jote* right. The defendants, who are the landlords, deny the plaintiff's right, and set up the plea of limitation under Article III, Schedule III of the Bengal Tenancy Act.

Both the lower Courts have decreed the suit, being of opinion that the plaintiff has an occupancy right in the lands in suit, and that the defendants were not justified in evicting him. They have also held that the limitation applicable to the suit is not two years under Article 3 of Schedule III of the Bengal Tenancy Act, but 12 years under the Indian Limitation Act of 1877, there being a dispute of title between the parties. On appeal to this Court, it has been contended before us that the case falls within Article 3 of Schedule III of the Bengal Tenancy Act, and the period of limitation applicable is two years, and not 12 years; and in support of this contention, a decision of a Division Bench of this Court (PRINSEP and HILL, JJ.) in *Saraswati Dasi* v. *Horitarun Chuckerbutti* (I. L. R., 16 Cal., 741) has been quoted. That decision was pronounced in a suit which was of a similar character to the suit now before us, and is to the effect that, although under the old rent law (Bengal

* Appeal from appellate decree No. 1122 of 1889, against the decree of Baboo Atool Chunder Ghose, Subordinate Judge of Mymensingh, dated the 30th of March 1889, affirming the decree of Baboo Anand Mohun Biswas, Munsif of Hosseinpore, dated the 24th of February 1888.

Act VIII of 1869, section 27), as expounded by the decisions of this Court, the suit could have been brought within 12 years from the date of dispossession, the title of the tenant being disputed and put in issue in the case, still, under the Bengal Tenancy Act, the plaintiff has only two years to bring the suit.

It was, however, argued on the other side that the law under Article III of the 3rd Schedule of the Bengal tenancy Act is substantially the same as it was under section 27, Bengal Act VIII of 1869, and that, therefore, the plaintiff having sought for a declaration of his title, and that title being disputed by the landlord, the suit is well within time, it having been instituted within 12 years from the date of the cause of action.

Section 27 of Bengal Act VIII of 1869 is as follows (omitting passages which are unimportant for the present question)— **[928]** "All suits to recover occupancy of any land, farm, or tenure, from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same, * * * shall be commenced within the period of one year from the date of the accruing of the cause of action and not afterwards." And it has been held in several cases by this Court that the said section 27 refers only to possessory actions against the londlord, and not to a suit where title is set up, and where the plaintiff seeks to have right declared and possession given in pursuance thereof; but that where the existence of the tenure is not disputed, and the plaintiff's original title as tenant is not and never has been questioned, and where there is no question of title either raised in the suit or raised before the suit, the case is governed by section 27, Bengal Act VIII of 1869: see *Nistranee* v. *Kalee Pershad Doss Chowdhry* (21 W. R., 53); *Asman Singh* v. *Obeedooddeen* (23 W. R., 460); *Dhurjobutty Chowdhrain* v. *Chamroo Mundul* (25 W. R., 217); *Forbes* v. *Sree Lal Jha* (I. L. R., 8 Cal., 365); *Joyunti Dassi* v. *Mahomed Ally Khan* (I. L. R., 9 Cal., 423); *Imam Baksh Mondul* v. *Momin Mondul* (I. L. R, 9 Cal., 280); *Srinath Bhattacharji* v. *Ram Ratan De* (I. L. R. 12 Cal., 606); and *Basarut Ali* v. *Altaf Hosain* (I. L. R., 14 Cal., 624).

In the present case the title of the plaintiff as a tenant is disputed, and he seeks to establish his title and recover possession of what he claims to be his *jote*; and if we had to apply the law as it was expounded under Bengal Act VIII of 1869, there could be no doubt that the suit, having been instituted within 12 years from the cause of action, would be within time.

But then, what we have to consider is whether the case is not groverned by Article 3, Schedule III of the Bengal Tenancy Act.

That Article runs thus :—" To recover possession of land claimed by the plaintiff as an occupancy ryot," " two years" from " the date of dispossession." And section 184 of the Act provides that " the suits, appeals, and applications specified in Schedule III annexed to this Act shall be instituted and made within the time prescribed in that schedule for them respectively."

[929] The decision in *Saraswati Dasi* v. *Horitarun Chuckerbutti* (I. L. R., 16 Cal., 741) is a direct authority upon the question we have to decide in this case; and it seems to me that we ought to adopt it, unless we are clearly of opinion that it is erroneous.

There is a marked difference of phraseology in the two corresponding sections of the two Acts. Act VIII of 1869, s. 27, speaks of, "suits to recover occupancy of any land, farm, or tenure from which a ryot, farmer or tenant has been illegally ejected ; " whereas Article 3 of the Bengal Tenancy Act speaks of suits " to recover possession of land claimed by the plaintiff as an occupancy ryot." The former Act referred to tenants of every class, and contemplated cases where the tenant being illegally ejected would be entitled to recover the *occupancy* of the land, that is to say, as has been held by this Court,

it referred to *possessory* actions by tenants, whether they be ryots having or not having rights of occupancy, or whether they be middlemen; whereas the new Act refers to occupancy ryots alone and contemplates suits to recover *possession* of land *claimed* by a plaintiff as an *occupancy ryot*, *i.e.*, where, by the very nature of the action, the ryot has to set out his *title* to the land claimed. It can hardly be, therefore, said that the Legislature intended simply to substitute, as it was contended on behalf of the respondent, the period of two years for that of one year, as provided by s. 27 of Act VIII of 1869. The words of Article 3 of the new Act would rather seem to indicate, although the matter is not very clear, that *all* suits for recovery of possession, wherein an occupancy right may be claimed, are to be governed by the limitation prescribed in that article. I observe that the Select Committee to which the Bengal Tenancy Bill was referred for consideration, on the 14th March 1884, referring to "Limitation," reported as follows:—"We consider that a moderately short period of limitation should be fixed for the recovery by an occupancy ryot of land comprised in his holding and, following the precedent presented by s. 81 of the Central Provinces Tenancy Act, 1881, we have fixed the period at two years from the date on which he is ejected, adding a proviso to guard against the revival of causes of action already barred." And this was adopted by the Legislature. It may [930] seem somewhat remarkable that, on the face of the various rulings of this Court with reference to s. 27 of the old Act, the Legislature intended to curtail, greatly to the disadvantage of the ryot, the period of limitation from 12 years to 2 years; and it may seem equally remarkable that it is only in cases of occupancy ryots that this curtailment has been made, and not in regard to tenants of any other class; but what we have to do is simply to administer the law as we find it.

A contention was raised before us by the learned Vakeel for the respondent to the effect that, the cause of action having arisen before the Bengal Tenancy Act came into operation, the plaintiff would be entitled to bring his suit within 12 years, that being the time within which he might have sued if the Bengal Tenancy Act had not been passed; but I am unable to accept this contention as correct. Section 184 of the Bengal Tenancy Act declares that suits specified in Schedule III of the Act *shall* be instituted within the time prescribed in that schedule And there is no saving clause for suits in which the cause of action had arisen before that Act was passed.

Another contention was raised before us to the effect that the suit as laid was not a suit against the defendant as *landlord*, but as a person having no title whatsoever, and, therefore, it did not fall within Article 3 of the Act. But it seems to me that, the defendant being in fact the landlord, it does not matter whether the plaintiff described him as such in the plaint or not.

For these reasons I think that the decree of the lower Court is wrong and should be reversed with costs.

Norris, J.—I concur in reversing decree of the lower Appellate Court.

C. D. P. *Appeal allowed.*

NOTES.

[In (1902) 7 C.W.N., 218 this was dissented from, but that case was overruled in (1904) 31 Cal., 647. See also (1903) 9 C.W.N., 56.

As regards the retrospective operation of limitation provisions, see also (1913) 21 I.C.. 43.]

[17 Cal. 930]

ORIGINAL CRIMINAL.

The 23rd July, 1890.

PRESENT:

MR. JUSTICE WILSON.

Queen-Empress
versus
Solomon.

Practice - Prosecutor's right of reply—Criminal Procedure Code (Act X of 1882), ss. 289, 292.

The putting in, as evidence on his behalf, of any documentary evidence by an accused person during the cross-examination of the witnesses [931] for the prosecution and before he is asked under s. 289* if he means to adduce evidence, does not give the prosecution a right to reply.

Empress v. *Kaliprosonno Doss* (I. L. R., 14 Cal., 245) followed. *Queen-Empress* v. *Venkatapathi* (I. L. R., 11, Mad., 339) dissented from.

THE accused was charged with forgery of a valuable security, forgery, using as genuine a forged document, having the same in his possession with intent to use it as genuine, forgery for the purpose of cheating, and cheating. The offences were alleged to have been committed in connection with certain loans obtained by the accused from the Hong-Kong and Shanghai Bank on the security of Government opium passes alleged to have been forged, such loans having been made in the months of March and April 1890.

The Officiating Standing Counsel (Mr. *Pugh*) and Mr. *T. A. Apcar* for the prosecution.

Mr. *Woodroffe*, Mr. *Allen*, and Mr. *J. G. Woodroffe* for the defence.

Mr. *Hyde* for the Hong-Kong and Shanghai Bank.

During the cross-examination of the witnesses for the prosecution, various documents were proved and put in as evidence on behalf of the defence. These documents consisted of numerous genuine opium passes, cheques, and entries in the books of the Hong-Kong Bank and the Bank of Bengal, showing the loan transactions of the accused with both banks for the years 1888 and 1889. Documents were also put in to show the transactions between the accused and one Nursing Dass, a dealer in opium, who was alleged by the defence to be dead, and whose name appeared on some of the forged passes as alleged purchaser of

* [Sec. 289 :—When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Procedure after examination of witnesses for prosecution.

If he says that he does not, the prosecutor may sum up his case; and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

If the accused or any one of several accused says that he means to adduce evidence and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

If the accused, or any one of several accused says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.]

the opium they purported to cover. Evidence was also given in cross-examination to show the number of lots of opium purchased and shipped by the accused during the months of January to April 1890, and of the number of lots purchased in those months by the firm of which Nursing Dass was a partner.

After the close of the case for the prosecution, on the accused being asked whether he intended to adduce any evidence, Mr. *Woodroffe* replied in the negative. Mr. *Pugh* thereupon stated [932] that if he should deem it necessary, after hearing what use the defence proposed to make of the evidence referred to above, he should claim a right to reply on behalf of the Crown. Mr. *Woodroffe* submitted that the Crown could not have a right to reply, and the Court intimated that it would be fairer to both parties to have the question decided at that stage than to leave it over to be decided after Counsel had addressed the jury for the accused.

Mr. *Pugh.*—It has always been the invariable rule in England, and is still the practice, that when documentary evidence is put in on behalf of the accused, the prosecution is entitled to the right of reply (Roscoe, p. 220). Here s. 288* of the Criminal Procedure Code expressly provides for the difficulty experienced in England of an accused being forced under certain circumstances to put in as his own evidence the deposition of a witness taken before the committing Magistrate. In this case there has been a large mass of evidence, of which it is difficult to see the relevancy, and until the prosecution know the purpose for which it has been put in, and the use intended to be made of it, it is impossible for me to tell what bearing it has on the case and to deal with it. The Crown will thus be placed at a considerable disadvantage, and it may result in a miscarriage of justice. The decisions on the point of the various High Courts are conflicting. The first reported case in this Court, *Hurry Churn Chuckerbutty* v. *The Empress* (I. L. R., 10 Cal, 140), is clearly distinguishable *The Queen-Empress* v. *Grees Chunder Banerji* (I. L. R., 10 Cal., 1024) decided by FIELD, J., was the first case which really interfered with the former practice of this Court, and that was decided upon the erroneous supposition that the Code of Criminal Procedure is a penal statute. That case was followed by TREVELYAN, J., in *The Empress* v. *Kaliprosonno Doss* (I. L. R., 14 Cal., 245), but, as there pointed out, it was dissented from and not followed by NORRIS. J., in a case which is unreported. On the other hand, the Madras High Court in *The Queen-Empress* v. *Venkatapatha* (I. L. R., 11 Mad., 339) have decided the other way, and have refused to follow the decision in *The Queen-Empress* v *Grees Chunder Banerji* (I. L. R., 10 Cal., 1024). I am also informed that it is the practice of the Allahabad High Court under such circumstances to allow a reply, though there are no [933] reported decisions of that Court. I contend, therefore, that the decisions of this Court to the contrary are erroneous, and that the Code has not taken away the right of reply which existed and had been the practice of the Court under the High Courts Criminal Procedure Act (X of 1875) before the Code was made applicable to it, and that after what has happened in this case the Crown is entitled to reply.

Mr. *Woodroffe* was not called on.

The **judgment** of the Court was as follows :-

Wilson, J.—The question raised now is one which I think I am bound to answer at this stage, in fairness to those who have the responsibility of conducting the case for the prosecution and for the defence, namely, whether,

Evidence given at preliminary inquiry admissible.

* [Sec. 288 :—The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.]

in the events which have happened down to this stage, the Crown is entitled to a reply. This seems to me to depend solely on the provisions of s. 292* of the Code of Criminal Procedure. Independently of authority I should have thought that it did not give the Crown the right of reply. It only gives the right when the accused has stated, in reply to the question put to him under section 289, that he means to adduce evidence. I further think it is my duty to follow the decisions of this Court rather than that of the Madras High Court. I hold, therefore, that up to this stage of the case nothing has happened which gives the Crown a right of reply.

Attorney for the Prosecution: The Officiating Government Solicitor (Mr. *W. K. Eddis*).

Attorney for the Accused: Baboo *G. C. Chunder*.

Attorneys for the Bank: Messrs. *Watkins and Co.*

H. T. H.

NOTES.

[The following were cases before the amendment in the Criminal Procedure Code (1898) 11 Mad., 339; 14 Bom., 436; 14 All., 212; 16 All., 88; but see now 31 Cal., 1050; 30 Bom., 421; 11 Bom., L.R., 177.]

[17 Cal. 933]

PRIVY COUNCIL.

The 13th March, 1890.

PRESENT:

LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Pirthi Pal Kunwar............Plaintiff

versus

Guman Kunwar and another............Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Declaratory decree, Suit for—Declaratory decree not obtainable by absolute right—Discretion of Court.

It is discretionary with a Court to grant or to refuse a declaratory decree with regard to the circumstances—*Sreenarain Mitter* v. *Kishen Soondery Dass* (11 B. L. R., 171, at p. 190; L. R. I. A., Sup. Vol., 149) referred to and followed.

[934] A talukhdar died, leaving a widow; also a son who, having succeeded as talukhdar, died childless. This son's widow, being in possession, sued for a declaration that an adoption by the father's widow, to the father, was void and ineffectual. The ground of suit was that, at some time or other after the death of the plaintiff, the person alleging himself to have been adopted might obtain the talukhdari, unless his adoption should now be negatived.

With regard to all the circumstances, the refusal of such a declaration was approved by their Lordships. If the person alleged to have been adopted should sue hereafter, the question would be decided whether he was validly adopted or not.

Prosecutor's right of reply.

* [Sec. 292:—If the accused, or any of the accused, has stated when asked under section 289, that he means to adduce evidence, the prosecutor shall be entitled to reply.]

APPEAL from a decree (27th July 1885) of the Judicial Commissioner of Oudh, reversing a decree (17th December 1884) of the District Judge of Sitapur.

The question on this appeal was whether the Appellate Court below had rightly reversed a decree declaring that the adoption of the second defendant by the first was invalid, and whether the appellant was entitled to have such a declaration made. Ratan Singh, talukhdar of Katesar, in the Sitapur district and tehsil, died in 1837, leaving a son, Raja Sheo Baksh, and a widow, Rani Guman Kunwar, now the first defendant. Raja Sheo Baksh died in 1869, having, as alleged, made provision for the maintenance of the first defendant, and leaving a widow, the plaintiff.

On the 14th December 1883 Rani Guman Kunwar executed a document, registered the next day. This recited that Raja Ratan Singh had by will directed Guman to adopt a son to him, which she had accordingly done by adopting Maneshwar Baksh, to whom she bequeathed all her property.

On the 25th December 1884 Pirthi Pal brought this suit against Rani Guman Kunwar and Maneshwar Baksh to have it declared that this adoption was void. She obtained from the District Judge a declaration that, after the plaintiff's death, the succession would take place as if no such document as that of 14th December 1883 and no adoption had been made. The Judge refused to deal with any question as to the inheritance to Pirthi Pal's own property.

On appeal the Judicial Commissioner reversed the above decree and dismissed the suit with costs, giving judgment as follows :—

"The first question which I have in this appeal to decide is whether I should be exercising a wise discretion in allowing the decree to stand. And I think that I should not. The District [935] Judge writes :—'It is an open question as to who will succeed to the property or the estate of the defendant No. 1 upon her demise. It would be difficult, if not impossible, to ascertain with any degree of accuracy at the present moment what would constitute the estate of the defendant No. 1 when she dies. How are we to know and how could we determine the question? It would be equally difficult to determine who is the next reversioner. Such a question could not be determined now.' And again :—'The defendant denies any intention to prejudice the plaintiff's interests, the object which the defendant has in view being merely, it is said, to provide an heir and successor to her own property. The will is somewhat ambiguous in its terms, and may admit of different interpretations being placed upon it.' The plaint is not drawn distinctly either under s. 39, or under s. 42 of 'The Specific Relief Act, 1877,' and counsel for the plaintiff admits his inability to confine himself to either section of the Act. The plaintiff could obtain no immediate relief under her decree, and her rights will be in no way prejudiced by delay.

"In these circumstances, the remarks of their Lordships in *Sreenarain Mitter* v. *Kishen Soondery Dassee* (11 B. L. R., 171, at p 190; L. R., I. A., Sup. Vol., 149), although made with reference to the law which preceded Act III of 1877, appear to me to be of force."

The Judicial Commissioner then quoted the passage that is given in the judgment below.

On this appeal

Mr. *J. D. Mayne*, for the Appellant, argued that the decision of the Judicial Committee referred to by the Appellate Court below did not support his conclusion in the present cases. The facts here were sufficient to show that the Court of First Instance had exercised a sound judicial discretion in granting a declaratory decree.

He referred to *Thayammal* v. *Venkatarama Aiyan* (L. R., 14 I. A., 67; I. L. R., 10 Mad., 205); *Jagadamba Chowdhrani* v. *Dakhina Mohun* (L. R., 13 I. A., 84; I. L. R., 13 Cal., 308); *Sreenarain Mitter* v. *Kishen Soondery Dassee* (11 B. L. R., 171, at p. 190; L. R., I. A., Sup. Vol., 149).

[936] The respondents did not appear.

Their Lordships' **judgment** was delivered by

Sir B. Peacock.—The circumstances of this case are very fully stated by the Judicial Commissioner in his judgment, and their Lordships have very few remarks to make beyond those which the Judicial Commissioner made when he delivered that judgment. He referred to the case of *Sreenarain Mitter* v. *Kishen Soondery Dassee* (11 B. L. R., 171, at p. 190; L. R., I. A., Sup. Vol., 149), and read the remarks which had been made by the Judicial Committee in that case. Amongst those remarks it was said: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances of the case, to grant the relief prayed for. There is so much more danger than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

The Judicial Commissioner, in exercising that judgment which the Judicial Committee had suggested ought to be adopted by the Courts in India, thought that this was not a case in which, in the exercise of a sound judicial discretion, he ought to grant a declaratory decree, or that a declaratory decree ought to have been granted by the Court of First Instance and he therefore reversed the decision of that Court and refused a declaratory decree. It appears to their Lordships that the Judicial Commissioner exercised a very sound judgment in what he did. All that is suggested by the learned counsel on the part of the appellant in support of a declaratory decree is this—that, at some time or another after the death of the present plaintiff, the person who according to the plaintiff's contention is not an adopted son may by some means, either by an act of the Government or otherwise, obtain possession as an adopted son. The only object, therefore, of having a declaratory decree is to prevent him being put into possession. Their Lordships cannot assume that the Government, if petitioned to put the person claiming to be an adopted son into possession, would do so unless they saw that he had a right to that possession. The **[937]** officers of Government would in ordinary course, if there were any doubt as to the title, refer the parties to the Civil Court.

If the person claiming to have been adopted brings an action to enforce his title, the question will be investigated whether he was validly adopted or not.

Under these circumstances, their Lordships think that there was no ground for this appeal, and they will humbly advise Her Majesty that the judgment of the Judicial Commissioner be affirmed.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[*See* also (1891) 15 Bom., 607; (1902) 26 Mad., 291; (1905) 8 O.C., 21, (1894) 22 Cal., 354; (1912) 14 I.C., 81.]

[17 Cal. 937]

PRIVY COUNCIL.

The 14th March, 1890.

PRESENT:

LORD MACNAGHTEN, SIR B. PEACOCK AND SIR R. COUCH.

Jibun Nissa and others ....Defendants

versus

Asgar Ali and others............Plaintiffs.

[On appeal from the High Court at Calcutta.]

Deed, Construction of—Deeds not intended to operate according to their tenor—Nullity of transaction apart from fraud.

Documents, principally a potta and a kobala, executed between a Mahomedan pardanashin lady and one of her relations purported to represent, the one a putni lease from her of her lands, and the other a sale of her house, and ground, from the date of the execution. That she received the consideration was not proved, but had it passed it would have been distributed between the two deeds, which formed part of one and the same transaction. From the acts of the parties it was established that her intent was to deprive her heirs, not herself, and that she had no intention to part with the property *in præsenti*, as the deeds represented that she did. *Held*, that, the latter not being intended to operate according to their tenor, the whole transaction was a nullity.

APPEAL from a decree (16th August 1886) of the High Court reversing a decree (16th July 1886) of a Division Bench, affirming a decree (22nd April 1885) of the Second Subordinate Judge of the 24-Pergunnahs District.

The plaintiffs, now respondents, were the nephews of Delrus Banu Begum deceased on 16th January 1883, and were her heirs by Shiah law. The question raised was whether she had defeated the [938] plaintiffs' title by transferring the property belonging to her, and in her possession, consisting of three parcels of revenue-paying land in the 24-Pergunnahs, and of a dwelling-house, to her grandnephew Nawab Mahomed Mehdi, who died on the 28th April 1879, and whose heirs the defendants were. The latter, when sued by the right heirs of Delrus, who was of advanced age, set up the following title. They alleged that Delrus, having long been in litigation with the plaintiffs, especially in the suit *Delrus Banu Begum* v. *Nawab Saiyad Ashgar Ali Khan* (15 B. L. R., 167; and on appeal to the Privy Council, *Ashgur Ali* v. *Delrus Banu Begum*, (I. L. R., 3 Cal., 324) for the expenses of which suit she wanted money, was desirous that they should not inherit her estate, but that it should go to Mahomed Mehdi: that, accordingly, on the 3rd August 1876, in consideration of a payment of Rs. 6,000, and a yearly rent of Rs. 647, she executed a putni potta of the three parcels of revenue-paying land in favour of Mahomed Mehdi, receiving from him a corresponding kabuliyat: and that on the next day, the 4th August 1876, she executed to Mahomed Mehdi, for a consideration of Rs.6,000, a kobala of the dwelling-house, with ground adjoining; taking from him a lease for her life, at an annual rent of Rs. 2,647 of the three parcels granted in putni, and also a lease of the house and ground for her life at a monthly rent of Rs. 25. There was no question as to the making of these instruments, which were all registered; but the plaint alleged that in August 1876 Delrus was incapable of attending to business, and that, if the consideration did pass, which was doubtful, the execution was obtained by undue influence. The plain-

tiffs also alleged that Delrus did not understand the nature of the transactions, never intending that there should be an actual transfer. They alleged that possession continued as before, and that the rents reserved were never paid.

The Subordinate Judge was of opinion that the consideration was inadequate; yet that, as the act of the owner, to carry out her own objects, the attempted transfer of the putni interest in the land was good against the heirs of Delrus. As to the alleged sale of the house, he held that the want of consideration for the deed of sale was against its operating. He therefore made a decree that the plaintiffs were entitled to obtain possession of the [939] house and ground appurtenant, but not of the lands granted in putni to Mahomed Mehdi. On the appeal of both parties, heard by a Division Bench (PETHERAM, C.J., and GHOSE, J.), the Chief Justice expressed an opinion, at which also, on a further appeal under the 15th section of the Letters Patent, the High Court (PRINSEP, WILSON and BEVERLEY, JJ.) arrived; his colleague on the Division Bench differing.

On the appeal under the Letters Patent the High Court's judgment was delivered by PRINSEP, J., who was of opinion that the putni transaction was not separable from the matter of the kobala, and who, after going through the evidence, gave this decision :—

"The conclusion at which we arrive is, that the old lady, Delrus Banu Begum, executed the putni without knowing or being told the correct nature of the transaction, the manner in which it affected her rights, or the sacrifice which she was making; but that the knowledge which she should have acquired was kept from her by Mehdi and his dependents; that she never actually received the full amount of the consideration; that it is not proved that she relinquished any portion of it; that as the primary object of the transaction was to obtain at least Rs. 12,000, there is every reason to believe that if she had known that the full consideration had not been paid, she would not have executed the deeds; and consequently that the putni was executed under undue influence and in fraud. But this transaction may also be regarded from another point of view, viz., that no effect was given, or intended to be given, to the transaction, that it was a mere sham and therefore inoperative."

Wilson, J., concurring and also doubting whether any consideration had been proved to have passed, added : –

"What, then, is the consequence? I have already shown that, in my opinion, apart from any actual fraud, from the nature of the relation between the parties, the inadequacy of the price and the absence of any independent advice, the transaction cannot stand. Further, I think that if this transaction were really intended to be what it is represented to be on paper, there was, in addition, a gross actual fraud. Of the consideration of Rs. 12,000 which the old lady is alleged to have received, certainly half she never got, and very probably nothing.

[940] "On the other hand, it is equally possible that things may not have been at all so bad as they look from that point of view. I think they were not so, and my reason is this. I do not think there was ever any intention on the part of any party to that transaction that it should have any such operation as the deeds represent. As I have said, I think the lady intended to deprive her nephews of their inheritance if she could, and she wanted money. I cannot see anywhere any satisfactory evidence that she intended to deprive herself then and there of her house absolutely, and of the whole almost of her valuable interests in the zamindari properties, in favour of Mehdi. A very important piece of evidence on that subject is the deposition of Gunga Churn. He tells us what was her intention at the time. He says, 'I know the plaintiffs in this case,

She was on terms of enmity with them since the wakf case, and she told me repeatedly, "They are my *jain mokhalef* (bitter enemies)." 'Further on, 'I asked her, that having regard to the income of the property, I see the putni is granted for a very low amount. On this she said, "I have two reasons for granting this putni. First, I require funds for the Privy Council case, and no one wants to purchase the property on account of the pendency of that suit, and they have all along been my enemies. They are my heirs after my death, and it is my intention that they may not get my estate. Mahomed Medhi is my grandson, and I like him, and it is for this reason also that I make the grant for a reduced value." At the time of the execution of that deed there was a decree in execution against Delrus Banu Begum. At that time she required money to pay off that debt also.' That shows an intention to deprive her heirs, not an intention to deprive herself. Then, when we compare this with what happened afterwards, and find that this deed was never in any part of it acted upon, but that all subsequent transactions proceeded on the footing of the property being hers, and not on the footing of what appeared on the face of the document; I think the proper inference is, that the lady never had any real intention to part *in præsenti* with the property in the manner the defendants represent, just as I think that there is no satisfactory evidence to show that she ever received any proper consideration. It follows, therefore, that the whole transaction must be regarded as a nullity.

[941] "But another view of the case has been put before us by Baboo *Mohesh Chunder Chowdhry*. He contended, that even if it be held that the transaction was not intended to have present operation in the full sense of the term, it was at least clear that the lady had a strong desire to benefit Medhi after her death, and so we were asked to give effect to the transaction as one by which she was to retain the whole benefit for her life, and Medhi was to take it after her death. Now, in order to give effect to this contention, it must be held, that although, under the terms of the deeds, Medhi was to have a vested interest from the dates of their execution, in fact he was not to have it till after the death of Delrus. There are several objections to this view: First, it would directly contradict the deeds; secondly, it would conflict with the case put forward by the defendants themselves in their pleadings and evidence; and thirdly, under the authority of the decisions of the Privy Council on this subject, it would seem that there are very strong reasons for saying that it would conflict with the rules of Mahomedan law *. I therefore concur in the conclusion arrived at by my learned colleague."

Mr. *R. V. Doyne*, for the Appellant, argued that as to the putni grant, and the consideration for it, the first Court was right in dealing with it as separate from the questions arising as to the sale of the house. There was no reason on the evidence for supposing that Delrus did not execute all the documents with full knowledge of their effect; or that she was deceived. She wished to benefit Mahomed Medhi. No particulars of fraud were either proved, or alleged, and in the absence of fraud, the inadequacy of the consideration would not invalidate the transaction, so far as to prevent its being carried out, according to the intention of Delrus upon her death in 1879. This, at all events, applied to the putni.

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the Respondents, were not called upon.

Their Lordships' **judgment** was delivered by

Sir R. Couch.—The respondents in this appeal brought a suit against the appellants, in which they alleged that Delrus Banu Begum died possessed

* *Abdul Wahid Khan* v. *Nuran Bibi*, L. R., 12 I. A. 91; also reported in I. L. R., 11 Cal. 597, and see cases cited at p. 602 of that report.

of considerable property, and that they were, [942] according to the Shiah law, of which sect the family were members, her heirs, and as such were entitled to the estate left by her. The defence depended upon a transaction which took place on the 3rd and 4th of August 1876.

In order to explain that transaction it may be stated that Mahomed Mehdi, the principal party to it, was the grandson of a brother of Delrus Begum. The nature of it was that Delrus Begum, who was said to be wishing to raise money, sent for Mehdi, and on his coming an agreement was made by which he was to pay her Rs. 12,000, and to receive in return a putni of her estate, with the exception of the house in which she lived, and about 20 bighas of land. He was also to have a kobala or deed of sale of the house and premises, and the Rs. 12,000 were equally distributed between the putni and the kobala. It is apparent from the evidence that this was one transaction. The putni was executed on the 3rd of August 1876, and the kobala on the following day. The putni states that out of 268 bighas of land in holding No. 186, Delrus Begum had her dwelling-house and 20 bighas of land; and that she had issued a notification for letting out in putni the 248 bighas, and that Mehdi, having applied to take the land in putni, she granted him a putni on receipt of a bonus of Rs. 6,000 at a determined and fixed annual rental of Rs. 647-14-10 gundahs in respect of her proprietary right in the 248 bighas. It provides that out of that rental he is to pay the annual Government revenue of Rs. 347-14-10 gundahs, and to pay to her Rs. 300 per annum as profits for her proprietary right.

By the kobala Delrus Begum sold to Mehdi for Rs. 6,000 her rights in about 20 bighas of land belonging to her dwelling-house, together with the pucca buildings and garden with trees, etc.

On the same date, the 4th of August, Mehdi executed an ijara by which he granted to Delrus Begum all his rights in the land included in the putni and kobala, at a rent of Rs. 2,647 14 annas 10 pie. This is the amount of rent Delrus Begum was to receive under the putni, with Rs. 2,000 in addition, and it provided that if Delrus Begum failed to pay the rent due on account of any instalment on the first day of the succeeding month, she should be liable to pay interest for the overdue instalment at the rate of 1 per cent. per mensem, and if she failed to pay the rents due on account of three [943] successive instalments, her ijara rights were to cease on the first of the fourth month, and she says: -" I shall not make any default in the payment of any instalment; and if any land be taken by Government, I will not get the compensation thereof—that is, any portion of the value of it."

There were two questions raised by the defence – first as to the putni, and next as to the kobala. The case has been before five Judges of the High Court, and the Judge of the 24-Pergunnahs, and all those Judges came to the conclusion, with regard to the kobala, that it was not intended to be a real transaction. It has not been contested by Mr *Doyne*, who has argued the case with great care and ability, and has called their Lordships' attention to every portion of the evidence which might assist the case of his clients, that this is a true finding.

That is very important with reference to the putni, because it was evidently one transaction, and it would be very difficult, if not impossible, to come to the conclusion that if that part of the transaction was altogether an unreal one, and that it was never intended that it should operate as a sale, the other part, that is the putni, was intended to be a real transaction. The consideration is said to have been Rs. 12,000; but it is obvious that at least Rs. 6,000 were never paid, and were not intended to be paid, or to have any effect as purchasing the property. With regard to the putni, the case was presented in the High

Court as being a case of a fraud practised upon Delrus Begum ; and it seems to have been treated in that way by some of the learned Judges. Their Lordships see no ground for thinking that any fraud was practised upon the lady. The defect in the transaction is that the intention on her part was not that which is apparent on the face of the deeds—in fact, that the deeds do not represent really what was intended. The evidence has been very fully examined, and it is not necessary to say more than that their Lordships, after the full argument which has been addressed to them on behalf of the appellants, have come to the conclusion that, as regards the result of the case, they agree in the judgment which has been given by the learned Judges of the High Court on the appeal from the two Judges who differed in opinion. They agree in that result for the reasons which were given by Mr. Justice WILSON towards the conclusion of his judgment, [944] namely, that the deeds were not intended to operate according to their tenor.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court of the 16th August 1886, and to dismiss the appeal; and the appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the Appellants : Messrs. *Barrow and Rogers.*

Solicitors for the Respondents : Messrs. *T. L. Wilson and Co.*

C. B.

NOTES.

[See also (1898) 2 O. C., 149.]

[17 Cal. 944]

APPELLATE CIVIL.

The 12th June, 1890.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE RAMPINI.

Birjmohun Lal and others............Plaintiffs

versus

Rudra Perkash Misser............Defendant.*

Minor—Age of majority Guardian and Manager—Limitation—Agent duly authorised—Act XL of 1858., ss 4, 7, 12—Majority Act (IX of 1875), s. 3—Court of Wards Act (Bengal Act IX of 1879), ss. 7—11, 20, 65—Limitation Act (XV of 1877), s. 20.

In a suit to recover money due upon certain promissory notes executed between the 14th December 1885 and the 16th March 1886, the defendant pleaded (*inter alia*) minority, and alleged that by an order of the Civil Court the Collector had been appointed his guardian and manager of his estate under Act XL of 1858. that on the 6th December, when he was

* Appeal from Original Decree No. 134 of 1889, against the decree of Baboo Girish Chunder Chatterji, Subordinate Judge of Monghyr, dated the 26th of April 1889.

nineteen years of age, his estate had been released by the Court of Wards and was made over to his father on the 17th December; that on the 30th December the District Judge held that he was still a minor, and appointed a manager of his estate, and that the District Judge's order had been upheld on appeal by the High Court.

Held, that there was no evidence that a guardian of the person or property of the defendant had ever been appointed within the meaning of section 3 of the Indian Majority Act (IX of 1875), and as the defendant was not under the jurisdiction of the Court of Wards at the time of execution of the promissory notes, he was then no longer a minor, but *sui juris* and competent to enter into a binding contract.

Held, that the Collector is not a Court of Justice within the meaning of section 3 of the Majority Act. A Collector appointed under section 12 of [945] Act XL of 1858 cannot properly be styled the guardian of a minor's property.

Held, that under section 3 of the Majority Act the disability of minority only continues so long as the Court of Wards retains charge of a minor's property and no longer.

Rudra Prokash Misser v. *Bhalo Nath Mukherjee* (I. L. R., 12 Cal., 612) referred to and commented on.

Held also, that an agent may be impliedly authorised within the meaning of section 20* of the Limitation Act to make a payment of interest or principal before the expiration of the period prescribed.

THIS was a suit by the brothers and the minor sons (by their guardian and next friend) of one Muddun Mohun Lal, deceased, to recover from the defendant the sum of Rs 7,881, being the principal Rs. 5,800 and interest Rs. 2,081, alleged to be owing to the plaintiffs' firm upon ten on-demand rokas or promissory notes executed on various dates between the 14th December 1885 and the 16th March 1886 in favour of Muddun Mohun Lal, one of the rokas being executed by one Sital Prosad Misser, the am-mukhtar of the defendant, and the remainder by the defendant himself. Various sums, as the plaintiffs alleged had been paid upon the first seven rokas on account of interest on the 15th Falgoon 1293 F. S. (corresponding with the 5th February 1886), so that no question of limitation could arise.

The defendant in his written statement pleaded minority; that the loans had been raised by Sital Prosad Misser without his authority upon blank sheets of paper executed by him, and that Sital Prosad had no authority from him to pay interest; that he had not received the consideration for the rokas from Sital Prosad; and that the first five rokas were barred by limitation. In support of the defence upon the ground of minority the following facts were relied upon by the defendant. It was alleged that under an order of the District Judge of Bhagulpore, dated the 1st September 1873, the Collector of the district was appointed manager to the estate of the defendant, who was then an infant, having been born on the 19th April 1866. On the 6th December 1885 the defendant ceased to be a ward of Court. On the 17th December his estate was made over to his father under section 65 of the Court of Wards'

---

* Sec. 20.—When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

Effect of payment of interest as such.

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

Effect of part-payment of principal.

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the hand-writing of the person making the same.

Effect of receipt of produce of mortgaged land.

Where mortgaged land is in the possession of the mortagagee, the receipt of the produce of such land shall be deemed to be a payment of the purpose of this section.]

Act (Bengal Act IX of 1879). On [946] the 30th December the defendant applied to the District Judge of Bhagulpore to be appointed guardian of his minor brother, Dharam Prokash. The Judge rejected the application, being of opinion that the defendant was still a minor, and by an order of the same date appointed one Bhola Nath Mukerjee, manager of the defendant's estate. The High Court, on appeal, in the case of *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (I. L. R., 12 Cal., 612) held, the Collector having been appointed guardian of the defendant's estate under Act XL of 1858, the defendant must by virtue of s. 3 of the Indian Majority Act (IX of 1875) continue to be a minor until he reached the age of twenty-one, whether the original guardian continued to act or not. It was admitted that the defendant was nineteen years and four months old on the 14th December 1885.

The Subordinate Judge decided in the defendant's favour upon all the points raised and dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court.

Mr. *Woodroffe* (with him Mr. *R. E. Twidale* and Baboo *Saligram Singh*) for the Appellants.

Mr. *Sandel* and Baboo *Kishori Lal Goswami* for the Respondent.

The following authorities were referred to in the course of the arguments:—Act XL of 1858, ss. 4, 12; Indian Majority Act (IX of 1875), s. 3; Court of Wards' Act (Bengal Act IX of 1879), ss. 7—11, 20, 65; Contract Act (IX of 1872), ss. 11, 68; *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (I. L. R., 12 Cal., 612); *Khwahish Ali* v. *Surju Prasad Singh* (I. L. R., 3 All., 598); *Stephen* v. *Stephen* (I. L. R., 8 Cal., 714; I. L. R., 9 Cal., 901); *Periya Sami* v. *Seshadri Ayyangar* (I. L R., 3 Mad., 11); *Mugniram Murwari* v. *Gursahai Nund* (I. L. R., 17 Cal., 347); Indian Stamp Act (I of 1879), s. 33.

The **judgment** of the Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by

Rampini, J.—The plaintiffs sue the defendant for the sum of Rs. 5,800 due as principal and for the sum of Rs. 2,081 due as interest on ten rokas or promissory notes, nine of which were executed by the defendant, and one of which was executed by [947] one Sital Prosad Misser, the am-mukhtar or general agent of the defendant, between the 22nd Aughran and 26th Falgoon 1293 Fusli, *i.e.*, the 14th December 1885 and 16th March 1886.

The answer of the defendant is (1) that he was a minor at the time of the execution of these rokas; (2) that he signed the rokas on blank sheets of paper, which he handed over to Sital Prosad, and that he himself received only Rs. 2,000 out of the Rs. 5,800 alleged to have been paid to him on them; (3) that the plaintiffs' claim on five of these rokas is barred by limitation; and (4) that Sital Prosad had no authority from him to borrow money or pay interest on his behalf.

The lower Court has found all these pleas in favour of the defendant, and the plaintiffs now appeal and contend that the findings of the Subordinate Judge are wrong.

We proceed to deal with his findings *seriatim*, and, first, with his finding that the defendant was a minor at the time of the execution of these rokas.

It is admitted that the defendant was nineteen years and four months old at the time of the execution of the rokas, but it is said that, notwithstanding this fact, he was then a minor in consequence of the provisions of s. 3 of the Indian Majority Act (IX of 1875) which prescribe that any person of whose person or property a guardian has been or shall be appointed by any Court of Justice shall not attain his majority until he shall have completed the age of 21, and a decision of this Court, *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (I.L.R., 12 Cal., 612), has been cited in which the question of the majority of this

very defendant was at issue and in which it was decided that he did not attain his majority until the age of 21. But the present plaintiffs were not parties to that case, and therefore we cannot regard the decision in the case of *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (I. L. R., 12 Cal., 612) as more than a legal precedent for the principle that when a guardian has once been appointed to a minor under the provisions of Act XL of 1858, the disability of infancy will last till the age of 21, whether the original guardian continue to act or not. To enable this ruling to be used as evidence against the plaintiffs in [948] this case, it is incumbent on the defendant to prove in this case the facts on which that decision was passed, and this the defendant has failed to do. He has not, in our opinion, in any way proved that any guardian of his person or property ever has been appointed by a Court of Justice under the provisions of Act XL of 1858. It has no doubt been said that a guardian of his property was appointed by the Judge of Bhagulpore on the 1st September 1873, inasmuch as on that date the Judge of Bhagulpore ordered the Collector (presumably of Monghyr), under s. 12, Act XL of 1858, to take charge of the defendant's property. But, in the first place, there is no legal evidence in this case of the Judge of Bhagulpore's having passed any such order. The evidence on this point consists of two returns submitted by the Collector of Monghyr to the Commissioner of Bhagulpore, the first of which is without date and the second of which is dated the 20th March 1886, and which have been marked Exhibits C1 and C2, respectively. In these it is recited that on the 1st September 1873 the Judge of Bhagulpore directed the Collector, under s. 12, Act XL of 1858, to take charge of the estate in question. But, strictly speaking, this is not legal evidence of the Judge having passed any such order. If he did pass such an order, the order itself, or an attested copy of it, should have been produced, and not merely a recital by another officer that such was the case, there being nothing to show how that officer became cognizant of the alleged order of the Judge.

In the second place, we do not think that, even if the Collector was appointed by the Judge under s. 12, Act XL of 1858, to take charge of the defendant's property, it can be said that a guardian of his property was appointed within the meaning of s. 3 of Act IX of 1875. We think that the guardian there referred to must be the guardian of the person and the administrator of the property of a minor which the Judge has power to appoint under the provisions of s. 7* of Act XL of 1858. It is to be observed that in s. 12† of Act XL of 1858 the Collector is not styled the guardian

---

*[Sec. 7:—If it shall appear that any person claiming a right to have charge of the property of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the court shall grant a certificate of administration to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the minor who is willing and fit to be entrusted with the charge of his property, the court may grant a certificate to such relative.

Certificate of administration to whom to be granted.

The Court may also, if it think fit (unless a guardian has been appointed by the father), appoint such person as aforesaid, or such relative or any other relative or friend of the minor, to be guardian of the person of the minor.]

Court may appoint such person guardian.

†[Sec. 12:—If the estate of the minor consist, in whole or in part, of land or any interest in land, the Court may direct the Collector to take charge of estate, and thereupon the Collector shall appoint a manager of the property of the minor and a guardian of his person, in the same manner and subject to the same rules in respect of such appointments and of the duties to be performed by the manager and the guardian, respectively, so far as the same may be applicable, as if the property and person of the minor were subject to the jurisdiction of the Court of Wards.]

When the estate consists of land, Court may direct Collector to take charge of estate.

of the person or property of the minor, whose property he is appointed to take charge of; but, on the contrary, he is authorized to appoint some other person or persons to be the manager of the property and [949] the guardian of the person of the minor. Now, there is no evidence whatever in this case to show that any such manager or guardian of the defendant's property or person was appointed by the Collector by virtue of the order of the Judge passed on the 1st September 1873, and if there had been, this would not have brought the defendant within the purview of s. 3 of the Majority Act, for the Collector is not a Court of Justice. We of course have not failed to notice that in the case of *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (I. L. R., 12 Cal, 612), the Collector has been spoken of as the guardian of the defendant's property, but the question as to whether a Collector appointed under s. 12, Act XL of 1858, can properly be styled the guardian of a minor's property seems never to have been raised or considered in that case. We therefore do not think that this point can be held to have been decided in that case, and hence we do not feel ourselves bound by that decision on this point.

Then, it has been said that the defendant was a minor, because his estate was at one time under the jurisdiction of the Court of Wards; but it is clear from the terms of s. 3 of the Majority Act that the disability of minority only continues as long as the Court of Wards retains charge of the minor's property, and no longer; and it is admitted and shown in this case that the defendant's property was released by the Court of Wards on the 6th December 1885, *i. e.*, before the execution by the defendant of the first of the series of rokas sued on in this suit.

For these reasons we think that between the 14th December 1885 and the 16th March 1886, the defendant in this case was not a minor, but *sui juris*, and competent to enter into a binding contract.

Then, turning to the facts of the case, we feel no doubt that the defendant executed nine of the rokas now sued on (which indeed he does not deny) and got the full amount of the consideration mentioned in them, as well as the Rs. 200 paid on the roka of the 15th Falgoon 1293, which was executed for him by his admitted general agent and manager, Sital Prosad, who swears he executed it with the defendant's authority. We entirely disbelieve the defendant's statement that he signed blank sheets of paper and entrusted them to his agent Sital Prosad, who handed him over [950] only Rs. 2,000 for them. The evidence adduced on behalf of the plaintiffs shows that the defendant came in person with Sital Prosad and got the money himself on all occasions but one, and the notes themselves, except Exhibit No. X, show that the amounts of the loans are written on them just above or below the signatures, evidently by the same hand as affixed the signatures to them. On this point the defendant says: – "In some blank chittis I sent through Sital Prosad, I noted the amount to be borrowed, in others not." The rokas, however, show that this was done on all the rokas, except Exhibit X, signed by the defendant himself. This being so, we cannot believe that the defendant did not get the money. But even if he did not when he gave Sital Prosad authority to get the money from the plaintiffs for him, as he says he did, if his agent did not give it to him, he is liable to the plaintiffs for the amounts paid to his agent on his account with his assent and at his instance. There seems no doubt that the money was borrowed partly to meet the expenses of a case the defendant was carrying on in the High Court, partly to pay the Government revenue due on the defendant's estate, and partly to defray the expenses of the *murhan* ceremony of his brother.

There remains the question as to whether the suit is in any way barred by limitation. It is admitted that if the payment of interest on the 15th

Falgoon 1293 is proved, then the suit is not barred with regard to any of the rokas. Now, we feel no doubt that the interest on the first five rokas was paid, as alleged by Sital Prosad. We see no reason to discredit the endorsements on the back of the rokas. The Subordinate Judge says they have all been rubbed or fumigated so as "to give them an appearance of oldness." In our opinion one or at the most two only of the endorsements on the rokas appear to have been rubbed or smudged, and we do not think this smudging gives them any appearance of oldness, nor can we see what effect it has had on them. We therefore see no reason for suspecting their authenticity on this account. On the whole, we think that the payment of the interest in question is sufficiently proved by these endorsements and by the oral evidence adduced by the plaintiffs.

The next question is whether Sital Prosad was "duly authorised" to make such payment. It is to be observed that s. 20 of the [951] Limitation Act does not require the agent to be authorized in writing, and we think that an agent may impliedly be so authorized. Undoubtedly Sital Prosad was authorised to borrow money for the defendant. This is clear we think from Sital Prosad and the defendant's conduct, as well as from the fact that while defendant admits that Sital Prosad was his am-mukhtar and manager. he does not produce his am-mukhtarnama to show how his authority was limited: Sital Prosad says it was left in his zemindari serishta. We therefore consider that Sital Prosad must be held to have been authorised to make the payment of interest, which is proved by the evidence to have been a condition precedent to the plaintiffs making any further loans to the defendant. In addition to any implied authority, there is, we think, ample evidence to show that the defendant was aware of the payment immediately after it was made and that he ratified it by receiving the balance of the Rs. 200 from Sital Prosad and by signing another note for Rs. 200 with the knowledge that the amount due for interest had been paid by Sital Prosad out of the amount borrowed by him on his (the defendant's) account. We, therefore consider that the defendant is bound by the payment of interest made on his behalf on the 15th Falgoon 1293 by Sital Prosad. The suit is consequently not barred by limitation in respect of the first five rokas, and the defendant is accordingly liable to pay the full amount for which he has been sued in this suit.

For these reasons we set aside the findings of the Subordinate Judge in this case on all points, and decree the suit in favour of the plaintiffs for the full amount claimed by them with costs.

A. A. C. *Appeal allowed.*

NOTES.

[See the explanation of this case in **(1909) 36 Cal., 768** by MOOKERJEE and CARNDUFF, JJ., where all the previous cases are reviewed *in extenso*.]

[17 Cal. 951]

ORIGINAL CIVIL.

The 31st July and 1st and 8th August, 1890.

PRESENT :

MR. JUSTICE WILSON.

Macmillan and another............Plaintiff

versus

Suresh Chunder Deb............Defendant.*

Copyright—Form of Registration—"Selection" of poems, copyright in—Infringement of copyright by publication of copy before registration—Assignments of copyright previous to registration—Limitation of suits for infringement of copyright—Statute 5 & 6 Vic., c. 45.

The plaintiffs, the partners of a firm *M. & Co.*, were the proprietors, registered under 5 & 6 Vic., c. 45, of the copyright of a selection [952] of songs and poems, composed by numerous well-known authors, which was prepared by one *P.* and originally published in 1861. Since the original publication the book ran through several editions, on of which was published in the year 1882. The book was registered under the provisions of the above Statute on the 8th February 1889, the name of both the publisher and proprietor being entered in the register as *M. & Co.* the firm's address being given, and the date of the first publication was entered as the 19th July 1861. The poems contained in the book were arranged by *P.*, not in chronological order of their production, but in gradation of feeling and subject, and at the end of the book were given some notes, critical and explanatory. On the 15th January 1889 the defendant published, at Calcutta, a book containing the same selection of poems and songs as was contained in *P's book*. The arrangement, however, of the defendant's book differed from *P's*, in that the poems of each author were placed together and in order of their composition. In one of the poems the defendant printed forty lines, which were contained in the work by the original author, but which were omitted by *P.*, and in another poem one line. In many places there were differences of reading in the two books, and in more of punctuation. In the defendant's book some of the titles to the poems, which had been assigned thereto by *P.* and not by the original authors, appeared, as well as a good many of *P's* notes, some with acknowledgment and some without. With each poem the defendant gave a mass of notes, critical and explanatory, and he also prefixed to the poems of each author a biographical notice. The suit was instituted on the 27th February 1890 and the plaintiffs complained that the publication of defendant's book constituted a breach of their copyright and prayed for the usual relief by way of injunction and damage. They contended that although the copyright in the works of the original authors had long lapsed, they were entitled to the copyright in the "selection" made by *P.*

It was contended on behalf of the defendant that there could be no copyright in such a selection ; that if any existed the defendant's book did not infringe it ; that the plaintiffs' book being registered as first published in 1861 and the infringement charged being in respect of the edition of 1882, and there being no evidence to show that the same selection was contained in the latter as in the former edition, the plaintiffs were not entitled to the relief prayed for ; that the author of the plaintiffs' book being *P.*, in whom the copyright would *prima facie* be, and the property being registered as in the plaintiffs' firm, the registry was bad as the assignment of the copy right to the plaintiffs was not shown ; that the registration was also bad, as the entry merely contained the name and address of the plaintiffs' firm, and not the individual names and addresses of the partners of the firm ; that the publication of the defendant's book having been before the date of registration, the suit would not lie : and

* Original Civil Suit No. 89 of 1890.

that the suit was barred by the special limitation provided by section 26 of the Statute 5 & 6 Vic. c. 45.

[953] *Held*, that such a "selection" could be the subject-matter of copyright, the true principle applicable to such cases being that one person is not at liberty to use or avail himself of the labour which another has been at for the purpose of producing his work, and so take away the result of the other's labour, or in other words his property.

Held, further, that the defendant's book constituted a piracy of the plaintiffs' book and had infringed their copyright, and that they were entitled to the relief they sought.

Held, also, that in the absence of any evidence to the contrary it was reasonable to assume that successive issues of a book of this kind under the same name are substantially the same book; that it was unnecessary that the registry should show an assignment of the copyright by *P.* to the plaintiffs [*Weldon* v. *Dicks* (L.R., 10 Ch. D., 247) followed]; that the registration was not bad by reason of the names and addresses of the partners of the firm not being given [*Low* v. *Routledge* (33 L. J. Ch., 717) and *Weldon* v. *Dicks* (L. R., 10 Ch. D., 247, followed]; that the title to copyright is complete before registration, which is only a condition precedent to the right to sue, and that the plaintiffs had not therefore lost their right of action by reason of the defendant's book being published before theirs was registered [*Tuck* v. *Priestr* (L. R., 19 Y. B. D. 629) and *Gourband* v. *Wallace* (25 W. R., 604; W. N., 1877, p. 130) followed]; and that, assuming that the rule of limitation provided by section 26 of the Statute was applicable in this country, the suit was not barred by limitation [*Hogg* v. *Scott* (L. R., 18 Eq., 444) followed].

THIS was a suit for infringement of copyright brought by the members of the firm of Messrs. Macmillan and Company, the London publishers, and publishers and proprietors of a book called "The Golden Treasury of Songs and Lyrics," which was a selection made by Professor Palgrave from the poems of numerous English authors of various periods. This book was first published on the 19th July 1861, since which date there had been several editions, one of which was published in 1882.

The suit was instituted on the 27th February 1890 against the defendant to restrain the publication, printing, and sale of a book called "Select Short Poems, Part X, with copious notes, criticisms, and question papers, etc., prescribed for the B. A. Examination of the Calcutta University, 1890, and for the first B. A. Examination **[954]** of the Bombay University." This work was issued and published by the defendant at Calcutta on or about the 15th January 1889, and was alleged by the plaintiffs to be an infringement of their copyright.

The plaintiffs alleged that the copyright in the "Golden Treasury" belonged and had always belonged to them; that they were the registered proprietors of the first and subsequent editions thereof, which had all been duly entered at Stationers' Hall in the Book of Registry of Copyrights and Assignments, kept at the Hall of the Stationers' Company in London pursuant to the Statute 5 & 6 Vic., c. 45, and they annexed a duly certified copy of an entry from such register. Such entry was as follows:—

No. 111.

Time of making the entry.	Title of book.	Name of publisher and place of publication.	Name and place of abode of the proprietor of the copyright.	Date of first publication.
February 8, 1889.	The Golden Treasury of the best Songs and Lyrical Poems in the English language	Macmillan & Co., 16, Bedford Street, Strand, London, W. C.	Macmillan & Co., 24, Bedford Street, Strand, London, W. C.	19th July 1861.

I hereby certify that the above written is a true copy of an entry in the Book of Registry of Copyrights and Assignments kept at the Hall of the Stationers' Company pursuant to Act of Parliament 5 & 6 Vic., c. 45.

One shilling

CHAS. REID REVINGTON.

Witness my hand this 9th day of February 1889.

Registering officer appointed by the Stationers' Company.

Stationers' Copyright Registry Company.

The plaintiffs further alleged that the book was sub-divided into four parts or books the fourth part of which had been prescribed by the Syndicates of the Calcutta and Bombay Universities, respectively, as one of the text-books for the B. A. examinations; that the poems and extracts contained in the book were selected [955] and the notes thereto compiled by Professor Palgrave with great care, taste and judgment, and were the outcome of a large expenditure of learning, time and trouble, and they claimed that the said selection and notes were entitled to be protected from the infringement and piracy by the defendant; they charged that, both as regarded the notes and also as regarded the selection of the songs and poems, the defendant had in his book wrongfully copied and made an illegitimate use of their book, and of the taste, judgment, researches and learning of Professor Palgrave, and that the defendant's book was an infringement of their copyright. They stated that they first got information of the publication of the defendant's book in the early part of the year 1889 and communicated with the defendant on the subject, but that he did not comply with their demand to stop the publication and hand over all copies in his possession, and they alleged that in consequence of the defendant's act the sale of their book had been greatly interfered with and their profits had been considerably diminished. They accordingly prayed for an injunction against the defendant in the usual terms, for damages, and for an account of the profits made by him on past sales.

The defendant in his written statement pleaded that the author of the "Golden Treasury" being Professor Palgrave, he was the only person entitled to the copyright, assuming that copyright in respect of the book could be claimed by any one. He admitted that the book was first published on the 19th July 1861, but denied that the entry in the register referred to by the plaintiffs was an entry made pursuant to the Statute 5 and 6 Vic, c. 45, and he submitted that the suit was barred by limitation. He stated that his book was compiled by himself and published on the 15th January 1889 to meet the wants of students preparing for the B. A. examinations, and he denied that in the compilation of his work he had wrongfully copied or made an illegitimate use of the "Golden Treasury." He also stated that his work contained a large mass of information, instructive matter, criticism and notes useful for students, and he denied that his publication infringed the copyright, if any, of the plaintiffs. He stated that in the preparation of his work he had recourse to the complete published works of the authors of many of the poems, and [956] in the remaining cases he had referred to many publications other than the "Golden Treasury." He relied on the differences in the text and arrangement of the poems in the two works as supporting his case, and while admit-

ting that some of Professor Palgrave's notes had been taken, pointed out that only in these instances had they been so taken without acknowledgment. He stated that the poems contained in his work had been prescribed for the B.A. examination, and submitted that as the "Golden Treasury" was not a work aiming at instruction, and did not fulfil the functions of an educational work the publication of such a work as his became necessary, and he denied that by its publication he had caused any damages to the plaintiffs by diminishing the sale of the "Golden Treasury."

Mr. *Pugh* and Mr. *Garth* for the Plaintiffs.

Mr. *Bonnerjee* and Mr. *O'Kinealy* for the Defendant.

The following issues were settled at the hearing: —

(1) Are the plaintiffs the owners of the copyright, if any?

(2) Is the entry in the book of registration a sufficient compliance with the Statute so as to enable the plaintiffs to maintain the suit?

(3) Has the defendant infringed the plaintiffs' copyright?

(4) Is the plaintiffs' right to sue in respect of the publication of the defendant's book barred by limitation?

The evidence, on behalf of the plaintiffs, given at the hearing consisted of a certified copy of the entry above referred to, and certain formal proof of the publication of the plaintiffs' book and the publication and sale of the defendant's work and copies of the 1882 edition of the former were put in. Certain correspondence which had passed between the parties was also tendered and admitted. In support of his case the defendant was called and examined.

It appeared from the evidence that the "Golden Treasury" was divided into four books, each book corresponding to a period of literary history. The poems in each book were arranged, not in chronological order of their production, but, as stated in the preface, "in gradation of feeling or subject."

At the end of the work there was a summary of each book and some notes, critical and explanatory. The fourth book, in respect of which this suit was brought, contained selected poems of [937] Wordsworth, Coleridge, Shelley and other authors, and had been set as a text-book by the Calcutta University. The defendant's book contained the same selection of poems as the fourth book of Professor Palgrave. The arrangement of the poems was, however, altered, those of each author being placed together and in order of their composition, and prefixed to the poems of each author was a biographical notice. With each poem was a large number of notes and other critical and explanatory matter, and it appeared that a good many of Professor Palgrave's notes had been copied, some with acknowledgment and some without. In one poem of Shelley's some forty lines were printed which Professor Palgrave had omitted, and in one of Wordsworth's, one line. In a good many places there were differences of punctuation, and in a few of reading. Titles affixed by Professor Palgrave to some of the poems also appeared in the defendant's work and appeared clearly to have been borrowed, as they did not appear in the work of the original authors. The defendant in his evidence stated that he had selected these poems because they were set by the University. He stated that he had seen what poems were included in Part IV of Professor Palgrave's book, but denied that he had taken his versions from that book, and stated that in the majority of instances he had gone to the works of the original authors for them. Apart from the notes, he stated that he made no use of the plaintiffs' book, except to see what poems were contained in it. He denied that he had copied any of the titles, but could not say where he had got those which did not appear in the works of the original authors but were assigned to some of the poems in Professor Palgrave's book.

Mr. *Pugh* (in opening the plaintiffs' case) pointed out that what was set as a text-book for the B. A. Examination was Palgrave's "Golden Treasury, Part IV," and not the selection of poems contained therein, and that it was clear the defendant's selection was taken from the plaintiffs' book, and was not the result of independent labour and research. The variations relied on by the defendant were evidently inserted, most of them, merely with a view to conceal the piracy, and the defendant could not be allowed to protect himself in that way. It was clear the titles of the poems referred to and the notes had been copied. The [958] last case upon the question in this Court was that of *Macmillan* v. *Kally Dass Mookerjee* (Unreported O. C. Suit No. 106 of 1880) decided by WILSON, J., which showed that in such cases as this of compilation, a person had no right to use another's work to lighten his own labours. On the question of copyright in selections there were no direct authorities, but he referred to *Longman* v. *Winchester* (6 Vesey., 269), *Spiers* v. *Brown* (6 W. R. Eng., 352), *Butterworth* v. *Robinson* (5 Vesey, 709), *Sweet* v. *Benning* (16 C. B. 491), *Smith* v. *Chatto* (31 L. T. N. S., 775), and Copinger on Copyright, page 43.

Mr. *Bonnerjee* (on behalf of the defendant) submitted that the plaintiffs had proved no case whatever with reference to the edition of 1882 as the certificate only referred to the edition of 1861, and assuming that they could have a copyright in that edition, they could only have it in those parts of that edition which appeared in the one of 1882, and as there was no evidence on this point, the suit must fail [*Murray* v. *Bogue* (1 Drew, 353)]. The book admittedly being the work of Professor Palgrave, the plaintiffs are only the assignees of the copyright in the book. That being so, to satisfy the requirements of the Act, the plaintiffs should have registered Professor Palgrave as the owner and themselves as such assignees, and consequently the registration is bad. It is also bad because the firm is registered as the proprietor, and in law there is no such person. The names and residences of the partners should have been given. Next, the suit will not lie as the defendant's book was published before the plaintiffs' book was registered. It is also barred by limitation, as it has not been brought within 12 months of the publication of the defendant's book, as required by section 26 of the Statute 5 and 6 Vic., c. 45.

Upon the main question in the case there has been no infringement of copyright. What the University set was Palgrave's collection of poems for the sake of convenience instead of setting out the list of the poems. The "Golden Treasury" is not suited for educational purposes, and the defendant was perfectly entitled to take these poems from Palgrave's book and prepare them in the way he has done to assist students. The notes in the defendant's book show the different scope of the work. Palgrave took no credit for the [959] selection, but merely for the arrangement, and that the defendant has not copied. Apart from arrangement, there could be no copyright in selection, and any one can print these poems. It is clear the defendant's work is an independent one with a totally different object to the plaintiffs' He cited the following cases in support of his arguments : *Jarrold* v. *Houlston* (3 K. & J., 708), *Wilkins* v. *Aikin* (17 Vesey, 422), *Spiers* v *Brown* (6 W. R. Eng., 352), *Tuck* v. *Priester* (L. R. 19 Q. B. D., 629), *Clementi* v. *Walker* (2 B. & C., 861).

Mr. *Pugh* in reply :—The only substantial question in the case is whether such a selection is prohibited. *Spiers* v. *Brown* (6 W. R. Eng., 352) is in my favour. It is clear from the book itself that the defendant has not, as alleged, honestly compiled his work for the benefit of students. He has copied the selection, notes and even some of the titles, and the alterations relied on are merely colourable. *Murray* v. *Bogue* (1 Drew., 358), is distinguishable and

Tuck v. *Priester* (L. R. 19 Q. B. D., 629), was under a different Statute. *Gouband* v. *Wallace* [25 W. R. Eng., 604; W. N., (1877) 130] is an authority against the contention of the other side, that a suit won't lie when an infringement has taken place before registration. In registering it is optional to enter the name of the firm or the names of the partners. Copinger on Copyright, p. 137, *Low* v. *Routledge* (33 L. J., Ch. 717), per KINDERSLEY, V. C. The contention that Palgrave was the proprietor and that the plaintiffs should have been registered as assignees is contrary to the decision in *Lover* v. *Davidson* (1 C. B. N. S., 182). On the question of limitation *Hogg* v. *Scott* (L. R., 18. Eq. 444), is against the plaintiffs' contention.

The following **judgment** was delivered on 8th August:—

Wilson, J.—This is a suit brought to restrain an alleged infringement of copyright. The plaintiffs are the proprietors, registered under 5 and 6 Vic., c. 45, of the copyright of a work published under the title of 'The Golden Treasury of Songs and Lyrics.' The book contains a selection, made by Mr. Palgrave, from the poems of many English authors of various periods. It is divided into books, each book corresponding to a period of literary history. The **[960]** poems in each book are arranged, not in the chronological order of their production, but, as the preface says, 'in gradation of feeling or subject.' At the end of the work are placed a summary of each book, and some notes critical and explanatory. The fourth book contains selected poems of Wordsworth, Coleridge, Hartley Coleridge, Southey, Hood, Wolfe, Shelley, Allan Cunningham, Keats, Charles Lamb, Byron, Scott, Campbell and Moore.

The plaintiffs complain that the defendant has infringed their copyright by the publication of a book which he has issued, under the title 'Select Short Poems, Part X, with copious notes, criticisms, and question-papers, etc., prescribed for the B. A. Examination of the Calcutta University for the year 1890, and for the first B. A. Examination of the Bombay University.' These poems are the same selection as those in the fourth book of the Golden Treasury; and that the selection was borrowed by the defendant is beyond all doubt, because what was set as a text-book by the Calcutta University was the fourth book of Mr Palgrave's work, Titles affixed by Mr. Palgrave to certain poems have also been borrowed; and a good many of his notes have been copied, some with acknowledgment and some without. On the other hand, the arrangement of the poems has been altered. Those of each author are placed together, and in the order of their composition. In one poem of Shelley the defendant prints forty lines which Mr. Palgrave had omitted; in one of Wordsworth one line. In many places there are differences of reading, and in more of punctuation. Whether these differences are mainly due to the editor or to the printer I cannot say. The defendant has prefixed to the poems of each author a biographical notice; and with each poem he gives a mass of notes and other critical and explanatory matter. Mr. Palgrave's summary of his fourth book is not given

The main question is whether the defendant's book is a piracy of Mr. Palgrave's. If the question had turned only on the notes which have been borrowed, I should not have been prepared to answer that question in the affirmative. The defendant's book purports to be a sort of variorum edition of the poems; it gives explanations and critical estimates derived from many sources; and the notes taken from Mr. Palgrave are not many in number, and **[961]** bear a very small proportion to the whole mass of annotations.

But Mr. Palgrave's selection of poems has been borrowed by the defendant, and the important question is whether that is an infringement of copyright. And first I have to consider whether there is copyright in a selection.

There has not, so far as I know, been any actual decision upon this question. But upon principle I think it clear that such a right does exist; and there is authority to that effect as weighty as anything short of actual decision can be. In the case of works not original in the proper sense of the term, but composed of, or compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by HALL, V.C., in *Hogg* v. *Scott* (L. R., 18 Eq., 444, see page 458), "the true principle in all those cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or, in other words, his property." I think it unnecessary to refer in detail to the cases; it is enough to say that this principle has been applied to maps, to road books, to guide books, to street directories, to dictionaries, to compilations on scientific and other subjects. This principle seems to me clearly applicable to the case of a selection of poems. Such a selection as Mr. Palgrave has made obviously requires extensive reading, careful study and comparison, and the exercise of taste and judgment in selection. It is open to any one who pleases to go through a like course of reading, and by the exercise of his own taste and judgment to make a selection for himself. But if he spares himself this trouble and adopts Mr. Palgrave's selection, he offends against the principle In *Longman* v. *Winchester* (16 Vesey, 269, see page 271) at p. 271, Lord ELDON laid down the principle I have stated, and referred to various cases to which it had been applied or was applicable, and said:—"So in the instance mentioned by Sir Samuel Romilly, a work consisting of a selection from various authors, two men might perhaps **[962]** make the same selection; but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." And this passage is cited as an authority by Lord HATHERLEY, then Vice-Chancellor, in *Spiers* v. *Brown* (6 W. R., Eng, 352, see page 353) I am of opinion that the selection of poems made by Mr. Palgrave and embodied in the Golden Treasury is the subject of copyright, and that the defendant's book has infringed that right.

Some other points of a more or less technical nature were raised on behalf of the defendant. It was pointed out that the book registered was registered as first published in 1861, whereas the infringement charged is of an edition of 1882; it was contended that it ought to be proved affirmatively that the poems in the edition of 1882 were contained in that of 1861, and *Murray* v. *Bogue* (I Drew, 353) was cited. In the absence of any reason to suppose the contrary, I think it is reasonable to assume that successive issues of a book of this kind, under the same name, are substantially the same book.

It was next contended that the author of the book being Mr. Palgrave, in whom the copyright would *prima facie* be, and the property being registered as in the present plaintiffs, the registry is bad because it does not show an assignment to them. But the Act does not seem to me to require any such thing; and it has been so held in *Weldon* v. *Dicks* (L. R., 10 Ch. D., 247).

It was further contended that the registration was bad because it contained the firm and business address of the plaintiffs, and not the individual names and addresses of the partners in the firm. But this is contrary to the view expressed by KINDERSLEY, V.C., in *Low* v. *Routledge* (33 L. J. h. 717, see page 724), and that acted upon by MALINS, V.C., in *Weldon* v. *Dicks* (L. R., 10 Ch. D., 247). which I follow.

Then it was contended that the publication of the defendant's book having been before the registration, this suit would not lie. But it is clear that the title to copyright is complete before registration, which is only a condition precedent to the right to sue. This is made very clear by the reasoning in the judgments in [963] *Tuck* v. *Priester* (L. R., 19 Q. B.D., 629), decided on another Act. And it was expressly so held in *Gouband* v. *Wallace* (25 W. R., Eng. 604, W.N., 1877, 130).

Lastly, reliance was placed on s. 26 of the Act, which, it was suggested, prescribed one year as the period of limitation for such a suit as the present. But, assuming that a rule of limitation in the Act would be applicable in this country, the decision in *Hogg* v. *Scott* (L. R.. 18 Eq. 444), negatives the contention.

There will be a perpetual injunction restraining the printing or sale of the defendant's book as being an infringement of the plaintiff's copyright, with costs on scale 2.

Decree for Plaintiffs.

Attorneys for the Plaintiffs: Messrs. *Harris & Simmons.*

Attorney for the Defendant: Baboo *G. C. Chunder.*

NOTES.

[I. THE AUTHORITY OF THIS CASE —

This case is an authority for the following propositions, among others: —

(1) That a selection made from non-copyright material by independent labour is itself the subject-matter of copyright.

(2) That the fact of such selection being copyright does not prevent another from making a selection by *independent* labour bestowed on the *common sources of information.*

(3) That although such a book may be used as a guide to the common sources, it is illegitimate use thereof to reproduce, on so using it, selections which are the same or substantially the same, with only colourable modifications.

(4) That it is still a piracy notwithstanding

(a) that there may be some other pieces included,

(b) that there may be added to such selections much other additional useful matter,

(c) that there may be pursued a different order (chronological),

even if these should constitute substantial and valuable improvements.

(5) That in such case, an injunction should be granted to prevent an infringement of copyright.

The judgment of Sir ARTHUR WILSON in this case of I. L. R., 17 Calcutta, 951, which was new in the instance, has been recognised as good law in English Courts, and referred to with approval. In his judgment in *Moffatt and Paige Ld. v. George Gill & Sons Limited* (86 Law Times Reports, p. 465 at p. 470) Lord Justice COLLINS, Master of the Rolls, observed, "Then there is also the authority of the gentleman who was well known in these Courts before he went to India and who afterwards became a distinguished Indian Judge, Sir ARTHUR WILSON, in which the very point is raised and decided in the case of *Macmillan* v. *Sarka Chunda Gung* (17 I. L. R. Calcutta 951). In that case the matter in question was the well-known series called 'The Golden Treasury,' which is a series of quotations put together by Mr. Palgrave, and the defendant had reproduced his work practically, superadding notes of his own, and the learned judge upheld, or sustained, a claim for infringement. It seems to me that is precisely what the defendant, Mr. Marshall, did in the present case."

II. LITERARY PROPERTY IN SELECTION—

Very slight skill is required for protection by the laws of copyright as is shown in the case *Kelly* v. *Morris*, (1886) L.R. 1 Eq., 697; *Cote* v. *Devon & Exter Constitutional Newspaper Company*, (1889) 40 Ch. D., 500. In the House of Lords case of *Walter* v. *Lane* (1900) A.C. 539, the shorthand reporter's copy of a speech was protected although Lord ROBERTSON

and the Court of Appeal remarked that a mere copyist does not produce a book and that the phonograph is not an author. It may be added that the American Law recognises literary property consisting in selection. *List Publishing Co.* v. *Keller*, 30 Federal Reporter, 772, was the case of a society directory.

In the case of *Moffatt and Paige, Limited* v. *George Gill and Sons, Limited*, reported in (1902) 86 Law Times Reports, p. 465, the annotations of a play of Shakespeare were in question. The defendant, Marshall, had reproduced the common quotations from a copyright edition and it was held by the Court of Appeal in England that although he might have made the quotations from his own wide study and exceptional memory as he claimed, and although he might be entitled to use that book as a guide to the common source, he infringed the law by selecting the identical quotations, without arriving at them by independent labour, even if he had merely refreshed his memory with the book.

Leslie v. *Young* (1894), A.C., 385, decided by the House of Lords is an authority that both recognised the rule and laid down the exception. In it there were two kinds of selections from the official railway time tables that formed the subject matter of the suit. One of them consisted in the omission of smaller stations and the indication of mileage; the other consisted in time tables for convenient tours round about a place. The latter was protected, the former was not. Both involved some labour, but the labour in respect of the former was purely mechanical, while the latter involved the exercise of judgment, knowledge and skill.

III. LAW REPORTS—

As regards Law Reports, it may be taken as a settled proposition placed beyond the possibility of a doubt, that the head-notes, arguments of counsel, and statements of facts that appear in Law Reports, which are the result of independent intellectual labour on the part of the reporter, are, each of them, subject matter in which copyright vests in the reporter or his assigns (*Sweet* v. *Benning*, 16 C.B.. 459 : 24 L. J. C. P., 175).

The case of *Saunders* v. *Smith* (1838) 3 Myl. & C., 711, in which Smith's Leading Cases were in question, is loosely supposed to justify an infringement if annotations are appended. That case went expressly on the ground of acquiescence. The value of the book lay in the notes and not the cases, and it was also distinguished by its purpose—it was not capable of being used as a *substitute* for the reports. In the later case of *Sweet* v. *Benning* this latter element was held by the majority of the Court not to justify the piracy, though Justice MAULE strongly relied on this circumstance in his dissenting judgment.

Piracy of the Term Reports by the chronological order being artfully changed into an arrangement under heads and titles, was restrained in *Butterworth* v. *Robinson* (1801) 5 Vesey, 709. It was recognised as authority by the House of Lords in *Walter* v. *Lane* (1900), A.C., 539 and it was held by NORTH, J., to furnish the rule for the new instance arising for decision in that case. In *Hodges* v. *Welsh* (1840) 2 Irish Eq., R., 266, the collection and classification was new and there were in addition several previously unpublished decisions and notes. *Sweet* v. *Shaw* (1839), 3 Jur., 217 : 8 L.J. Ch. 216, may also be seen where the cases were abridged, eleven cases only being copied *verbatim*.

In *Wheaton* v. *Peters*, the Supreme Court of the United States laid down that neither the Judge nor the State had any copyright in the written opinions of the Court. The case of *Callaghan* v. *Myers*, 128 U. S., 617, recognised the State acquiring copyright through the reporter. In explanation of *Wheaton* v. *Peters*, the Court observed, "Therefore, the only matter in Wheaton's reports which could have been the subject of the copyright in regard to which the jury trial was directed was the matter not embracing the written opinions of the Court, namely, the title page, table of cases, head-notes, statements of facts, arguments, of counsel and index. Such work of the reporter which may be the lawful subject of copyright comprehends also the order of arrangement of the cases, the division of the reprints into volumes, the numbering and paging of the volumes, table of the cases cited in the opinions (where such table is made) and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various headnotes and cross references, where such exist."

It may be added that *selection* of judgments, a common material, has been recently protected in India in **18 C. W. N., 1078.**

IV. REGISTRATION—

This was applied in 29 Mad., 292 where there was no registration.

The English Copyright Act 1911 (which has been re-enacted for India in III of 1914) has done away with the necessity of registration.

But it was held there by PHILLIMORE and PICKORD, JJ., in *Evans and another* v. *Morris*, **(1913) W.N., 58**, that although the plaintiffs' remedies under the old Act were preserved by the Interpretation Act 1889, they were so preserved with the disadvantage that they must prove registration before action brought, and that registration in respect of such infringements was necessary.]

[17 Cal. 963]

APPELLATE CIVIL.

The 19th May, 1890.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE AMEER ALI.

Tarini Churn Sinha and another............Plaintiffs

versus

Watson and Co............Defendants.*

Fishery, Right of - Jalkar - Navigable river - Change in course of the river.

The jalkar, or right of fishing, in a navigable river is not affected by reason of the river having merely changed its course.

Gray v. *Anund Mohun Moitra* (W. R 1864, 108) followed.

Sibessury Dabea v. *Lukhy Dabea* (1 W R , 88) distinguished.

THIS was a suit for the recovery of possession of 68 bighas of re-formed chur land of the jalkar, or right of fishing, over a portion of the river Howlia, a public navigable river, and for mesne profits of the land and the jalkar from the year 1291 (1884) until the institution of the suit on the 22nd Bysack 1294 (20th May 1887).

The plaintiffs, Tarini Churn Sinha and Gopi Sundari Dasi, were joint-proprietors of the entire 16 annas of mouzah Bowat, pergunnah Bhandordaha, in the district of Nuddea. Their case was **[964]** that the land in suit was a re-formation on the original site of land appertaining to their zemindari of mouzah Bowat, that it had submerged into the bed of the Howlia in 1283 (1876) when that river, which at the time of the thak and survey measurements in 1854 and prior to 1283, used to flow towards the north and west of the mouzah, suddenly changed its course and, taking a south-easterly direction, flowed through it; that upon the land re-forming on the opposite side of the river the plaintiffs in Bysack 1290 (April 1883) proceeded to take possession of the land as well as the jalkar over the portion of the river which flowed through their property, but were resisted by the defendants, Watson and Company.

* Appeal from Appellate Decree No. 879 of 1889, against the decree of F. F. Handley, Esq., Judge of Nuddea, dated the 24th of January 1889, modifying the decree of Baboo Gonesh Chunder Chowdhry, Subordinate Judge of Nuddea, dated the 28th of April 1888.

The defendants alleged that more than 12 years previous to the institution of the suit the land in dispute had submerged in the bed of the river Howlia, and denied that it was a re-formation on the site of any portion of mouzah Bowat. They pleaded that the suit was barred by limitation, inasmuch as they had been in adverse possession of both the land and the jalkar for upwards of 12 years: they further pleaded that the jalkar right of the Howlia from Kadipur to Gazadia khal and Boalia was included in the istemrari settlement of taraf Srirampur, which constituted their zemindari; that the jalkar had been in the possession of the maliks of the said zemindari since the time of the decennial settlement; that they had regularly paid the rent fixed for the jalkar and were in possession.

The Subordinate Judge found that the greater portion of the land was submerged in 1283, and that the re-formation on the original site took place subsequently and within 12 years of the suit and accordingly held that the suit was not barred. But in coming to the conclusion that the plaintiffs were entitled to the jalkar of the portion of the river which flowed through their land, the Subordinate Judge remarked :—

"It has already been found that the portion of the jalkar lying on the south and south-east of the black-dotted line marked in the ameen's map is situate within the boundary of plaintiffs' zemindari, mouzah Bowat. The jalkar being so situate, the question to be decided is whether it is the property of the plaintiffs. It appears from the evidence of the witnesses on both sides that the encroachment of the river on plaintiffs' mouzah was not gradual. According to the statement of the witnesses for the [965] plaintiffs, the greater portion of the land was diluviated in one year, *i.e.*, during the rainy season of 1283, and the remaining portion was washed away in subsequent years. The witnesses for the defendants state that the diluviation was completed in one year, *i.e.*, during the rains of 1278. It also appears from the evidence of some of the witnesses for the defendants that the river Howlia has since become more narrow and shallow in consequence of the silting up of its source at Matabhanga. Under these circumstances, I am of opinion that the right in this portion of the jalkar has become vested in the plaintiffs, they being owners of the bed of this portion of the river. It is undoubtedly proved by documents produced by the defendants that the jalkar right in the Howlia from Kadipur to Shyampur and from Rajnagur to Gujra khal belongs to them, and that the portion of the river, of which the jalkar right is in dispute, lies within these limits. But as it is found that the change in the course of the river here was sudden and not gradual, the defendants are not entitled to extend their right of fishery over this portion of it. The ruling in the case of *Sibessury Dabea* v. *Lukhy Dabea* (1 W. R., 88) is an authority in support of this view."

The Subordinate Judge accordingly gave the plaintiffs a decree for possession of that portion of the disputed land and jalkar which was found to be situate within the boundary of mouzah Bowat, together with mesne profits from the date of dispossession until delivery of possession.

On appeal, the District Judge reversed the decision of the Subordinate Judge, in so far as it gave the plaintiffs possession of the jalkar on the ground that the defendants held the jalkar by grant, and having been in possession for 25 years, had acquired a title to it by prescription as well.

The plaintiffs appealed to the High Court.

Baboo *Jusoda Nundun Pramanick* for the Appellants.

Baboo *Bhowani Churn Dutt* for the Respondents.

The **judgment** of the Court (O'KINEALY and AMEER ALI, JJ.) was delivered by: -

Ameer Ali, J.--The point involved in this appeal is whether a right of jalkar in a public navigable river can exist apart from the right to the bed of the river, or must it necessarily follow **[966]** that right. Both these questions have been raised and discussed in other cases; still they are of some difficulty. The facts of the case are these: The river Howlia, which is a public navigable river, flowed, prior to 1283, in a certain course; and it seems to have in 1283, or thereabouts, adopted a different channel, and is now running over a portion of the plaintiffs' land. The plaintiffs sue to establish their jalkar right over that portion of the river which flows over their land. Admittedly, the defendants have a jalkar right by grant from Government over this river within certain specified limits; and there is no question that the jalkar, which is claimed by the plaintiffs, falls within that limit; it is also undisputed that the river in its present channel is a public and navigable river. The Subordinate Judge held, apparently on the authority of the case of *Sibessury Dabee* v. *Lukhy Dabee* (1 W. R., 88) that, inasmuch as the destruction of the river was sudden and not gradual, the defendants are not entitled to their jalkar right over the river in its present course, but that their right is restricted by the rights of those over whose lands the river now flows; and in that view of the matter he made a decree in favour of the plaintiffs. He says:—"under these circumstances" (referred to by him in the judgment), "I am of opinion that the right in this portion of the jalkar has become vested in the plaintiffs, they being owners of the bed of this river." On appeal to the District Judge, that Court took a different, and, we think, a correct view of the principle applicable to the case. It seems to us that the decision of the case depends upon the answer to the question—Do the defendants lose the right, admittedly vested in them, by a change in the course of the river, though the river does not lose the character of a navigable river, and continues subject to the rights of the public as before? We think the principle applicable to the case was discussed and enunciated so early as 1864 in the case of *Gray* v. *Anund Mohun Moitra* (W. R., 1864, p. 108) before LOCH and NORMAN, JJ. In that case it appeared that the river over which the defendant had a right of fishery had changed its course and formed an inlet Afterwards it resumed its old course, leaving the inlet separate and dry. In a suit by the owner of the bed of the **[967]** inlet, NORMAN, J., referring to the Institutes, said:—"We find it laid down that if a river, leaving its natural channel, flows in another course, the former channel belongs to them who possess the farms on its banks, to each man according to the breadth of his land on the bank; and the new channel is subject to that law which governs the river, that is, it becomes public. But if, after some time, the river returns to its former channel, the new channel again belongs to them who have the farms on its banks." And then in another passage, "applying these principles to the present case, if the river simply change its course, and there is nothing to modify the conclusion which the Court ought to draw from the simple fact, the old dry course of the river must be taken to have become private property. And as incident to and part of the same, the owner of the soil is entitled to all bheels or ponds, gulfs or damrorees, in which water remains but which do not communicate with the river except in

the time of floods, and he could have claimed a settlement with the Government in respect of any jalkar in the same. The right of the defendant to the fishery in the water in question being merely granted out of, and a part of, the right of the Government to the river can no longer exist where the right of the Government itself is gone." There, as it seems to me, the learned Judges held, that inasmuch as the inlet of the river had become separated from the main channe and had partially dried up, and Government had lost its right in respect to it, the right of the defendant also was lost. But the principle laid down was—that so long as the river retains its navigable character, it is subject to the rights of the public, and the right of fishery remains in the person who held it under a grant from Government. In the present case, which is the converse of *Gray* v. *Anund Mohun Moitra*, there is no question that the defendants had been for a long time in the enjoyment of the right granted to them by Government, and that the river which forms the subject-matter of the dispute is still a public navigable river. The case of *Sibessury Dabee* v. *Lukhy Dabee* (1 W. R., 88) has no bearing on this question at issue here. In that case, the *daha*, or streamlet, respecting which the dispute was, formed a separate and apparently dried up armlet of the river Hughli, [968] and the learned Judges there held that an anterior right of fishery did not necessarily attach to the streamlet, which had no connection with the river Hughli. We are accordingly of opinion that the view taken by the learned Judge below is the correct view, namely, that the defendants have the right over the river in its present course to the same extent and under the same limits as they possessed previous to the change in its channel, and that the plaintiffs are not entitled to the relief which they seek.

The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

NOTES.

[In the recent case of *Raja Srinath Roy* v. *Dinabandu Sen* (1914) 18 C W.N., 1217 : 20 C. L. J., 385, the Privy Council have declared the right to "follow the river" whether the river's encroachments are *gradual* or *sudden*.]

[17 Cal. 968]

APPELLATE CIVIL.

The 6th June, 1890.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE AMEER ALI.

Mon Mohun Sirkar and others............Plaintiffs

versus

The Secretary of State for India in Council and others ....Defendants *

Res judicata- *Suit for possession and mesne profits—Civil Procedure Code (Act XIV of 1882), ss. 13, 211 and 244—Decree for possession and mesne profits up to date of suit —Separate suit for subsequent mesne profits.*

In a suit for recovery of possession and mesne profits, the Court has power under s. 211 † of the Civil Procedure Code either to award mesne profits up to the date of the institution of the suit or up to the date of delivery of possession. And where a decree for possession is silent as regards mesne profits which have accrued between the date of the institution of the suit and delivery of possession, a separate suit will lie for such subsequent mesne profits, ss. 13 and 244 of the Code being no bar to it.

Sadasiva Pillai v. *Ramalinga Pillai* (L.R., 2 I. A., 219 : 15 B.L.R., 383) ; *Fakharuddin Mahomed Ashan Chowdhry* v. *Official Trustee of Bengal* (L. R., 8 I. A., 197 : I.L. R., 8 Cal., 178) ; *Byjnath Pershad* v. *Badhoo Singh* (10 W. R., 486) ; *Pratap Chandra Burua* v. *Swarnamayi* (4 B L. R., F.B. 113. 13 W. R. F. B., 15) ; and *Haramohini Chowdhrani* v. *Dhamani Chowdhrani* (1 B.L.R., A.C., 138), referred to.

[969] THIS was a suit for mesne profits. For the purposes of this report, the facts of the case and the contentions of the parties are sufficiently stated in the judgment of the High Court.

Baboo *Saroda Churn Mitter*, Baboo *Jadab Chunder Seal*, and Baboo *Srinath Das* for the Appellants

Baboo *Hem Chunder Banerjee* and Baboo *Bhowani Churn Dutt* for the Respondents.

The **judgment** of the Court (O'KINEALY and AMEER ALI, JJ.) was delivered by—

Ameer Ali, J.—The question involved in this appeal is whether, having regard to the provisions of s. 13 of the Civil Procedure Code, the plaintiffs' suit is barred as *res judicata*. The plaintiffs had on the 28th March 1884 brought a suit against the present defendants to recover possession of certain lands, and in the plaint had claimed mesne profits from the day of

* Appeal from Appellate Decree No. 1025 of 1889, against the decree of W.H. Page, Esq., Judge of Moorshedabad, dated the 20th of February 1889, affirming the decree of Baboo Nobin Chunder Ganguli, Subordinate Judge of Moorshedabad, dated the 16th of August 1888.

† [Sec. 211 :—When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

In suits for land, Court may decree payment of mesne profits with interest.

Explanation.— 'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom, together with interest on such profits]

dispossession up to the date of restoration of possession. That suit was dismissed by the first Court, but was eventually decreed by the High Court in favour of the plaintiffs with mesne profits for three years preceding the date of suit. No mention was, however, made regarding the subsequent mesne profits. The plaintiffs have accordingly instituted the present suit for the mesne profits from the 28th of March 1884 to the date of recovery of possession, and the defendants contend that it is barred under the provisions of explanation III to section 13 of the Code, and the lower Courts, giving effect to this contention, have dismissed the plaintiffs' suit. The plaintiffs have appealed specially to this Court, and it is urged on their behalf that, as it was discretionary with the Court in the former suit to assess the mesne profits subsequent to date of suit, the mere fact that the Court abstained from exercising that discretion does not constitute the present suit a *res judicata*. We think this contention to be sound. No authority has been cited by the learned pleaders for the defendants in support of their contention that the plaintiffs are precluded from maintaining the present action. They have relied simply on the words of the section, but as the question is *res integra*, we are at liberty to construe the section reasonably by a comparison of the other sections of the Code.

It is admitted that at the time the plaintiffs instituted their former suit, they had no cause of action with respect to mesne [970] profits accruing due after date of suit; and they would not have been entitled to ask any relief in respect thereof but for the provisions of section 211. That section runs thus:—

"When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit."

It is abundantly clear that the Legislature, in order to avoid a multiplicity of suits, empowered the Court in an action for the recovery of possession of property to assess the damages accruing due after suit and during the continuance of the trespass. But the section is not imperative or obligatory: it is merely discretionary. The Judicial Committee of the Privy Council in the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (L. R., 2 I. A., 219 at p. 228), accepting the contentions of the respondents' Counsel in that appeal, stated the principles relating to suits for mesne profits thus :—" First, that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; and, secondly that the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit." And in the case of *Fakhruddin Mahomed Ahsan Chowdhry v. Official Trustee of Bengal* (L. R., 8 I. A., 206), where the question was whether, in awarding wasilat without any special mention of the period for which it was to be paid, it should be presumed that the Court intended to give it up to date of restoration of possession, the Judicial Committee, having regard to the defendant's contention, said " the question (in this case) is whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest."

[971] Clearly, therefore, the Court had the power under s. 211 (s. 196 of the old Code) to assess and award the damages up to the date of recovery of possession, or to give to the plaintiff so much only as accrued up to the time of the commencement of the suit; and it chose, in the exercise of its discretion, to give him only that which had accrued due, and in respect of which he had a cause of action, and left him, to all intents and purposes, to bring a separate suit for the rest. There is nothing in principle or law to lead us to the conclusion that the mere abstention of the Court to award to the plaintiff mesne profits after date of suit would be a bar to any suit in respect thereof. On the contrary, the penultimate clause of section 244 clearly shows that it is not so.

"Nothing in this section," it says, "shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree."

Again, a claim for mesne profits is distinct from a claim for recovery of immoveable property, and it is only under the Statute that such claims may be joined in one suit (s. 44, rule A). The cause of action in respect of the continuing trespass after institution of suit arises from day to day, and it is only by express enactment, and in order to avoid, as we have already remarked, a multiplicity of suits that the Courts have been vested with the discretion of awarding damages during the continuance of the trespass and until its cessation. It does not follow that because plaintiff prayed for assessment of damages until he was restored to his property and the Court in its discretion was satisfied with decreeing his claim for damages so far as they had accrued due, his claim for damages for trespass continued after suit would be barred by the rule of *res judicata*. The opinion expressed by MACPHERSON, J., in *Byjnath Pershad* v. *Badhoo Sing* (10 W. R., 486), which that learned Judge reiterated with greater emphasis in *Pratap Chandra Barua* v. *Swarnamayi* (4 B. L. R., F. B., 113: 13 W. R. F. B., 15), and the observations of the Chief Justice in that case fully support the view we have taken. Were we to uphold the contention urged by the respondent's pleader, the result would be as pointed out by PHEAR, J., in the case of *Haramohini* [972] *Chowdhrain* v. *Dhanmani Chowdhrain* (1 B. L. R., A. C., 138, at p. 142), "that an unsuccessful defendant directed by the Court to give up possession of the property held by him to the plaintiff might with impunity withhold possession from the plaintiff, notwithstanding the decree in which possession of the property is directed to be delivered over, keeping the plaintiff out by main force under every circumstance of aggravation, without the slightest apprehension or risk of having damages assessed against him."

For the above reasons we hold that the plaintiffs' suit is not barred.

The case must go to the first Court for the trial of any other issue that might have been raised between the parties. Costs to abide the result.

C. D. P. *Appeal allowed and case remanded.*

NOTES.

[The claims to recover mesne profits and possession are distinct claims :—(1891) 19 Cal., 615. Mesne profits *after* suit will not be deemed to have been refused, if not granted, (1899) 21 All., 425; (1895) 19 Bom., 532; (1905) 32 Cal., 118; *see also* (1891) 14 Mad., 328.

As regards mesne profits before suit, see, however, (1894) 21 Cal., 252; (1901) 25 Bom., 115.]

SUBJECT INDEX.

PAGE

PAGE

Appeal—*(concluded.)*

questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact, sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favour of the plaintiff, but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him on all his findings or in the reasons on which they were based : *Held*, on an application for leave to appeal to the Privy Council, that the High Court did not "affirm" the judgment of the lower Court within the meaning of s. 596 of the Civil Procedure Code. *Held*, also, even assuming the judgment of the lower Court was affirmed by the High Court, that there were substantial questions of law in the case which entitled to the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case.

ASHGHAR REZA *v.* HYDER REZA ... ... XVI 287

Appellant—

Substitution of. See PRIVY COUNCIL, PRACTICE OF.

Appellate Court—

See RECOGNIZANCE TO KEEP PEACE.

Power of. See SECURITY FOR COSTS : SPECIAL APPEAL.

Application—

For execution not in accordance with Law. See LIMITATION ACT, 1877, ART. 179.

For execution of decree. See CIVIL PROCEDURE CODE, 1882, S. 230.

Form of. See EXECUTION OF DECREE.

For registration as proprietor See LAND REGISTRATION ACT, S. 78.

In continuation of previous application for execution. See LIMITATION ACT, 1877, ART. 179.

In suit by persons not parties. See PRACTICE.

To execute decree. See LIMITATION ACT, 1877, ART. 179.

To have judgment-debtor declared insolvent. See JURISDICTION.

To take step in aid of execution. See LIMITATION ACT, 1877, ART. 179.

To transfer decree for execution. See CIVIL PROCEDURE CODE, 1882, S. 230.

Appraisement Proceedings

See SANCTION TO PROSECUTION.

Appropriation—

For religious and charitable purposes. See MAHOMEDAN LAW, ENDOWMENT.

Arbitration—

See SUPERINTENDENCE OF HIGH COURT.

Award on one point only—Remission to arbitrator—Refusal by arbitrator to act—Limitation—Adverse possession. A case was referred for decision to an arbitrator. The arbitrator made his return, deciding by the award only one of the issues raised in the case, viz., that the defendants had been in possession of the land in suit for more than twelve years. The plaintiffs and the defendants claimed under the same landlord. The Munsif remitted the award to the arbitrator for determination of the other matters arising in the case; the arbitrator, however, refused to act further in the matter, and the Munsif himself took up the case and decided it in favour of the plaintiffs. On appeal, the Subordinate Judge held that the award made by the arbitrator was sufficient for the determination of the case, and reversed the decision of the Munsif, and gave the defendants a decree in terms of the award. *Held*, that as the plaintiffs and the defendants claimed under one and the same landlord, and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that the Munsif had acted rightly, on the arbitrator declining to complete the award, in deciding the case himself.

JONARDON MUNDUL DAKNA *v.* SAMBHU NATH MUNDUL ... ... XVI 806

Jurisdiction of Court over arbitrators—Civil Procedure Code (Act XIV of 1882). ss. 508, 516. When a Court has referred a suit to arbitration it has jurisdiction over the arbitrators to compel them to give up documents filed before them as exhibits during the course of the arbitration, and to return the original records of the suit which may have been handed to them. Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators.

NURSING CHUNDER DAWN *v.* NUFFER CHUNDER DUTT ... ... XVII 832

PAGE

PAGE

Case--*(continued.)*

PAGE

Case—*(continued.)*

PAGE

Case—(*continued.*)

PAGE

Civil Procedure Code—(continued.)

Act XIV of 1882—(continued.)

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PRINTED BY THE LAW REPORTS OFFICE PRESS, MADRAS.

TABLE OF CORRESPONDING PAGES IN THE "LAW REPORTS"

L. R. REPRINTS :—CALCUTTA, VOL. VIII.

I. L. R. 16 Cal.	L. R. Cal. 8	I. L. R. 16 Cal.	L. R. Cal. 8	I. L. R. 16 Cal.	L. R. Cal. 8	I. L. R. 17 Cal.	L. R. Cal. 8
1	1	347	231	642	430	144	639
9	6	349	233	645	432	148	642
13	9	355	237	652	437	152	646
16	12	364	243	657	440	155	648
19	14	367	245	661	443	160	651
25	18	383	254	667	447	162	653
31	22	397	263	677	453	168	657
33	23	414	274	682	457	173	660
40	28	417	276	693	464	196	674
62	42	423	280	702	470	200	677
71	47	426	282	706	472	209	683
80	53	429	284	711	476	223	692
85	57	432	287	715	479	234	699
89	60	436	289	725	486	246	706
98	66	442	293	730	490	251	710
103	69	449	298	741	496	256	713
117	78	457	304	744	498	260	716
121	82	465	310	747	500	263	718
126	85	468	312	749	502	268	721
127	86	473	316	753	504	272	724
132	90	482	322	758	508	277	727
137	94	487	326	766	513	281	730
148	101	504	337	771	517	285	733
155	105	509	340	776	520	289	735
159	108	511	342	779	522	290	736
161	109	513	344	781	524	291	737
173	117	523	350	788	529	298	742
184	124	530	354	794	533	301	744
186	125	535	358	799	536	304	746
189	128	540	361	804	540	311	751
194	132	545	364	806	542	320	757
203	137	549	367	I. L. R. 17 Cal.	L. R. Cal. 8	324	759
206	140	556	372	1	547	326	761
223	150	564	378	3	549	329	763
233	156	574	384	23	562	337	768
238	160	584	390	33	568	341	770
246	165	586	392	39	572	344	772
250	168	592	395	45	576	347	775
252	170	596	398	48	578	362	784
267	179	598	400	53	581	373	791
281	187	603	403	57	584	380	795
287	190	610	408	66	590	383	797
300	201	619	414	84	601	387	800
307	206	622	416	115	620	390	802
310	208	627	419	122	625	393	80[illegible]
323	216	636	425	131	631	398	8[illegible]
326	218	638	427	137	635	414	[illegible]
330	220	640	428			432	[illegible]

TABLE OF CORRESPONDING PAGES IN THE "LAW REPORTS"

I. L. R. REPRINTS :—CALCUTTA, VOL. VIII—*(continued)*.

I. L. R. 17 Cal.	L. R. Cal. 8	I. L. R. 17 Cal.	L. R. Cal. 8	I. L. R. 17 Cal.	L. R. Cal. 8	I. L. R. 17 Cal.	L. R. Cal. 8
436	834	557	915	693	1006	872	1128
444	839	562	918	695	1007	875	1131
449	843	566	921	699	1010	882	1135
455	846	570	924	**704**	1014	886	1138
458	849	574	926	707	1016	896	1144
466	854	580	930	711	1019	**903**	1149
469	856	584	933	721	1025	906	1151
474	859	590	937	726	1029	911	1155
485	866	**606**	947	769	1057	919	1160
488	868	610	950	786	1068	926	1165
489	869	614	953	**809**	1084	930	1168
491	871	620	957	814	1088	933	1170
498	876	631	964	819	1092	937	1173
512	885	642	971	826	1096	944	1177
516	888	670	988	829	1099	951	1183
518	889	674	992	832	1101	963	1192
538	902	680	996	840	1106	968	1196
541	904	684	999	849	1112		
543	906	686	1000	852	1114		
548	909	688	1002	862	1121		

TABLE OF CASES REPORTED.

A

DHU—GUR

J

JAD—KOI

K

KOK—MOH PAGE

MOH—PRE PAGE

N

O

P

S

T

TABLE OF CASES CITED.

A

E

F

G

THE END